

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

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February 22, 2024

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to Sentencing Guidelines, December 26, 2023

Dear Judge Reeves:

The Practitioners Advisory Group (“PAG”) provides comments on the Commission’s proposed amendments regarding: (1) the rule for calculating loss under §2B1.1; (2) the treatment of youthful individuals; (3) the use of acquitted conduct; (4) the resolution of two circuit conflicts; (5) miscellaneous amendments related to §2D1.1(a) and §4C1.1; and (6) the simplification of the three-step process for calculating the guideline range.

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II. The Treatment of Youthful Individuals

The Commission is considering two proposals to address concerns raised by the sentencing of youthful offenders. Part A of the proposal offers three options for amending how criminal history is calculated for offenses committed prior to age 18. Part B amends §5H1.1 to permit a downward departure due to a defendant's youthfulness at the time of an offense.

A. Criminal History

The Commission proposes three different options for calculating criminal history under §4A1.2(d) for offenses committed prior to age 18. Option 1 assigns juvenile offenses 1 point; Option 2 does not score any criminal history points for juvenile adjudications; and Option 3 does not count juvenile adjudications or adult convictions committed by an individual who is less than 18 years old towards the calculation of criminal history points.

The PAG recommends Option 3, which does not consider any offense committed prior to age 18 in determining a defendant's criminal history score. The PAG supports this Option for three reasons: (1) caselaw and scientific evidence recognizing the significant differences between children and adults; (2) the significant variations across the country in how juvenile cases are treated; and (3) the due process concerns related to juvenile adjudications.

1. *Children are not Adults*

Assigning criminal history points when a juvenile is sentenced as an adult ignores the substantial scientific evidence that, regardless of whether the proceeding was “adult” or “juvenile,” individuals less than 18 years of age bear lesser culpability for their actions. As the Supreme Court has recognized, “children are constitutionally different from adults for purposes of sentencing.”²⁰ “Because juveniles have diminished culpability and greater prospects for reform, [] ‘they are less deserving of the most severe punishments.’”²¹ There are

three significant gaps between juveniles and adults. First, children have a “lack of maturity and an underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking. [] Second, children “are more vulnerable . . . to negative influences and outside pressures,” including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings.” [] And third, a child’s character is not as “well formed” as an adult’s, his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] depravity.”²²

These differences are not just common sense but are based on “science and social science as well.”²³

Just as the law on juveniles’ lesser culpability has evolved in response to scientific evidence, the guidelines should do the same. Counting juvenile adjudications and adult convictions committed before the age of 18 towards a defendant’s criminal history score disregards the science that demonstrates that the human brain is not fully developed until an individual is in their middle to late twenties.²⁴ Justice Kennedy noted in *Roper* that “any parent knows” that youth development continues beyond a child’s 18th birthday.²⁵ “This understanding is not limited to parents. Car rental companies and insurers, for instance, charge significantly higher rental prices for drivers

²⁰ *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

²¹ *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

²² *Miller*, 567 U.S. at 471 (quoting *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005)).

²³ *Id.* (citing *Roper*, 543 U.S. at 569 and identifying studies).

²⁴ See B.J. Casey et al., *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*, 16 Ann. Rev. L. & Soc. Sci. 203, 212-215 (2020); see also Ctr. for Law, Brain & Behavior, White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers (2022), available at: <https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence>.

²⁵ *Roper*, 543 U.S. at 569.

under 25. As one scholar observed, “[parents, neuroscientists and care rental companies appear to be on the same track here; it is the criminal justice system that is out of sync.”²⁶

While the Commission’s 2017 report on Youthful Offenders reflects the highest recidivism rates for youthful offenders, this does not undermine support for Option 3.²⁷ To the contrary, longer periods of incarceration reduce opportunities for education and employment. Youthful offenders miss these opportunities at key moments in their education and professional development, and once these opportunities pass them by, it is even more difficult for younger defendants to gain these important skills. This, in turn, results in increased recidivism. The recidivism results from youthful defendants lacking access to education and professional development, not just their youth. Studies by the Department of Justice do not support harsher and longer sentences for younger defendants; they suggest sentences that offer these defendants greater access to education and relevant employment, and life skills. Children do not belong in adult courts, jails and prisons, as this has the unintended consequence of increasing recidivism and results in collateral consequences such as reduced education continuation, housing and employment opportunities, and this in turn, leads to recidivism.²⁸ Similarly, juveniles who are transferred to adult courts have increased recidivism rates, which are likely caused by “[t]he stigmatization of other negative effects of labeling juveniles as convicted felons; [t]he sense of resentment and injustice juveniles feel about being tried and punished as adults; [t]he learning of criminal mores and behavior while incarcerated with adult offenders; [t]he decreased focus on rehabilitation and family support in the adult system.”²⁹ What these studies demonstrate is that incarcerating youthful offenders and treating them like adult offenders has negative unintended consequences. It is the PAG’s position that the sentencing guidelines should not exacerbate these unintended consequences by increasing criminal history based on offenses committed by juveniles.

