



2011 Juvenile Defender Conference
August 19, 2011 / Chapel Hill, NC

ELECTRONIC MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.



2011 Juvenile Defender Conference
Beyond Adjudication: Direct and Indirect Consequences

August 19, 2011 / Chapel Hill, NC

*Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services*

AGENDA

8:00 to 8:45am	Check-in
8:45 to 9:00	Welcome Whitney Fairbanks, Civil Defender Educator UNC School of Government, Chapel Hill, NC
9:00 to 9:45	The Direct Consequences of Adjudication <i>C. Renee Jarrett, Lead Attorney Council for Children's Rights, Charlotte, NC</i>
9:45 to 10:30	The Collateral Consequences of an Adjudication <i>Lisa Campbell, Public Defender Defender Association of Philadelphia, Philadelphia, PA</i>
10:30 to 10:45	Break
10:45 to 11:15	Taking a Peek: Who Gets to Look in the "File" <i>Whitney Fairbanks</i>
11:15 to 12:00pm	Disproportionate Minority Contact: A Panel Discussion Moderator: <i>Eric Zogry, Juvenile Defender Office of the Juvenile Defender, Raleigh, NC</i> Panelists: <i>Phillip Penn, Assistant Public Defender Office of the Public Defender, Durham, NC The Honorable Louis A. Trosch, Jr., District Court Judge District 26, Charlotte, NC Kim Williams, Lead Juvenile Justice Planner Governor's Crime Commission, Raleigh, NC</i>
12:00 to 1:00	Lunch (<i>provided in building</i>) *

* IDS employees may not claim reimbursement for lunch



1:00 to 1:45	Making the Most of It: Disposition Advocacy in Delinquency Proceedings <i>Paddison "Pat" Hudspeth, Attorney at Law</i> <i>Aldridge, Seawell, Spence, & Hudspeth, Manteo, NC</i>
1:45 to 2:00	Break (<i>light snack provided</i>)
2:00 to 2:45	Information Gathering and Sharing <i>Jason Langberg, Equal Justice Works Fellow/Attorney and</i> <i>Erwin Byrd, Staff Attorney</i> <i>Advocates for Children's Services, Durham, NC</i>
2:45 to 3:30	A Fine Mess: Dual Jurisdiction Cases <i>Meader Harriss, Assistant Public Defender</i> <i>Office of the Public Defender, Edenton, NC</i>
3:30 to 3:45	Break (<i>light snack provided</i>)
3:45 to 4:45	Kids Are Different (Ethics) <i>Simmie Baer, Clinical Assistant Professor</i> <i>Northwestern University School of Law, Chicago, IL</i>

CLE HOURS: 6 (Includes 1 hour of ethics/professional responsibility)

The Collateral Consequences of an Adjudication

Additional Materials
August 18, 2011



YOU BELONG @ KFC

KFC is an Equal Opportunity Employer. Applicants for all job openings are welcome and will be considered without regard to race, gender, age, national origin, color, religion, disability, military status, or any other basis protected by applicable federal, state or local law.

PLEASE TELL US ABOUT YOURSELF

Last Name	_____	First Name	_____	MI	_____	Preferred Name	_____
Current Address	_____			City	_____	State	_____
Social Security Number	_____			Are you under 18?	☐ Yes ☐ No If yes, how old are you? _____		
Telephone (Home)	() _____			Do you have appropriate work documents?	☐ Yes ☐ No		
Telephone (Cell)	() _____						

WHAT WOULD YOU LIKE TO DO @ KFC?

- ☐ Team Member
- ☐ Shift Supervisor
- ☐ Assistant Unit Manager
- ☐ Restaurant General Manager

HOW MANY HOURS WOULD YOU LIKE TO WORK EACH WEEK?

- ☐ Less than 20 Hours
- ☐ 20 - 30 Hours
- ☐ 31+ Hours

Desired Wage \$ _____/hr

HAVE YOU WORKED AT KFC, A&W, LONG JOHN SILVER'S, PIZZA HUT, OR TACO BELL BEFORE?

