Before the United States Sentencing Commission
Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Concerning Youthful Individuals

Statement of Marsha L. Levick
On Behalf of Juvenile Law Center

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I. INTRODUCTION

The United States Sentencing Commission's proposed 2024 Amendments concerning Youthful Individuals offer an important opportunity to align the federal sentencing guidelines with recent case law and research recognizing that children are developmentally different from adults and should not receive the harshest adult sentences. For almost 50 years, Juvenile Law Center, which I co-founded as the country's first nonprofit, public interest law firm for children, has worked to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

As Juvenile Law Center's Chief Legal Officer, one of my primary responsibilities is the oversight and management of the organization's litigation and appellate docket. In that role, I have authored or co-authored appellate and amicus briefs in state and federal appeals courts throughout the country, including many before the United States Supreme Court. Most prominently, I co-authored the lead child advocates' amicus briefs in the Supreme Court's recent juvenile sentencing cases.[1] I also served as co-counsel in *Montgomery v. Louisiana*,[2] where the Supreme Court ruled *Miller v. Alabama* retroactive. I was co-lead counsel in the notorious "Kids for Cash" scandal, where two Pennsylvania judges in Luzerne County were alleged to have received nearly $3 million in kickbacks from the developer and co-owner of for-profit juvenile detention centers to which youth who appeared before one of the judges were routinely sent. In addition to flagrant greed and corruption,

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[1] *See Roper v. Simmons*, 543 U.S. 551 (2005) (striking down the juvenile death penalty as unconstitutional); *Graham v. Florida*, 560 U.S. 48 (2010) (striking down life without parole sentences for juveniles convicted of nonhomicide offenses and requiring "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (holding that the age of a child subjected to police questioning is relevant to the *Miranda* custody analysis); *Miller v. Alabama*, 567 U.S. 460 (2012) (striking down mandatory imposition of life without parole sentences for juveniles convicted of homicide).

[2] 577 U.S. 190 (2016).

the scandal exposed rampant violations of youth's due process rights and was especially shocking given the trivial offenses for which the judge incarcerated hundreds of youths.

In addition, I have argued before both state and federal appellate courts, authored or co-authored scholarly articles on youth in the juvenile and adult legal systems—including on sentencing issues—and I co-teach seminars on the juvenile justice system at Temple University Beasley School of Law and the University of Pennsylvania Carey Law School. For the last several years, I have also chaired the American Bar Association's Juvenile Justice Standards Task Force, which is charged with reviewing and amending nearly twenty volumes of juvenile justice standards first adopted by the ABA in 1980.

My views on the United States Sentencing Commission's proposed 2024 Amendments regarding Youthful Individuals are based on my decades-long career advocating on behalf of youth in the juvenile and child welfare systems. They are also informed by Juvenile Law Center's close collaboration with colleagues at The Sentencing Project, The Gault Center, National Youth Justice Network, and Citizens for Juvenile Justice.

With respect to the treatment of criminal history presented in **Part A**, we believe that the purposes of the sentencing guidelines as well as the goals of the juvenile justice system, inconsistent juvenile records and transfer laws, and the substantial racial disparities in youth sentencing dictate that the Commission adopt Option 3 and remove all consideration of youthful offenses from criminal history scoring. With respect to **Part B**, we agree that the explicit consideration of youth at sentencing is a critical update, but believe the Commission should avoid specifying precisely what aspects or elements of youth the trial court should consider and do not believe recidivism studies are reliable or relevant to the trial court's sentencing decision.

The lack of support from prosecutors on Parts A and B, as expressed in comments submitted to the Commission, is both contrary to the founding principles of the sentencing guidelines and contrary to the available evidence and research. As this Commission knows, indeterminate sentencing practices — which led to arbitrary and capricious sentencing outcomes — as well as persistent racial disparities in sentencing were key motivators in adopting the sentencing guidelines. These identical concerns are at the core of the sentencing policies of the juvenile justice system; clinging to the status quo will

perpetuate the very harms these guidelines have sought for decades to ameliorate. The opposition also ignores well-established research that shows that the vast majority of youth will naturally desist from criminal activity by their mid-twenties and that, to the extent recidivism studies suggest a more persistent criminal trajectory, the research and methodology are simply too unreliable and inconsistent to actually inform policy. We urge the Commission to resist this call to in fact do nothing.

II. THE COMMISSION'S MANDATE TO CORRECT DISPARITIES, ARBITRARINESS, AND INDETERMINACY

The United States Sentencing Commission was created, and the Guidelines developed, in order to decrease disparities, arbitrariness, and indeterminacy in sentencing.

Congress passed the Sentencing Reform Act (SRA) as Title II of the Comprehensive Crime Control Act of 1984.[3] The SRA created the Commission and directed it to develop mandatory guidelines to promote greater uniformity in sentencing outcomes. The report of the Senate Judiciary Committee on the Comprehensive Crime Control Act of 1983 captures the reasoning and concerns of the SRA's drafters.[4] The report observed that "every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted or similar crimes, committed under similar circumstances. . . These disparities, whether they occur at the time of the initial sentences or at the parole stage, can be traced directly to the unfettered discretion the law confers on these judges and parole authorities responsible for imposing and implementing the sentence."[5]

The report's authors explain that such disparities harm both individuals and public safety: "Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons."[6] The report concludes: "The shameful disparity in criminal sentences

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[3] Pub. Law 98-473.