Juvenile adjudications also are not the same as adult convictions. The goals of juvenile adjudications are different from those of adult courts, and these different goals impact the charging and confinement decisions in juvenile courts. Juvenile courts are designed to assist the

²⁶ Francis X. Shen et al., Justice for Emerging Adults After Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older, N.Y.U. L. Rev. 101, 107 (2022) (citing David P. Farrington et al., Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing, 11 Criminology & Pub. Pol’y 729, 733 (2012) and David Pimentel, The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence, 46 Tex. Tech. L. Rev. 71, 100 (2013)).

²⁷ See U.S. Sent’g Comm’n, *Youthful Offenders in the Federal System* (“Youthful Offenders”) at 49-50 (May 2017), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf.

²⁸ See U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency Prevention, *Treat Children as Children* at 1-3 (2022), available at: <https://ojjdp.ojp.gov/about/ojjdp-priorities#treat-children-as-children>.

²⁹ See U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* at 7 (June 2010); see also National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, *Young Offenders: What Happens and What Should Happen* (February 2014).

entire family, not just the juvenile who is the focus of the proceeding. In the PAG's experience, nearly every juvenile case involves family circumstances that impact decisions about whether to convict or adjudicate a case, along with the length and type of sentence imposed. As a result, factors that have nothing to do with the culpability of the juvenile or the seriousness of the offense impact placement decisions. And these, in turn, impact whether the adjudication or conviction is scored for purposes of calculating criminal history under the guidelines.

For example, a juvenile delinquent who is not consistently attending school may be sent to a lock-down facility, to ensure that s/he finishes their formal education. One juvenile court judge who is familiar to a PAG member often says, "I am going to make sure of one thing – that you are going to graduate high school. Do you know how I know that? Because I am going to see to it." PAG members have handled cases where childrens cannot return to their families due to safety reasons, and if no suitable housing (foster care or a treatment bed) is available, by default these children must be housed in a lock-down facility. In Wyoming, the lock-down facilities are required to take juvenile delinquents, whereas the treatment facilities and foster families have no such requirement. Thus, sometimes, the lack of resources available for a less restrictive setting results in a juvenile spending time in a lock-down facility. That "term of imprisonment" may then become the basis for criminal history points in a later federal prosecution.

2. *Nationwide Variations in Juvenile Adjudications*

State court practices vary widely in how juveniles are charged and treated. There are different practices with respect to when individuals under the age of 18 are sentenced as adults. In North Carolina, it was not until the very end of 2019 when the age for adult convictions was raised from 16 to 18 years old. Until then, 16 and 17 year olds received adult convictions as a routine course, despite their youth.³⁰ In West Virginia, a defendant under 18 years of age who is convicted in adult court can still be sentenced as a juvenile, which is contrary to the practice in New Jersey and North Carolina, where defendants under 18 years of age convicted in adult court are sentenced as adults.³¹ Thus, similarly situated defendants may have substantially different

³⁰ See *The Juvenile Justice Reinvestment Act* as part of the [2017 North Carolina State Budget](#).

³¹ See, e.g., *United States v. Moorner*, 383 F.3d 164, 169 (3d Cir. 2004) (noting that New Jersey law, which does not "permit a judge to impose a juvenile 'sentence' based on an adult conviction for a crime" is "in marked contrast to the West Virginia law . . . which explicitly allows for a defendant under eighteen to be sentenced under juvenile delinquency law even after being convicted under adult jurisdiction"); *United States v. Clark*, 55 Fed. App'x 678, 679 (4th Cir. 2003) (noting that there is a "West Virginia sentencing scheme permit[ing] a defendant under eighteen who was convicted as an adult to be sentenced as a juvenile delinquent," but that "North Carolina has no analogous statutory provision").

criminal history scores, based on different state rules concerning the treatment of juvenile defendants. This results in unwarranted sentencing disparities and, unfairness.³²

