



February 20, 2017

Judge William H. Pryor, Jr.
Acting Chair, United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Attention: Public Affairs—Comments on Proposed Amendments

CC: Ms. Rachel Barkow, Mr. Jonathan J. Wroblewski, Ms. J. Patricia Wilson Smoot

RE: Proposed Amendment: Youthful Offenders

Dear Chair Pryor and Commissioners,

The Campaign for the Fair Sentencing of Youth and the Campaign for Youth Justice (“the Campaigns”) are grateful that the United States Sentencing Commission has offered a proposed amendment addressing youthful offenders. The current Sentencing Guidelines have not yet been revised to account for ongoing advancements in our understanding of adolescent brain and behavioral development, as well as recent U.S. Supreme Court cases. **We encourage the U.S. Sentencing Commission to adopt the proposed amendments and to also consider additional revisions related to the treatment of youthful offenders under the Sentencing Guidelines.**

The U.S. Supreme Court has repeatedly concluded children are constitutionally different than adults in criminal sentencing

Throughout the last decade, the United States Supreme Court has repeatedly concluded that children are constitutionally different than adults for the purpose of criminal sentencing. In *Roper v. Simmons* (2005), the Court struck down the death penalty for children, finding that it violated the 8th Amendment’s prohibition against cruel and unusual punishment.¹ The Court emphasized empirical research demonstrating that children are developmentally different than adults and have a unique capacity to grow and change as they mature.² In *Graham v. Florida* (2010), the Court struck down life-without-parole sentences for non-homicide offenses, holding that states must give children a “realistic opportunity to obtain release.”³ In *Miller v. Alabama* (2012), the Court struck down mandatory life-without-parole sentences for youth convicted of

¹ *Roper v. Simmons*, 543 U.S. 551 (2005).

² *Id.*

³ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

homicide offenses and ruled that sentencing courts must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison” any time a child faces a potential life-without-parole sentence.⁴ *Miller* also requires that if a child is facing a sentence of life in prison, sentencing judges must consider certain factors related to the child’s age and his or her prospects for reform.⁵ In January 2016, the U.S. Supreme Court ruled in *Montgomery v. Louisiana* that the *Miller* decision applies retroactively to individuals serving mandatory life-without-parole sentences for crimes they committed while under age 18 and found life-without-parole sentences to be unconstitutional for the vast majority of youthful offenders who commit homicide offenses.⁶ Further information as to these U.S. Supreme Court cases can be found in the Campaign for the Fair Sentencing of Youth’s Comments addressing the Commission’s Proposed Priorities.⁷

Advances in adolescent developmental research demonstrate an empirical basis for treating youth differently than adults

The Sentencing Guidelines have not yet been revised to account for consistent scientific advancements in adolescent brain and behavioral development. As many parents and educators could verify from personal experience, the adolescent brain is not fully mature even at age 18.⁸ Empirical studies have repeatedly shown that the brains of youth are not fully developed, making it difficult for them to consider the long-term impact of their actions, control their emotions and impulses, and evaluate risks and rewards in the same way as adults.⁹ Youth as a whole are more vulnerable, more susceptible to peer pressure, and more heavily influenced by their surrounding environments, which they rarely can control.¹⁰ Due to the plasticity of their developing brains, however, children also possess a unique capacity for change and rehabilitation.¹¹

The Campaigns support the proposed amendments as to youthful offenders

The current Sentencing Guidelines permit offenses committed prior to age 18 to be considered when computing a defendant’s criminal history score. These offenses can include both juvenile adjudications and convictions in adult court for offenses that occurred prior to age 18. Considering either of these is antithetical to the U.S. Supreme Court jurisprudence regarding youthful offenders and decades of adolescent brain development research. Given that youth should not be held accountable for their actions in the same way as adults, a defendant’s prior

⁴ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

⁵ *Id.* at 2468.

⁶ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

⁷ Campaign for the Fair Sentencing of Youth’s Comments addressing Federal Register Number 216-13681; Support for Potential Priority (7) to Study the Treatment of Youthful Offenders (July 2016). Available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160725/priorities-comment.pdf#page=135>.