[4] Comprehensive Crime Control Act of 1983, Report of the Committee on the Judiciary United States Senate, S. 1762, 22.

[5] *Id.*

[6] *Id.* at 45-46.

is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward."[7]

As such, the SRA charged the Commission with promulgating guidelines "with particular attention to the requirements of § 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C.A. § 994. And in the words of then-President Ronald Reagan upon the signing of the Sentencing Guidelines Act of 1986, the "core purpose of the Sentencing Reform Act was to establish fairness and certainty in sentencing."[8] Using such a framework in a uniform manner is intended to "secure nationwide consistency."[9]

III. THE PROPOSED AMENDMENTS

The Commission's proposed amendments regarding the sentencing of youthful individuals are fully in line with the objectives discussed above. As explained in these comments, juvenile adjudication points introduce disparities, arbitrariness, and indeterminacy into federal sentencing practices that are anathema to the Guidelines' purpose and the Commission's mission.

In its landmark sentencing decisions concerning youthful individuals, the United States Supreme Court has repeatedly held that offenses committed by those under the age of eighteen must be treated differently from offenses committed by adults and that the youth who commit these offenses cannot be subjected to the harshest punishments.[10] The behavioral science adopted by

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[7] *Id.* at 66.

[8] Ronald Reagan, Statement on Signing the Sentencing Guidelines Act of 1986, July 11, 1986, 1986 U.S.C.C.A.N. 1770.

[9] *Gall v. United States*, 552 U.S. 38, 49 (2007).

[10] *See Roper v. Simmons,* 543 U.S. 551 (2005) (striking the juvenile death penalty as unconstitutional under the Eighth Amendment); *Graham v. Florida,* 560 U.S. 48 (2010) (striking life without parole sentences for juveniles convicted of nonhomicide offenses and requiring "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"); *Miller v. Alabama,* 567 U.S. 460 (2012) (striking mandatory imposition of life without parole sentences for juveniles convicted of homicide); *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) (finding that *Miller* applies retroactively); *Jones v. Mississippi*, 593 U.S. 98, 106 n.2 (2021(affirming that *Miller* and *Montgomery* require the trial court to consider unique attributes of youth before imposing life without parole).

the Supreme Court in the juvenile sentencing cases is supported and bolstered by neuroscience that demonstrates that critical regions of the human brain do not fully develop and become mature until an individual reaches their mid-twenties. Accordingly, offenses committed by youth cannot be treated in the same manner as adult offenses regardless of whether they are adjudicated in the juvenile or criminal justice systems.

Accordingly, the Commission's proposed Amendments concerning youthful individuals offer an important opportunity to align the Guidelines with current case law and research. **Part A** of the Amendments offers three separate options to address the current use of offenses committed under age 18 in the calculation of an individual's criminal history score. In evaluating these options, the Commission must consider: (1) the purpose of the Guidelines, (2) the unique history, purpose, and practice of the juvenile justice system, (3) racial disparities in the adjudication and sentencing of youth, (4) the impact of juvenile records laws, and (5) disparities in laws governing how and when youth are transferred for prosecution and sentencing in adult court. Based on these considerations, the Commission should select Option 3 and remove all consideration of youthful offenses from the criminal history score.

Part B of the Amendments takes the important step of explicitly including considerations and characteristics of youth for purposes of downward departures from the standard guideline ranges. Under the proposed Amendment, however, the trial court would be required to consider a list of specific individual factors related to youth as well as the influence of certain recidivism studies suggesting the propensity of youthful individuals to reoffend. While the explicit consideration of youth at sentencing is a critical advancement, the Commission should avoid specifying precisely what aspects or elements of youth should be considered to ensure an expansive view as research, knowledge, and experience evolves. Moreover, because the relevant neuroscientific research reflects aggregate, general characteristics of brain development in teens and young adults, requiring the specific consideration of neuroscience on an individualized basis at sentencing is not recommended. Additionally, given the highly variable methodologies and timelines associated with many recidivism studies, the use of any particular recidivism study is unreliable and, at best, merely reflects what brain and behavioral science and the age-crime data confirm: youth have a propensity for poor decision making, risk taking and reckless behavior that desists as they mature.

A. Part A: Offenses Committed by Youth Under 18 Should Not Be Considered When Computing Criminal History Under §4A1.2(d).

Under §4A1.2(d) of the current Guidelines, an individual's criminal history score includes points assessed for all juvenile adjudications as well as for adult criminal convictions the individual received when they were under eighteen. The inclusion of juvenile adjudications in any form violates the original mandate and purpose of the Commission in establishing the Guidelines as well as that of the juvenile justice system, while perpetuating arbitrary and inconsistent outcomes that only serve to exacerbate existing racial disparities in sentencing. Accordingly, Options 1 and 2, despite improvements upon the current Guidelines, do not go far enough. Given existing disparities in youth transfer laws as well as the science and case law dictating that youth be treated differently than adults, using any offenses before age 18 in computing criminal history is problematic. Accordingly, Option 3 offers the most consistent and fair approach to the handling of youthful offenses.