- ☐ Yes
- ☐ No

If you were referred to KFC by an employee, who was it?

AVAILABILITY

If hired, when could you begin work? _____

What hours can you work?

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
From	_____	_____	_____	_____	_____	_____	_____
To	_____	_____	_____	_____	_____	_____	_____

If your religious beliefs or practices prohibit you from working on a particular day or at a particular time, KFC will make reasonable efforts to accommodate those beliefs or practices in accordance with applicable law.

WHERE ELSE HAVE YOU WORKED?

Company	_____	Address	_____	City	_____	State	_____	Zip	_____
Telephone	() _____	If you are currently employed there, may we contact?				☐ Yes ☐ No		Last wage \$ _____/hr	
When did you start?	_____	When did you leave?	_____	Why did you leave? _____					
Supervisor's name	_____			Position/Job _____					
Company	_____	Address	_____	City	_____	State	_____	Zip	_____
Telephone	() _____	If you are currently employed there, may we contact?				☐ Yes ☐ No		Last wage \$ _____/hr	
When did you start?	_____	When did you leave?	_____	Why did you leave? _____					
Supervisor's name	_____			Position/Job _____					

Please list a work, school or personal reference (not a family member) we may contact.

Name	Relationship to You	Type of Reference (Work, School or Personal)	Telephone
_____	_____	_____	Home () _____
			Work () _____



YOU BELONG @ KFC

THE THINGS OUR LAWYERS WANT US TO ASK...

1. Within the last 7 years, have you been convicted of, or completed your sentence or parole for a crime involving violence, sex, stalking, minors, theft, property damage, fraud, robbery or drugs? ☐ Yes ☐ No
2. Are you currently charged with a crime involving violence, sex, stalking, minors, theft, property damage, fraud, robbery or drugs? ☐ Yes ☐ No
3. If hired, can you show proof of your legal right to work in the United States? ☐ Yes ☐ No

Crimes include felonies, misdemeanors, and other violations of the law. However, you should not respond "Yes" as a result of any conviction that has been judicially sealed, expunged or pardoned. Conviction of a crime will not necessarily disqualify you from consideration for employment and will be considered only as it relates to the job in question. CALIFORNIA residents do not respond "yes" for (i) conviction records that have been sealed or expunged by court order or statutorily eradicated, (ii) misdemeanor convictions for which you have successfully completed or otherwise discharged probation, (iii) misdemeanor marijuana convictions if the conviction occurred more than two years ago, (iv) any past arrest or detention not resulting in a conviction, or (v) any referral to or participation in any pretrial or post-trial diversion program. HAWAII residents do not answer this question. LOUISIANA residents do not respond "Yes" as a result of a misdemeanor. MASSACHUSETTS residents do not respond "Yes" as a result of any misdemeanor conviction where the date of the conviction or the completion of incarceration, whichever date is later, occurred more than five years ago. PENNSYLVANIA residents do not respond "Yes" as a result of a summary offense.

*Residents of HAWAII, LOUISIANA, MARYLAND, MASSACHUSETTS, NEVADA, PENNSYLVANIA, RHODE ISLAND and UTAH do not answer this question. Residents of MICHIGAN do not answer "Yes" as a result of pending misdemeanor charges.

AGREEMENT

Please read, sign and date below.

Nature of My Employment. If I am hired by KFC, I agree that I will be an at-will employee, which means that either I or KFC may end my employment at any time, with or without cause or notice. I agree that no written materials or verbal statements by KFC will constitute an express or implied contract of continued employment and that this at-will relationship can only be modified in writing by KFC's President. I agree that, if hired, I will obey KFC's rules, including treating confidentially any information I learn during my employment.

My Participation in KFC's Drug Free Environment. I am not a current user of illegal drugs, and I agree I will never work under the influence of drugs or alcohol.