⁸ Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009).

⁹ *Id.*; Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78 (2008).

¹⁰ Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009); Dustin Albert & Laurence Steinberg, Peer Influences on Adolescent Risk Behavior, in INHIBITORY CONTROL AND DRUG ABUSE PREVENTION: FROM RESEARCH TO TRANSLATION (Michael Bardo et al. eds., 2011).

¹¹ Jay N. Giedd, The Teen Brain: Insights from Neuroimaging, 42 J. OF ADOLESCENT HEALTH 335 (2008); Mark Lipsey et al., Effective Intervention for Serious Juvenile Offenders, JUV. JUST. BULL. 4-6 (2000).

youthful offenses should not be weighted in the same way as prior offenses that occurred after age 18.

- Consideration of Juvenile Adjudications for Criminal History Calculation

The Sentencing Commission seeks comments as to how the Guidelines should account for juvenile adjudications. The current proposed amendment omits juvenile adjudications from consideration for calculation of a defendant's criminal history and the Commission also proposes the alternatives of 1) excluding juvenile adjudications unless they are violent or serious and 2) excluding consideration of all offenses committed prior to age 18.

The Campaigns fully support the proposed amendment to exclude all juvenile adjudications from a defendant's calculated criminal history. The intended purpose of the juvenile justice system is to rehabilitate rather than punish youthful offenders and includes a focus on the "best interests of the child."¹² Accordingly, juvenile adjudications serve a distinct function from convictions within the criminal justice system. Individuals should not be further penalized for their youthful transgressions, particularly when these incidents are resolved in a rehabilitative setting. Therefore, any and all juvenile adjudications should be excluded from consideration when calculating a defendant's criminal history.

The Campaigns oppose creating an exception for juvenile adjudications if they are violent and/or serious. First, the majority of youthful offenders cease criminal behavior by their mid-20s, including those who commit violence offenses,¹³ so empirical data does not support treating these youthful offenders differently than the broader youthful offender population. Second, attempting to standardize what offenses would be considered serious or violent creates the risk of disparate outcomes for children with similar offenses. Because each state establishes statutory criminal offenses, children in different states with comparable crimes may be adjudicated differently for similar offenses. The result is that the Sentencing Guidelines may produce harsher sentencing outcomes for individuals in some states as compared to others. Lastly, all states have some sort of statutory transfer mechanism to adjudicate youth in the adult criminal justice system if they commit certain enumerated violent and/or serious offenses.¹⁴ Youth adjudicated delinquent for those offenses in the juvenile system have already been deemed amenable to rehabilitation or better served by the juvenile system. These youth therefore should be treated like all other youth adjudicated in the juvenile delinquency system.

¹² American Bar Association Division for Public Education, The History of Juvenile Justice at 5, available at <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>.

¹³ Laurence Steinberg, Elizabeth Cauffman, & Katheryn C. Monahan. *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*. Juvenile Justice Bulletin, U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. (Mar. 2015).

¹⁴ Patrick Griffin, Sean Addie, Benjamin Adams, and Kathy Firestine. *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*. Juvenile Justice Bulletin, U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. (Sept. 2011).

The current state of adolescent brain development research that indicates the brain continues to mature up to the mid-20s.¹⁵ This research supports policies establishing unique treatment for youthful offenders. The Campaigns would strongly endorse an amendment that excludes from consideration *all* offenses that occurred prior to age 18 when evaluating a defendant's criminal history, regardless of whether the individual was convicted in adult or juvenile court.

- Upward Departure for Juvenile Adjudications

The Campaigns would oppose a proposed amendment stating that all or a subset of juvenile offenses should be considered for the purpose of an upward departure under §4A1.3. As stated previously, the juvenile justice system is intended to be a system of rehabilitation rather than punishment for youthful offenders. Penalizing individuals for their youthful errors is contradictory to the established goals of this court system. Additionally, in many states, juvenile records are at least partially protected from public view to permit individuals to move forward in a positive manner without the collateral consequences of a criminal conviction.¹⁶ To consider these adjudications in a discretionary manner to enhance subsequent adult penalties contradicts the goals of the juvenile justice system.