1. Relevant Background Information

a. History, Purpose, and Practices of the Juvenile Justice System

Today's juvenile justice system traces its origins to the establishment of the first juvenile court in Cook County, Illinois in 1899. By the mid-1920's, most states had created separate juvenile courts for youth. From its inception, the juvenile justice system was established to differentiate juvenile offenses from adult criminal conduct and to ensure that youth were spared the harsh criminal consequences of adult court, from sentencing through the stigma of being branded criminal.[11] In this new system, with the judge serving in the role of *parens patriae*, the state's intervention was considered a civil matter rather than a criminal one.[12] By removing youth from adult criminal court jurisdiction, the founders of the juvenile court believed they could supervise and treat youth and respond to their needs with greater flexibility. While the criminal justice system focused on punitive responses to crime, the juvenile

[11] *In re Gault*, 387 U.S. 1, 14-15 (1967).

[12] *Id.* at 17.

justice system was developed in large part to facilitate the opportunity for juveniles to reform and abide by the law.[13]

The juvenile court's rehabilitative focus was premised on the assumption that a young person's actions were primarily the function of their environment and therefore did not warrant a punitive response: "Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control . . . [their] conduct is not deemed so blameworthy that punishment is required to deter him or others."[14] The rehabilitative ideal further rested on the belief that a child's character, not yet fully formed, could meaningfully be improved by intervention strategies geared to the minor's "best interests."[15]

The complete judicial discretion of the *parens patriae* model, however, led to vastly different outcomes for youth depending on the state, county, juvenile court judge and even other stakeholders. And throughout the history of the juvenile court system, from arrest through adjudication, disposition and transfer to criminal court for prosecution, Black, Brown, immigrant, and Indigenous youth have been treated more harshly. While the U.S. Supreme Court finally required some basic due process protections for youth in the 1960s and 1970s,[16] much of the *parens patriae* model still remains.[17] The most notable difference perhaps is the absence of jury trials; in juvenile court, the judge is still the ultimate finder of fact. Thus, issues that would be aggressively litigated before a jury with the presentation of experts may be seen by the juvenile court as a waste of time and resources, as the court may feel they can evaluate such things on its own.[18]

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[13] *Id.* at 15-16.

[14] *McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971).

[15] Barry Feld, *The Transformation of the Juvenile Court – Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 337 (1999).

[16] *In re Gault*, 387 U.S. 1 (1967); *Kent v. U.S.*, 383 U.S. 541 (1966); *In re Winship*, 397 U.S. 358 (1970); *Breed v. Jones*, 421 U.S. 519 (1975).

[17] Eduardo R. Ferrer, *Razing & Rebuilding Delinquency Courts: Demolishing the Flawed Philosophical Foundation of Parens Patriae*, 54 LOYOLA U. CHICAGO L. J. 885 (2023).

[18] Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?* 34 N. KY L. REV. 257 18-19, 33 (2007).

More importantly, the juvenile system continues to rely on indeterminate sentencing – a particular concern of the Commission when first established and a stark contrast to the criminal system that has all but abandoned it. In a recent survey of 29 juvenile defenders from 24 different states conducted by The Gault Center, the vast majority reported the use of indeterminate periods of confinement in their state. This arbitrariness in sentence length is compounded by the multiple ways in which release and termination of confinement is determined: the ultimate discretionary decision to release a youth from confinement may be made by a judge, the executive agency overseeing the state juvenile justice system, or an independent parole-type board, depending on which state the youth has been adjudicated in. Using minimum terms of confinement for assigning points based on length of confinement is therefore wholly inappropriate.

Finally, juvenile adjudications are more unreliable because youth are particularly prone to false confessions.[19] In one study of proven false confessions, a disproportionately high percentage were found to come from juveniles, most of whom were under 15.[20] In another study of exonerations, false confessions were the reason in 42% of juvenile exonerations (compared to 15% of all exonerations).[21] In studies that have gauged youths' decision-making during hypothetical interrogations and plea offers, many self-reported that they would falsely confess, and they did so more often than adults. Indeed, confession experts overwhelmingly agree that the phenomenon of false confessions among youth is sufficiently reliable to present in court.[22]

b. Historic and Persistent Racial Disparities in Juvenile Adjudications and Criminal Sentencing

The use of juvenile adjudications for adult sentencing has a disproportionate impact on youth of color. From the beginning, studies have shown "that [Black] children are represented in a much larger proportion of the delinquency cases than they are in the general population" and that "[a]n

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[19] Lauren J. Grove and Jeff Kukucka, *Do Laypeople Recognize Youth As a Risk Factor for False Confession? A Test of the 'Common Sense' Hypothesis*, 28 PSYCHIATRY, PSYCH., AND L. 185, 185-205 (2021) (summarizing numerous studies related to false confessions among youth).