My Records and References. There is nothing in my background that would cause a risk to KFC's customers, employees, or property. I authorize KFC to conduct reference checks, criminal and driving records checks, and other consumer report investigations. I release all parties from any liability from providing such information to KFC. In this regard, I understand that conviction of a crime will not necessarily disqualify me from consideration for employment. I understand that the nature and date of the offense and the relevance of the offense to the position(s) applied for will determine my eligibility for employment.

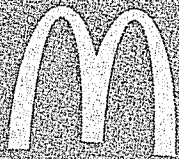
Information Certification. I certify that the information I have provided to KFC is true and complete. I agree to notify KFC immediately if I am later charged with any of the crimes listed above or (if I am a delivery driver) with a driving offense. I agree that any false information or omission allows KFC to refuse to hire me, or to terminate my employment at any time.

Agreement to Arbitrate. Because of the delay and expense of the court systems, KFC and I agree to use confidential binding arbitration, instead of going to court, for any claims that arise between me and KFC, its related companies, and/or their current or former employees. Without limitation, such claims would include any concerning compensation, employment (including, but not limited to, any claims concerning sexual harassment or discrimination), or termination of employment. Before arbitration, I agree: (i) first to present any such claims in full written detail to KFC; (ii) next, to complete any KFC internal review process; and (iii) finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission). In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration Association will apply, except that KFC will pay the arbitrator's fees, and KFC will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I gone to court.

Applicant's Signature _____ Date _____

INFORMATION FOR MARYLAND AND MASSACHUSETTS RESIDENTS. Under Maryland and Massachusetts law, and employer may not require or demand, as a condition of employment, prospective employment, or continued employment, that an individual submit to or take a lie detector or similar test. An employer who violates this law is subject to penalty.

INFORMATION FOR CONNECTICUT RESIDENTS. You are not required to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased pursuant to section 46b-146, 54-76o or 54-142. If your only criminal record consists of items that have been erased under the statutes listed above, then you may state on this form that you have not been arrested.



CREW

your name here

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McDonald's USA, LLC Employment Application

McDonald's is an equal opportunity employer committed to a diverse and inclusive workforce.

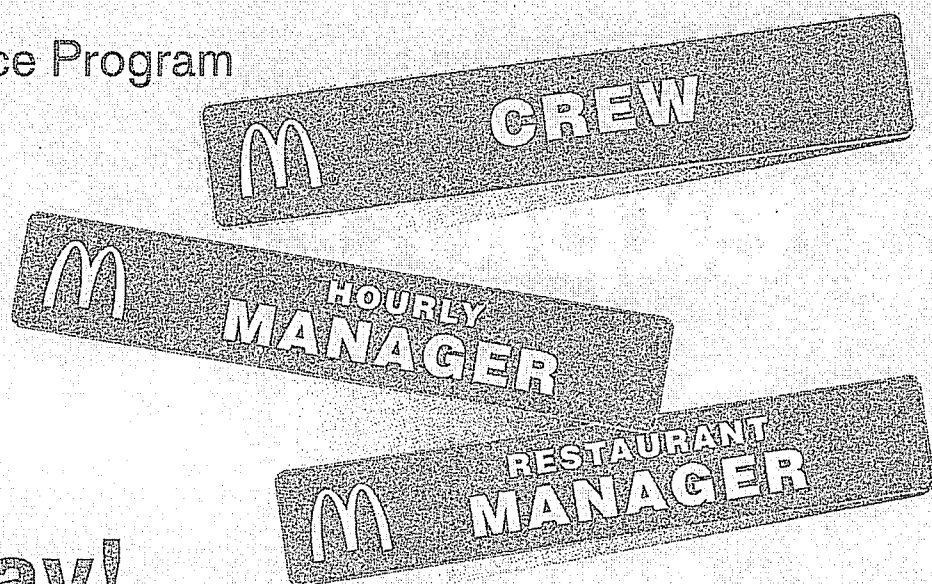


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First Name _____ MI _____ Last Name _____ Home Phone (____) _____ Cell Phone (____) _____
Address _____ City _____ State _____ Zip _____
Email _____ Social Security Number _____ Are you over 18? Yes/No if not, birth date _____
Have you worked for McDonald's® before? Yes/No if yes, dates/location(s) _____ Reason for leaving _____