- Downward Departure for Adult Convictions that Occurred While Under 18

The Campaigns support the proposed amendment recommending a downward departure for defendants who have adult convictions that occurred while under age 18 that would have been classified as juvenile adjudications if the laws in the jurisdiction did not categorically consider offenders below the age of 18 as adults. In interpreting this amendment, there are at least three ways in which youthful offenders under 18 can be categorically considered adults under the laws of a jurisdiction. The first way includes those states that consider the age of majority to be under 18 for purposes of the criminal justice system. Seven states treat all 17-year-olds as adults regardless of their offense, with two of those states also treating all 16-year-olds as adults regardless of their offense.¹⁷ The second way includes those states that permit prosecutors to directly file adult charges against children under 18 with no judicial hearing. In fifteen states, children under 18 who commit certain enumerated offenses are categorically considered to be charged as adults.¹⁸ The third way includes fourteen states that have mandatory waiver provisions, in which children are

¹⁵ Laurence Steinberg, Elizabeth Cauffman, & Katheryn C. Monahan. *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*. Juvenile Justice Bulletin, U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. (Mar. 2015).

¹⁶ Riya Saha Shah, Lauren Fine, and Jamie Gullen. *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement*. (2014.) Available at <http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf>

¹⁷ Georgia, Michigan, Missouri, New York, North Carolina, Texas, and Wisconsin automatically prosecute 17-year-olds as adults; New York and North Carolina also automatically prosecute 16-year-olds as adults. Campaign for Youth Justice. *Let's Raise the Age of Juvenile Jurisdiction*. Available at <http://www.campaignforyouthjustice.org/images/factsheets/RTAOnePagerJune72016final.pdf>

¹⁸ Alaska, Arizona, California, Colorado, the District of Columbia, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Pennsylvania, Vermont, Virginia, and Wyoming allow prosecutors to directly file charges against children in adult court. Campaign for Youth Justice. *The Detriments of Direct File*. Available at <http://www.campaignforyouthjustice.org/news/blog/item/the-detriments-of-direct-file>

mandatorily transferred into the adult criminal justice system if the judge finds probable cause the offense occurred and the child is a certain age.¹⁹ Finally, twenty-nine states statutorily exclude children charged with certain offenses from juvenile court, meaning they are statutorily required to be tried as adults.²⁰

The Campaigns oppose the automatic charging of children in adult court and therefore supports the proposed amendment as an effort to ameliorate the harms caused by automatically charging children as adults. However, the Campaigns strongly encourage the Sentencing Commission to clarify which of these mechanisms it intended to address through the proposed amendment as it is currently ambiguous. Additionally, the Campaigns strongly support clear examples or guidance as to when a downward departure is warranted, because federal judges may lack a familiarity with states' nuanced procedural mechanisms for convicting youth as adults.

Finally, the Campaigns strongly recommend that a downward departure should be recommended for *all* defendants who have adult convictions for offenses that occurred while under 18, primarily due to the developmental differences previously described of those under age 18 and recent U.S. Supreme Court jurisprudence. Additionally, this amendment has the potential to create unequal recommendations for downward departures (e.g., recommending a downward departure for a 17-year-old convicted as an adult for murder because all 17-year-olds in a given state are statutorily defined as adults while not recommending a downward departure for a 14-year-old who was discretionarily transferred to adult court who possess but did not use certain weapons). Accordingly, in order to reduce confusion among judges, increase fairness and ease of application, treat all youth in a developmentally-appropriate manner, and prevent unintended counter-intuitive outcomes, the Campaigns recommend the Sentencing Commission adopt an amendment which recommends a downward departure for all individuals convicted of adult offenses while under age 18.