[20] *Id.*

[21] *Id.*

[22] *Id.*

appreciably larger percent of the [Black] children came in contact with the courts at an earlier age than was true with the [w]hite children."[23] Further, "cases of [Black] boys were less frequently dismissed than were [w]hite boys. Besides, they were committed to an institution or referred to an agency or individual much more frequently than were [w]hite boys."[24] Little has changed in the intervening decades. Even as arrest and custody rates have dropped dramatically in the last twenty-five years, racial disparities persist.[25] Black, Brown, and Indigenous youth continue to be disproportionately represented at every stage of the juvenile system, including arrests, court referrals, detention, adjudications, incarceration and other out-of-home placements.[26] Youth of color are also disproportionately involved with the child welfare and school to prison pipelines, both feeders to the juvenile justice system.[27] Black, Brown, and Indigenous Youth are more likely to end up in the child welfare system and are typically held for longer periods of time when they are removed from their homes.[28] Similarly, Black and Brown youth are more likely to attend

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[23] James Bell & Laura John Ridolfi, W. Haywood Burns Inst., *Adoration of the Question: Reflection on the Failure to Reduce Racial & Ethnic Disparities in the Juvenile Justice System,* 8 (2008).

[24] *Id.*

[25] Josh Rovner, *Youth Justice by the Numbers*, THE SENTENCING PROJECT (May 16, 2023); https://www.sentencingproject.org/policy-brief/youth-justice-by-the-numbers/ (finding a 77% drop in juvenile justice incarcerations between 2000 and 2020 and an 80% decline in arrests, but finding that Black youth are 4.4 times as likely, and indigenous youth 3.2 times as likely, as white youth to be incarcerated).

[26] *Id.*; *see also* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 408–09 (2013).

[27] DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES AND HOW ABOLITION CAN BUILD A SAFER WORLD 36-39 (2022); Jay Blitzman, *Shutting Down the School-to-Prison Pipeline*, AMERICAN BAR ASSOCIATION (Oct. 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/empowering-youth-at-risk/shutting-down-the-school-to-prison-pipeline/; Andrew Bacher-Hicks, Stephen B. Billings & David J. Deming, *Proving the School-to-Prison Pipeline: Stricter Middle Schools Raise the Risk of Adult Arrest*, 21 EDUC. NEXT 52, 52-57 (2021).

[28] Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, THE APPEAL (May 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/; Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. POL. AND SOC. SCI. 253, 254 (2020); *"If I Wasn't Poor, I Wouldn't Be Unfit,"* HUMAN RIGHTS WATCH (2022), https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare; Rachel Anspach, *The Foster Care to Prison Pipeline: What It Is and How It Works*, TEEN VOGUE (May 25, 2018),

schools with school resource officers and police and are disproportionately represented among school referrals to juvenile court.[29]

Finally, as discussed further below, youth of color are more likely to be transferred or waived to criminal court to be prosecuted as adults, which contributes to their being disproportionately represented among youth under 18 with adult convictions and sentences. According to a 2017 American Communities Survey, Black individuals under the age of 18 comprised 14% of all youth, while white youth accounted for approximately 68%. Despite this, Black youth represented approximately 54% of all youth who were judicially waived to adult court and 58% of youth transferred to adult court for persons offenses according to national data; the biggest gap in disparities in forty years.[30]

The actual impact on racial disparities of the three options presented by the Commission is detailed below.

c. The Supreme Court Adopts Science Dictating that Youth Must Be Treated Differently

In a series of cases decided by the Supreme Court between 2005-2021, the Court relied upon both behavioral and neurological research to ban extreme sentences for youth under 18. In *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, 567 U.S. 460 (2012), the Court identified distinct attributes of youth that reduce their culpability and thus require that youth be treated differently than their adult counterparts.

These characteristics include: 1) immaturity of judgment and an underdeveloped sense of responsibility which results in "impetuous and ill-considered actions and decisions," *Roper*, 543 U.S. at 569 (quoting *Johnson v.*

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https://www.teenvogue.com/story/the-foster-care-to-prison-pipeline-what-it-is-and-how-it-works.

[29] Amir Whitaker et al., *Cops and No Counselors*, ACLU (March 2019), https://www.aclu.org/publications/cops-and-no-counselors; Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 410-411 (2013).

[30] Campaign for Youth Justice, Justice Policy Institute, (n.d.), *The Child Not the Charge: Transfer Laws Are Not Advancing Public Safety*, https://www.campaignforyouthjustice.org/images/child_not_the_charge_report_1.pdf.

Texas, 509 U.S. 350, 367 (1993)); 2) a greater susceptibility "to negative influences and outside pressures, including peer pressure" and limited control over their environment; and 3) the fact that their character is "not as well formed as that of an adult," making their personality traits "more transitory," "less fixed," and capable of change, *id.* at 569-71. These cases and the scientific research upon which they are based counsel against using youthful offenses to further criminalize and punish individuals.

d. Access and Availability of Juvenile Record Information Is Different in Every State

The wide variability, state to state, in juvenile records laws makes the assignment of points for juvenile adjudications highly problematic. While one of the original hallmarks of the juvenile justice system was its commitment to confidentiality to protect young people from the criminal consequences of an adult conviction, such protection is no longer uniformly provided.[31] All states have laws regarding the confidentiality of juvenile records and record information and most states provide some legal mechanism to provide record sealing or expungement at some point after a case is closed. However, the protection afforded to juvenile records and the ability of federal authorities or courts to access them varies greatly from state to state.[32] What this means in practice is that a federal court may have access to certain juvenile convictions in one state, while the records of those same offenses and adjudications may not be available in another state.