Total hours available per week _____

Are you legally able to be employed in the U.S.? Yes/No _____

How did you hear about this employment opportunity? _____ How far do you live from restaurant? _____ Do you have transportation? _____

May we contact your present employer? Yes/No

- 1) Company _____ Address _____ City _____ State _____ Zip _____
Phone Number (_____) _____ Job _____
Supervisor _____ Dates Worked: From _____ To _____
Rate of Pay _____ Reason For Leaving _____ **For McDonald's® Use Only** MGMT. REFERENCE CHECK DONE BY _____
- 2) Company _____ Address _____ City _____ State _____ Zip _____
Phone Number (_____) _____ Job _____
Supervisor _____ Dates Worked: From _____ To _____
Rate of Pay _____ Reason For Leaving _____ **For McDonald's® Use Only** MGMT. REFERENCE CHECK DONE BY _____
- 3) Company _____ Address _____ City _____ State _____ Zip _____
Phone Number (_____) _____ Job _____
Supervisor _____ Dates Worked: From _____ To _____
Rate of Pay _____ Reason For Leaving _____ **For McDonald's® Use Only** MGMT. REFERENCE CHECK DONE BY _____

Name _____ Street Address _____
City _____ State _____ Zip _____ Phone Number (____) _____
Teacher or Counselor we may contact as a reference _____ Dept. _____ Last Grade Completed _____
Grade Point Average _____ Graduated? Yes/No _____ Now Enrolled? Yes/No _____

U.S. MILITARY: Branch of Service: _____ Date Entered _____ Date of Discharge _____ Highest Rank _____
Do you have service-related skills and experience applicable to civilian employment? Yes/No If yes, describe _____

GENERAL: What other relevant experience or training have you had and what other activities are you involved in? (Exclude organizations that indicate race, religion, age, or national origin of members.)

Manager: Perforate and file separately.

McDonald's USA, LLC is an equal opportunity employer committed to a diverse workforce. In order to assist us in our efforts, we invite you to voluntarily provide responses to the following requests for information. Failure to respond will not subject you to adverse treatment. This form will be kept strictly confidential and will not be retained with your application. Information provided will be used only in accordance with law and for equal opportunity purposes.

[illegible]

Please read the section below carefully before signing.

U.S. law requires that, if hired, you must furnish appropriate documentation establishing identity and employment eligibility, generally within 72 hours of starting work. For example, acceptable documents include: a U.S. Passport, or INS Forms 688 or 688A; a Social Security Card or birth certificate issued by government authority and a driver's license, school I.D. with photo or other government issued documentation establishing identity. Certain other documents are equally acceptable. Please consult a member of the management team and ask them for a copy of INS Form I-9 for a list of these documents.

California Employment Only:

You may exclude information regarding any conviction for which the record has been judicially ordered sealed, expunged or statutorily eradicated. You also may exclude information regarding any conviction that is more than two years old for a violation of California Health and Safety Code Sections 11357, 11360, 11364, 11365 or 11550 (or predecessor statutes) as they relate to marijuana.

Connecticut Employment Only:

Under Connecticut law, an employer cannot require an employee or prospective employee to disclose arrest, criminal charge or conviction records that have been erased. An employment application that asks an applicant about his or her criminal history must contain the following notice:

1. The applicant is not required to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased pursuant to Sections 46b-146, 54-76a or 54-142a; 2. The criminal records subject to erasure pursuant to Sections 46b-146, 54-76a or 54-142a are records pertaining to a finding of delinquency or that a child was a member of a family with services needs, an adjudication as a youthful offender, a criminal charge for which the person has been found not guilty or a conviction for which the person received an absolute pardon; and 3. Any person whose criminal records have been erased pursuant to Sections 46b-146, 54-76a or 54-142a shall be deemed to have never been arrested within the meaning of the general statutes with respect to those proceedings so erased and may so swear under oath.