The Campaigns recommend further revisions to the Sentencing Guidelines

- Life Sentences

As a result of recent U.S. Supreme Court cases, the use of life sentences on child offenders under 18 years of age has largely been deemed unconstitutional. Additional litigation around the country has also called into question the legality of life-equivalent sentences.

The Commission should amend the Guidelines to create a clear presumption against the imposition of a life or life-equivalent sentence on individuals under the age of 18 at the time of the offense. For example, the Commission could include language within the Guidelines Manual that states: "There is a very strong presumption against the use of a life or

¹⁹ Campaign for Youth Justice. *The Impact of Mandatory Transfer Statutes*. Available at http://www.campaignforyouthjustice.org/images/factsheets/Mandatory_Transfer_Fact_Sheet.pdf

²⁰ Jurisdictional Boundaries, Juvenile Justice Geography, Policy, Practice, & Statistics. Available at <http://www.jjgps.org/jurisdictional-boundaries>

a life-equivalent sentence, which should very rarely, if ever, be imposed on a person who was less than 18 years of age at the time of the offense or offenses.”

- §5H1.1. Age (Policy Statement)

The Guidelines treat youth as an optional consideration relevant only in unique circumstances: “[a]ge (including youth) may be relevant in determining whether a departure is warranted, 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.”²¹ By making consideration of youth an exception rather than the rule, the Guidelines ignore the Eighth Amendment mandate that “children are constitutionally different from adults for purposes of sentencing.”²²

In the wake of the U.S. Supreme Court decisions, states around the country have passed legislation requiring judges to consider youth-related mitigating factors at the time of sentencing for children whose offenses occurred while under age 18.²³ West Virginia’s House Bill 4210 presents the most comprehensive approach. For all children sentenced in the adult criminal justice system, regardless of the offense level, the judge must consider a series of factors that make children unique from adults.²⁴ These factors include the child’s age, family and community environment, ability to appreciate the risks and consequences of their conduct, the role of peer pressure in the incident, and the child’s history of trauma.²⁵ Additionally, the judge must consider a comprehensive mental health evaluation, school records, any history in the child welfare system, and the child’s capacity for rehabilitation.²⁶ This robust list of factors the judge must consider enable judges to fully understand the life circumstances of every child sitting before them and tailor an age-appropriate sentence. The Commission should require the consideration of these or similar mitigating factors any time a child is being sentenced. At a minimum, the Commission should include language like that found in Assembly Bill 267 in Nevada, which requires judges sentencing children in adult court to “consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth.”²⁷

- §5H1.12. Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

Under the current Guidelines, “[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing *are not relevant grounds* in determining whether a departure is warranted.”²⁸ This policy statement is in direct contradiction with the

²¹ United States Sentencing Commission, Guidelines Manual, §5H1.1 (Nov. 2016).

²² *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012).

²³ See HB 4210, 81st Legislature, 1st Sess. (W. Virg. 2014); H.B. 7035, 2014 Reg. Sess. (Fl. 2014); S.B. 796, 2015 Reg. Sess. (Conn. 2015); S.B. 228, 86th Gen. Assemb., 1st Sess. (Iowa 2015); H.B. 2471, Am. 1 and SB 1830, Am. 2 (Ill. 2015).

²⁴ H.B. 4210, 81 Leg., 2d Sess. (W.Va. 2014).

²⁵ *Id.*

²⁶ *Id.*

²⁷ A.B. 267, 78th Reg. Sess. (Nev. 2015).

²⁸ USSG §5H1.12 (emphasis added)

U.S. Supreme Court’s ruling in *Miller v. Alabama*, in which the Court emphasized that children were “constitutionally different from adults for sentencing purposes” in part because children “‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘control over their environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.”²⁹ At least 75% of youth involved in the justice system have been victims of trauma, such as experiences of abuse, neglect, substance abuse, violence in the home, and violence in the community.³⁰ Reactions to this childhood trauma may manifest in different ways, including by engaging in risky behavior, being unable to manage emotions and control impulses, experiencing depression and anxiety, and exhibiting learning disabilities.³¹

The Commission should amend the Guidelines to state that lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing or the presence of adverse childhood circumstances warrants a downward departure for offenses that were committed when the defendant was less than 18 years of age.