For example, in Washington, juvenile court records are open to public inspection unless and until the youth turns 18 and successfully petitions to have their record sealed.[33] Even when sealed, however, the records can still be shared with federal law enforcement agencies. By contrast, in California the juvenile court record is protected as confidential, sealed as soon as the case is closed, and destroyed after a period of time depending on the offense.[34] Unlike

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[31] Riya Saha Shah, Lauren Fine & Jaime Gullen, *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement* 8 (Juv. Law Ctr. 2014), http://tinyurl.com/3ce5je2t.

[32] *See Failed Policies, Forfeited Futures: Revisiting a Nationwide Scorecard on Juvenile Records*, Juv. L. Ctr. (July 15, 2020), http://tinyurl.com/2nmrfp3s.; *see also* Counsel for State Governments, Clean Slate Clearinghouse, https://cleanslateclearinghouse.org.

[33] Wash Rev. Code § 13.50.050.

[34] Cal. Welf. & Inst. Code §§ 826, 827, 827.12.

in California and a handful of other states, automatic expungement is not the norm. In the majority of states like Washington, where individuals have to petition the court to have their records sealed or expunged, fees, unpaid restitution, inadequate notice, and other barriers leave many juvenile records arbitrarily accessible, particularly among youth with limited means or legal sophistication. These discrepancies lead to the inconsistent and arbitrary treatment of juvenile adjudications, further undermining the purpose of the sentencing guidelines.

e. Transfer Laws Differ in Every State

As with the disparities in juvenile records laws across the country, laws for the transfer of youth to criminal court likewise vary greatly across the country. All states have laws that provide for the transfer and prosecution of youth in criminal court.[35] However, states differ in the use of discretionary versus mandatory transfer and differ in the eligibility criteria for transfer, with wide variations in both the age and types of defenses for which a child may be eligible for prosecution as an adult.[36] The actual decision maker regarding a youth's prosecution in criminal court also varies state to state, with states allocating responsibility among juvenile court judges, criminal court judges, or even prosecutors.[37]

There are also substantial racial disparities involved in cases being transferred to criminal court for prosecution.[38] In 2016, Black youth were nine times as likely as white youth to be sentenced to prison while Indigenous youth were twice as likely and Latino/a youth were 40% more likely than white youth to be prosecuted as adults.[39]

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[35] Campaign for Youth Justice, *Winning the Campaign: State Trends in Fighting the Treatment of Children As Adults in the Criminal Justice System 2005 – 2020*, 21 (2021), https://www.campaignforyouthjustice.org/images/reportthumbnails/CFYJ%20Annual%20Report.pdf.

[36] Campaign for Youth Justice, *The Child Not the Charge: Transfer Laws Are Not Advancing Public Safety*, Justice Policy Institute, https://www.campaignforyouthjustice.org/images/child_not_the_charge_report_1.pdf.

[37] *Id.*

[38] *Id.*

[39] Campaign for Youth Justice, *Key Facts: Youth in the Justice System*, 7 (2016), http://cfyj.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf.

Nearly every state provides juvenile court judges with discretion to transfer youth to the adult system. However, even when the transfer authority rests with judges, the amount of discretion they have varies. There are discretionary, presumptive, and mandatory judicial waiver laws, with discretion of the judge during a formal hearing process varying from expansive to extremely limited.[40] While transfer is generally perceived to be used for youth who engage in serious crimes or crimes of violence, the fact is that judges are still transferring nearly half of youth to adult court for charges involving property offenses, drugs, and public order violations.[41] While total numbers of youth being judicially transferred has decreased since the 1990's, racial disparities have actually increased. In 2005, Black youth comprised 39% of all youth transferred by a judge, a proportion that increased to 55% in 2021, the most recent year for which there are data. Conversely, white youth comprised 45% of all judicial transfers in 2005, a proportion that fell to 29% in 2021. In 2021, seven in ten (71%) children transferred to the adult system by a judge were youth of color.[42]

Over half of states have transfer laws that automatically exclude certain youth from juvenile court because of their age and/or offense. These laws vary widely. For example, in Massachusetts, youth are only statutorily excluded from juvenile court if they are age 14 or older and are charged with first or second degree murder. By contrast, Maryland statutorily excludes youth 16 and older for 33 separate offenses.[43] Similar to statutory exclusion are mandatory waiver and presumptive waiver, which are transfer mechanisms that technically start in juvenile court, but the judges do not have full discretion and are either required to transfer a case to adult court upon a probable cause showing (11 states), or are required to presume that the case must be transferred absent clear proof the child should remain in the juvenile system (11 states).[44] Finally, in 12 states and the District of Columbia, youthful

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[40] Campaign for Youth Justice, *Winning the Campaign: State Trends in Fighting the Treatment of Children As Adults in the Criminal Justice System 2005 – 2020*, 21 (2021).

[41] *Id.*

[42] *Easy Access to Juvenile Court Statistics*, OJJDP, https://www.ojjdp.gov/ojstatbb/ezajcs/ (last visited Feb. 23, 2024).

[43] Campaign for Youth Justice, *Winning the Campaign: State Trends in Fighting the Treatment of Children As Adults in the Criminal Justice System 2005 – 2020*, 25 (2021).

[44] *Id.*

offenses can be filed directly to criminal court by the discretion of the prosecutor.