Similarly, juvenile defendants in many state jurisdictions are technically sentenced as adults — triggering criminal history points under Chapter 4 — even though these defendants are treated as juveniles by their state court systems.³³

3. *Due Process*

While juvenile adjudications for delinquent behavior sometimes allow for more due process considerations than other juvenile court proceedings, that is not always the case and there are major differences compared to proceedings in adult courts. For example, in some states like North Carolina, there is no right to a jury trial for juveniles, which is a hallmark of the adult criminal justice system.³⁴ Similarly, juveniles in North Carolina do not possess other trial rights, such as bail or speedy trial unless the matter is transferred to the adult court.³⁵

Additionally, counsel and even judges in juvenile courts advise juveniles that their juvenile record will not follow them, and that the documents concerning their proceeding will be sealed and their record will not impact them as adults. Unfortunately, this advice is wrong when these individuals are later convicted in federal court. In the PAG’s experience, if juvenile records are available, and they often are, these records can be considered in the federal sentencing process. And in the PAG’s experience, while it can be difficult, if not impossible, for defense counsel to obtain a client’s juvenile records, it appears that probation has some success accessing these records. This can create challenges when defense counsel is trying to competently advise a client about his or her criminal history score and applicable guidelines range, and it can result in a client entering a guilty plea only to learn that the guidelines range is higher due to a juvenile adjudication that defense counsel had not considered.

For all of these reasons, the PAG believes that offenses committed before a defendant is 18 years old should not be considered in the calculation of a defendant’s criminal history score, and it recommends that the Commission adopt Option 3.

³² A myriad of additional factors exist which cause disparities in juvenile justice, including racial and ethnic considerations. *See, e.g.*, Office of Juvenile Justice and Delinquency Prevention, *Literature Review: Racial and Ethnic Disparity in Juvenile Justice Processing*, available at: <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity>; *see also* Office of Juvenile Justice and Delinquency Prevention, *National Racial and Ethnic Disparities Databook*, available at: <https://www.ojjdp.gov/ojstatbb/r-ed-databook/>.

³³ *See, e.g.*, *United States v. Jones*, 415 F.3d 256, 260, 264 (2d Cir. 2005) (noting that “[y]outhful offender status carries with it certain benefits, such as privacy protections,” and “New York [State] Courts do not use youthful offender adjudications as predicates for enhanced sentencing,” yet federal courts have “still found it appropriate to consider the adjudications for federal sentencing purposes.”).

³⁴ *See McKiever v. Pennsylvania*, 403 U.S. 528, 545-551 (1971).

³⁵ *See, e.g.*, N.C.G.S. § 7B-2204 (right to pretrial release & detention). The procedural rights that juveniles have in connection with adjudication proceedings are set forth by statute. *See, e.g.*, N.C.G.S. § 7B-2400-2414 (providing for notice, the right to counsel and confronting witnesses, and discovery).

B. Downward Departure

The Commission seeks comment on whether §5H1.1 should be amended to include broader consideration of youthfulness. As set forth in Part VI of these comments, the PAG suggests that the Commission delete the departure provisions in order to simplify the guidelines and bring them more in line with modern sentencing law and practice. If, however, the Commission decides to retain departures as part of the guidelines, the PAG supports broadening the availability of downward departures due to a defendant's youth for the same reasons discussed above.

Based on the Commission's 2017 study, it appears that courts granted downward departures to youthful offenders at the same rates that it granted them for all other types of offenders.³⁶ This suggests that courts are not considering the special and unique characteristics of youthful offenders, and that is not surprising. Currently, §5H1.1 as written does not encourage downward departures based on age. It instructs that "[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."³⁷ It goes on to provide the example of a defendant who is "elderly and infirm" as a possible basis for a downward departure.

Given how age is presented in §5H1.1, there is little support for considering the science and development of youthful offenders, particularly because courts are instructed to only consider age if it is "present to an unusual degree and distinguish[es] the case from the typical" guideline case. At the very least, the PAG suggests that the commentary to this guideline include information and citations to the Supreme Court cases that discuss the "constitutionally different" considerations that apply to children and adults, and to allow courts to consider this information when determining the appropriate guidelines range.

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³⁶ See *Youthful Offenders* at 37-41.

³⁷ §5H1.1.

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VII. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding these proposed amendments. Our PAG colleagues look forward to providing testimony on several of these amendments during the Commission's upcoming

hearing, and the PAG welcomes further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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