- §4B1.1. Career Offender and §4B1.2. Definitions of Terms Used in Section 4B1.1

Similar to the computation for a defendant’s criminal history category, felonies committed prior to age 18 are part of the prior felony conviction analysis in sentencing for “career offenders.” The Guidelines commentary states that “[a] conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.”³² Due to the heightened neuroplasticity of the adolescent brain, young people have a heightened capacity for positive change.³³ The majority of individuals who commit crimes as youth demonstrate the ability to mature and change, with age 18 being the peak age for criminal behavior and 90 percent of all youthful offenders ending criminal activity by their mid-20s.³⁴

It is groundless policy, therefore, to identify individuals as career offenders when some or all of their criminal behavior occurs during a time period when criminal behavior is a transient developmental activity rather than a permanent character trait. The Guidelines should be amended to exclude consideration of offenses occurring before age 18 when analyzing a defendant’s eligibility for career offender sentencing.

- §5K2.0. Grounds for Departure (Policy Statement)

Judges are currently permitted to take an upward depart from the applicable guideline range if an aggravating circumstance exists “of a kind, or to a degree, not adequately taken

²⁹ *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012).

³⁰ The National Child Traumatic Stress Network, Service Systems Brief V. 2 N.2 (Aug. 2008). Available at <http://www.nctsn.org/sites/default/files/assets/pdfs/judicialbrief.pdf>

³¹ National Child Traumatic Stress Network, Effects of Complex Trauma, <http://www.nctsn.org/trauma-types/complex-trauma/effects-of-complex-trauma>

³² USSG §4B1.2, comment. (n.1)

³³ Arain et al. 2013, Scott et al. 2015.

³⁴ Scott, Elizabeth, Thomas Grisso, Marsha Levick, and Laurence Steinberg. The Supreme Court and the Transformation of Juvenile Sentencing. Issue brief. N.p.: Models For Change, 2015.

into consideration by the Sentencing Commission if formulating the guidelines, that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.”³⁵ Given that youth are constitutionally and developmentally different than adults, they should not be eligible for harsher sentences than adults who commit identical crimes.

The Commission should amend the Guidelines to recommend a downward departure for individuals who commit their offenses while under the age of 18. Judges should be encouraged to treat these individuals as part of a unique population and to reduce their sentences accordingly. Additionally, the Commission should amend the Guidelines to prohibit upward departures for individuals who commit offenses while under age 18.

- Retroactivity

The Commission should make the above recommendations retroactive. Youth who were sentenced a generation ago demonstrated similar age-related risk-taking, peer pressure, and developmentally-appropriate maturation out of criminal behavior as today’s youth, yet it has taken decades for adolescent brain development research to catch up. Particularly in light of the U.S. Supreme Court’s *Montgomery v. Louisiana* decision that retroactively applied *Miller v. Alabama* to youth who received mandatory life-without-parole sentences,³⁶ the Commission should ensure that individuals who were sentenced prior to any youth-related amendments receive relief based on those amendments.

The U.S. Sentencing Commission should adopt the proposed amendments addressing youthful offenders and further recommendations

The Campaign for the Fair Sentencing of Youth and the Campaign for Youth Justice are grateful that the U.S. Sentencing Commission is considering proposed amendments to the Guidelines as they relate to youthful offenders. It is critical for the Commission to update the Guidelines in light of evolving science and legal precedent finding that youth are developmentally and constitutionally different from adults. Amendments in this area would have a profound positive impact on individuals charged with federal offenses that occurred while they were youth and for those individuals who had youthful offenses considered as part of their criminal history analysis. Thank you so much for your serious consideration.

Sincerely,

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Director, The Campaign for the Fair Sentencing of Youth

Marcy Mistrett
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³⁵ USSC §5K2.0. (a)(1).

³⁶ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).