In states with statutory exclusion and direct file laws, as with discretionary transfer, racial disparities are stark.[45]

2. Option 3 Should be Adopted Because Options 1 & 2 Do Not Fully Address the Issues Raised by the Inclusion of Youthful Offenses in Criminal History Calculations.

Option 1 takes the important step of eliminating from the computation of criminal history under §4A1.2 the two points currently allocated automatically for juvenile sentences based on a certain period of "confinement." Eliminating this provision is necessary, not only because of the issue recognized by the Commission of how to define "confinement" in the context of the juvenile system, but also because of the indeterminate nature of juvenile sentences and the arbitrary imposition of them, identified herein. Further, because the goal of a juvenile disposition is rehabilitation, as opposed to punishment or incapacitation, the notion that each child requires a different course or term of incarceration, confinement, and or supervision based on age and circumstances leads to disparate responses from case to case. Dispositions in the juvenile justice system are intended to be both indeterminate and individualized. There is no rule of thumb dictating either a particular type or duration of confinement for each particular offense for which a child is adjudicated. Depending on the circumstances of the offense, the individual characteristics of the child, and the particular judge presiding over the case, a child adjudicated delinquent for rape could receive the same or lesser term of confinement as a child adjudicated delinquent for theft, robbery or simple assault. Applying points for a specified term of "confinement" is wholly unworkable when assessing the relevance of a juvenile disposition.

While **Option 1** eliminates the two points added for minimum terms of confinement in the juvenile system, it nevertheless continues to penalize all youth who are adjudicated delinquent in the juvenile system by assessing them one point. This provision should also be eliminated. The juvenile system was not intended to impose consequences beyond the period of juvenile court supervision and involvement, let alone potentially lifetime penalties on the one

[45] *Id.*

in eight youth who come into contact with it, 63% of whom will only have one encounter with juvenile courts.[46] Giving points in adult sentencing for juvenile adjudications does just that.

However, while **Option 2** improves on **Option 1** by eliminating automatic points for juvenile adjudications, it would replace the automatic points with a discretionary mechanism under §4A1.3 to permit the sentencing court to use juvenile adjudications for departures from the guidelines. Option 2 would also continue to assign automatic points for youth under 18 who were convicted and sentenced in the adult system.

Using juvenile adjudications, even as a matter of discretion, still undermines the rehabilitative purpose of the juvenile justice system and leads to inconsistent results due to the widespread variations in juvenile court laws, practices and policies across the country. Such an approach is also likely to exacerbate already existing racial disparities by subjecting Black, Brown, and Indigenous youth to the likelihood that their juvenile adjudications will be used for departures with greater frequency and to greater effect than white youth. To avoid increased racial disparities, discretionary departures based on juvenile adjudications should be avoided.

Indeed, the over-representation and excess punishment of youth of color is evident from available data showing disparities among individuals who receive juvenile adjudication points and individuals who receive criminal history points for offenses committed under age 18.

Option 1 would likely reduce racial disparities among those who received at least one 2-point juvenile adjudication. In FY2022, *two-thirds* of those individuals who received a 2-point juvenile adjudication under the Guidelines were Black, 22% were Latino/a, and 9% were white. By comparison, 46% of those who received a one-point juvenile adjudication were Black, 38% were Latino/a, and 11% were white.[47] According only one point to all juvenile adjudications therefore has the potential to address the particularly egregious racial disparity amongst those individuals who received 2-point juvenile

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[46] Charles Puzzanchera and Sarah Hockenberry, *Patterns of Juvenile Court Referrals of Youth Born in 2000*, Juvenile Justice Statistics, Nat'l Report Series Bulletin, OJJDP (Aug. 2022).

[47] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 10.

adjudications. The potential impact of this amendment, however, is limited: in FY2022 only 363 individuals received at least one 2-point juvenile adjudication, a mere 0.9% of all individuals with criminal history points.[48] Additionally, this proposal would fail to address the significant disparities that would remain amongst individuals who received at least a 1-point juvenile adjudication and individuals charged as adults for offenses committed as minors.

Individuals who have received at least one juvenile adjudication point are disproportionately Black and Latino/a compared to individuals who otherwise received at least one criminal history point. In FY2022, *over half* of all individuals who received at least one juvenile adjudication point were Black, 31% were Latino/a, and 10% were white.[49] Meanwhile, amongst those who otherwise received at least one criminal history point 30% were Black, 22% were white, and 44% were Latino/a.[50]

Option 2, eliminating points for juvenile adjudications entirely, would reduce disparities more than addressing solely 2-point juvenile adjudications and expand relief to more individuals: in FY2022, 940 individuals received at least one juvenile adjudication point.[51] Limiting relief, however, to individuals charged as juveniles rather than all offenses committed under age 18, fails to address the arbitrariness and bias characterizing whether a youth is prosecuted as a juvenile or adult.

Option 3, eliminating all points for offenses committed prior to age 18, would most comprehensively address racial disparities apparent in current federal sentencing practices and present throughout the juvenile justice system. In FY2022, 3,112 individuals received at least one criminal history point for offenses committed prior to age 18 and *nearly 60%* were Black,

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[48] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 8.

[49] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 19.

[50] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 19.