Massachusetts Employment Only:

An applicant for employment with a sealed record on file with the commissioner of probation may answer "no record" with respect to any inquiry herein relative to prior arrests, criminal court appearances or convictions. In addition, any applicant for employment may answer "no record" with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution. It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liabilities.

Maryland Employment Only:

Under Maryland law, an employer may not require or demand, as a condition of employment, prospective employment, or continued employment, that an individual submit to or take a lie detector or similar test. An employer who violates this law is guilty of a misdemeanor.

***DURING THE PAST 5 YEARS, HAVE YOU EVER BEEN CONVICTED OF, PLED GUILTY TO OR PLED NO CONTEST TO A CRIME, EXCLUDING MISDEMEANORS AND TRAFFIC VIOLATIONS? Yes _____ No _____**

IF YES, DESCRIBE IN FULL _____

***Answering yes will not necessarily bar you from employment. Applicants are not required to disclose sealed or expunged conviction records or the existence of such records.**

ARE YOU OR HAVE YOU EVER BEEN A SEX OFFENDER REGISTERED WITH ANY FEDERAL, STATE OR LOCAL GOVERNMENT AGENCY, INCLUDING ANY LISTING ON A PUBLIC WEBSITE? Yes _____ No _____

1. I certify that I have read this application and the information on it is complete and correct. I understand that any omissions or misrepresentation of information is grounds for dismissal.
2. I authorize the persons, employers, schools and organizations listed on this application to give you any information concerning my employment and other pertinent information they may have, personal and otherwise, and release all parties from all liability and damages that may result from furnishing this to you.
3. I acknowledge that McDonald's reserves the right to amend or modify any of its handbooks or policies at any time and without prior notice. These policies do not create any promises or contractual rights between McDonald's and its employees. At McDonald's, employment is at will. This means an employee is free to terminate his/her employment at any time, without any reason, with or without cause, and McDonald's retains these same rights. The Vice President of Human Resources of the McDonald's USA, LLC is the only person who may make an exception to this, and any exception must be in writing, addressed to a particular individual, and signed by the officer.
4. McDonald's is an Equal Opportunity Employer. Various federal, state, and local laws prohibit discrimination on account of race, color, religion, sex, age, national origin, disability, sexual orientation, veterans status or other protected categories. It is this McDonald's policy to comply fully with these laws, as applicable, and information requested on this application will not be used for any purpose prohibited by law.
5. I understand that as a part of the procedure for my employment application an investigative consumer report may be made concerning my character, general reputation, personal characteristics and mode of living. Upon written request, additional disclosure concerning the complete nature and scope of the investigation will be provided. If I am denied a job based either wholly or in part because of information contained in an investigative consumer report, I will be provided the name and address of the reporting agency that supplies the information.

Signature _____ Date _____

August 3, 2008

ESSAY

If You Run a Red Light, Will Everyone Know?

By **BRAD STONE**

WANT to vet a baby sitter? Need to peek into the background of a prospective employee? Curious about the past of a potential date?

Last month, PeopleFinders, a 20-year-old company based in Sacramento, introduced CriminalSearches.com, a free service to satisfy those common impulses. The site, which is supported by ads, lets people search by name through criminal archives of all 50 states and 3,500 counties in the United States. In the process, it just might upset a sensitive social balance once preserved by the difficulty of obtaining public documents like criminal records.

Academics have a term for the old inaccessibility of records like those for criminal convictions: “practical obscurity.” Once upon a time, people in search of this data had to hire private investigators to navigate byzantine courthouses and rudimentary filing or computer systems, and to deal with often grim-faced legal clerks. In a way, the obstacles to getting criminal information maintained a valuable, ignorance-fueled civil peace. Convicts could start fresh after serving their time without strangers knowing their pasts, and there was little risk that unsophisticated researchers could confuse people with identical names.

Well, not anymore. The information on CriminalSearches.com is available to all comers. “Do you really know who people are?” the site blares in large script at the top of the page.