[51] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 17.

whereas 27% were Latino/a, and 11% were white.[52] By comparison, amongst those who otherwise received at least one criminal history point, 28% were Black, 45% were Latino/a, and 23% were white.[53]

Accordingly, **Option 3** is the only solution of the three available options that fully accords with the intended purpose of the juvenile justice system, the adolescent brain and behavioral science recognized by the Supreme Court, and addresses the inconsistencies imposed by records and transfer laws while minimizing the disparate impact imposed on youth of color. The Commission should adopt **Option 3**.

B. Part B: The Commission Should Incorporate Language Dictating that Youth Be Considered in Relevant Cases Under §5H1.1.

Some of the Commission's proposed revisions to §5H1.1 should be incorporated, but not all. Youth must be a relevant consideration for a downward departure to be consistent with the mandates of the Supreme Court in *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones,* but specifying what aspects of youth should be considered is unnecessary and may lead to inconsistent and inequitable results. Specifically, we recommend the following amendment:

> Age ~~(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~~. Age may be a reason to depart 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 downward departure also may be warranted due to the defendant's youthfulness at the time of the offense. In an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

[52] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 28.

[53] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 28.

This enables the youthful individual and their counsel to present evidence and argument on why their age is relevant in each individual case without imposing factors for a judge to consider that may not have anything to do with the case before them, and allows for a more expansive view of the mitigating qualities of youth as knowledge, experience, and research continue to evolve. Moreover, because the neuroscientific research reflects aggregate, general characteristics of brain development in teens and young adults, requiring the specific consideration of neuroscience on an individualized basis at sentencing is not recommended.

1. The Recidivism Data Is Unreliable and Should Not Be a Factor for Trial Courts to Consider Under Part B

Recidivism data in general tends to be unreliable and varies greatly across studies. "[C]urrently, no consensus exists with respect to defining recidivism or the length of follow-up period for determining occurrences of recidivism."[54] Rates of recidivism can vary by state.[55] They are influenced by which system the youth was adjudicated in.[56] They also vary by offense type. For instance, in a series of studies examining recidivism rates among youth adjudicated delinquent for sex offenses, including rape, recidivism rates for any type of further offending consistently fall below 5%.[57]

The three-year look-back for the recidivism data reviewed by the Commission merely reinforces what the science says about youthful offending. Indeed, researchers have established that the regions of the brain associated with immature decision making and reduced culpability relied on by the

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[54] Angela A. Robertson et al., *Recidivism Among Justice-Involved Youth: Findings From JJ-TRIALS*, 47 Crim Justice Behav. 1059 (2020) ("The definition (i.e., new offense/rearrest, adjudication, or re-incarceration/commitment), the length of the tracking period, and youth characteristics used influence recidivism rates differently.")

[55] *Id.* ("findings of large differences in recidivism rates across sites in five states suggests a lack of generalizability of rates from one state to another even when recidivism is measured in the same way on the same type of youth.")

[56] Testimony to Massachusetts Coalition for Juvenile Justice Reform the Joint Committee on the Judiciary in Support of An Act to Promote Public Safety and Better Outcomes for Young Adults S.920/H.1826 – November 5, 2021 (Citing CDC data showing that "teens and young adults incarcerated in Massachusetts' adult correctional facilities have a 55% re-conviction rate, while teens exiting DYS commitment have a re-conviction rate of 22%").

[57] Michael F. Caldwell, *Quantifying the decline in juvenile sexual recidivism rates*, 22 PSYCH., PUB. POL'Y, AND L. 414, 414-426 (2016).

Supreme Court in *Roper, Graham*, and *Miller*, continues to develop into the twenties.[58] Some research finds that sensation-seeking peaks at approximately age 19 and self-regulation does not reach full development until ages 23 through 26.[59] The parts of the brain associated with impulse control, propensity for risk, vulnerability, and susceptibility to negative peer pressure, are still developing well into late adolescence and into one's twenties.[60]

2. Recidivism Data Is Contrary to the Age-Crime Curve

Even if higher youth recidivism rates are accurate in some instances, such rates ultimately bump up against the "age-crime curve," an undisputed pattern in propensity to engage in crime over the life course.[61] As studies have shown, youthful offending desists with maturity, and indeed that is what the crime data demonstrate. Therefore, considerations of recidivism, particularly by using a three-year look-back window, should not have any influence on

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[58] *See* Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCI. 10937, 10937 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 0 to 85 Years) Measured with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176, 189 (2013).

[59] Laurence Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, 21 DEVELOPMENTAL SCI. 1, 1-2 (2018).

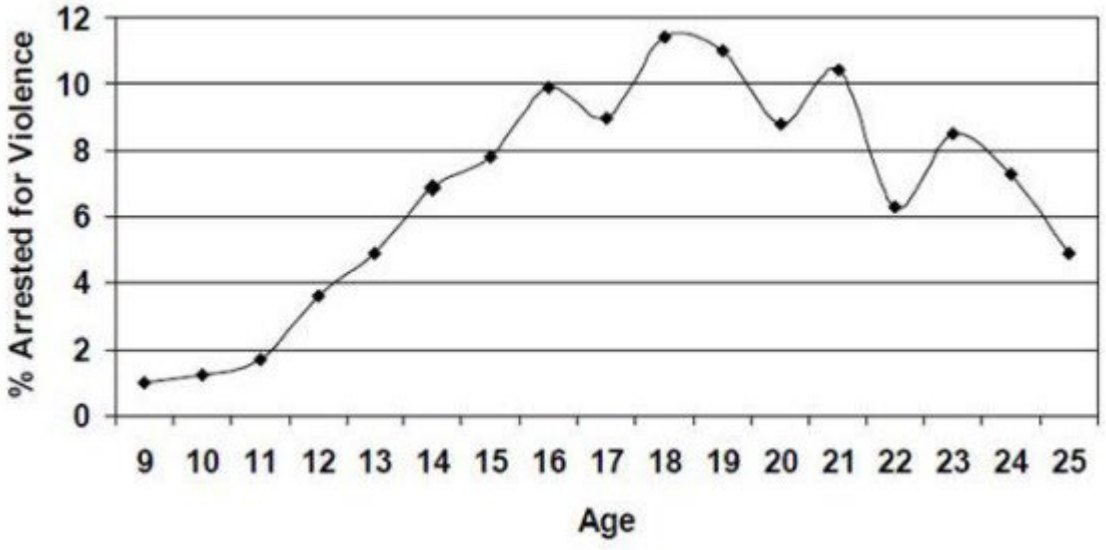
[60] Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 642 (2016) ("Over the past decade, developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority.") (citing Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* 5 (2014)); *see also* Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 J. MED. & PHIL. 256, 263-64 (2013); Nat'l Acads. of Scis., Eng'g & Med., *The Promise of Adolescence: Realizing Opportunity for All Youth* 22 (Richard J. Bonnie & Emily P. Backes eds., 2019), https://www.ncbi.nlm.nih.gov/books/NBK545481/pdf/Bookshelf_NBK545481.pdf ("the unique period of brain development and heightened brain plasticity . . . continues into the mid-20s," and that "most 18–25-year-olds experience a prolonged period of transition to independent adulthood, a worldwide trend that blurs the boundary between adolescence and 'young adulthood,' developmentally speaking.")

[61] Robert J. Sampson & John J. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555, 585 (2003); Rolf Loeber & David P. Farrington, *Age-Crime Curve*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 12-18 (Gerben Bruinsma & David Weisburd eds., 2014); Roland Neil & Robert J. Sampson, *The birth lottery of history: Arrest over the life course of multiple cohorts coming of age, 1995–2018*, 126 AM. J. SOCIO. 1127, 1127-1178 (2021).

sentencing youthful individuals and should be dropped from the proposed amendment.

Trends in arrests over the life course supports the existence of an "age-crime curve." Specifically, criminal conduct is most common when individuals are young and drops dramatically as adulthood is reached.[62] Adulthood is marked by greater maturity, complete brain development, and factors that encourage desistance from crime, like family and work responsibilities. The combination of these factors result in a natural cessation in criminal conduct by the end of one's thirties for acts of violence, and typically much sooner.[63]

Historical Example of Age-Crime Curve for Persons Arrests for Violent Offenses



National Institute for Justice, available at https://nij.ojp.gov/media/image/2776

State courts and legislatures have begun to take notice. A number of courts have relied on the current science to extend the reasoning of *Roper, Graham*, and *Miller* to find that the inappropriateness of harsh sentences like life without parole and the death penalty also applies to emerging adults older

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[62] Robert J. Sampson & John J. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555, 585 (2003).

[63] *See* Thomas A. Loughran et al., *Differential Deterrence: Studying Heterogeneity and Changes in Perceptual Deterrence Among Serious Youthful Offenders*, 58 CRIME & DELINQ. 3 (2012).

than 18.[64] And some state legislatures have also passed laws affecting sentencing and early release for youth over 18.[65]

As these courts and legislatures recognize, youth do not automatically desist from risky, compulsive and at times criminal conduct when they turn 18. Considering the unique attributes of youth, punishment and the threat of punishment are unlikely to have a deterrent effect until youth reach the age of maturity. Accordingly, the recidivism data the Commission is evaluating should not play a major role in guiding the Commission's decision making in implementing these proposed amendments.

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[64] *In re Monschke*, 482 P.3d 276 (Wash. 2021) (finding life without parole unconstitutional for youth under 21); *Commonwealth v. Mattis*, 224 N.E.3d 410 (Mass. 2024) (same); *People v. Taylor*, 987 N.W.2d 132 (Mich. 2022) (holding that 18 year olds are also precluded from receiving mandatory life without parole sentences).

[65] *See, e.g.*, Wyo. Stat. Ann. §§ 7-13-1002, 7-13-1003 (providing eligibility to individuals under 30 for placement in a youthful transition program and to a sentence reduction); Conn. Gen. Stat. Ann. § 54-125a (providing earlier parole eligibility to people under 21 at the time of their offense); Cal. Penal Code § 3051 (providing youth offender parole hearings to inmates who committed crimes when they were under 26); Ill. Comp. Stat. 5/5-4.5-115 (providing inmates who committed crimes when they were under 21 parole eligibility after 10-20 years); D.C. Code Ann. § 24-403.03 (allowing judges discretion to review sentences for individuals under 25 years old at the time of their offense after 15 years).