Databases of criminal convictions first moved online several years ago. But users of pay sites like Intelius.com and PeopleScanner.com had to enter their credit card numbers for access — often enough of an obstacle to discourage casual or improper inquiries.

According to Bryce Lane, president of PeopleFinders, the new site draws data directly from local courthouses and offers records of arrests and convictions in connection with everything from murder to minor infractions like blowing past a stop sign — at least for jurisdictions that include traffic violations in their criminal data. It also lets users view a map showing addresses and names of all those arrested or convicted of a crime in a specific neighborhood, and to place alerts that prompt e-mail when someone in their life gets busted or someone with a record moves in nearby.

“We are just trying to provide what’s already out there in an easier fashion, for free,” Mr. Lane said. “We think it’s pretty helpful to families.”

PeopleFinders, originally called Confi-Check, was founded in 1988 by Rob Miller, a former investigator for [Intel](http://Intel.com). PeopleFinders has been selling records to consumers for the last decade and recently acquired a large public-records firm — Mr. Lane declines to say which one because the transaction was private — that allowed

it to introduce the expanded free service.

Mr. Lane concedes that his site contains some mistakes. Every locale has its own computer system, he notes, and some are digitizing and updating records faster than others.

A quick check of the database confirms that it is indeed imperfect. Some records are incomplete, and there is often no way to distinguish between people with the same names if you don't know their birthdays (and even that date is often missing).

To further test the site, I vetted some of my colleagues at The New York Times. One, who shall remain nameless, had a recent tangle with the law that the site labeled a "criminal offense," while adding no other information. Curious, I called my colleague with the date and city of the now very public ignominy. The person was stunned to know that the infraction — a speeding ticket — was easily accessible and described as criminal.

"I went to traffic school so this wouldn't appear on my record. I'm in shock. This blows me away," my colleague said, demanding that I ask PeopleFinders how to have the record removed. "I don't necessarily want you all knowing that I'm a fast driver."

PeopleFinders' response: take it up with the authorities. When they update their records, the change will automatically appear on CriminalSearches.com.

My colleague's quandary illustrates why privacy advocates work themselves into knots about this kind of site. In the past, Congress carefully considered how the public should use criminal records. Amendments to the Fair Credit Reporting Act in 1997 required that employers who hire investigators to obtain criminal records from consumer reporting agencies advise prospective employees of the search in advance, and disregard some types of convictions that are older than seven years.

"I don't think Congress stuck that in there randomly," says Daniel J. Solove, a professor of law at the George Washington University Law School and author of "Understanding Privacy." "Congress made the judgment that after a certain period of time, people shouldn't be harmed by having convictions stick with them forever and ever."

BUT now, of course, none of the old restrictions apply. The information is available from a variety of sources, and now free. Jurors can and almost certainly will be tempted to look up criminal pasts of defendants in their cases. And employers can conduct searches themselves without hiring investigators. Mr. Lane of PeopleFinders says that employers cannot legally use the database in making hiring decisions — but there is nothing to stop them.

A recent investigation at the Justice Department demonstrates how once-obscure, now easily accessible public information can be abused in egregious ways. The investigative report by the department's inspector general and internal ethics office said government lawyers mined sites like Tray.com and OpenSecrets.org, which report on individual political contributions, to discover political affiliations of job candidates.

But the Internet entrepreneurs who are making public records accessible have little patience for the privacy

worrywarts who are getting in the way of their business goals.

“I think people generally understand the 21st-century reality that this type of public information is going to be widely available,” said Nick Matzorkis, the chief executive of ZabaSearch, a search engine that provides people’s addresses and phone numbers, culled from public records. CriminalSearches.com “is another indication of the inevitability of the democratization of public information online,” Mr. Matzorkis said.

Mr. Lane of PeopleFinders concurs and compares his site to the seat belt, saying it will make everyone safer.

Of course, that is easy for them to say. According to CriminalSearches.com, they are both clean.

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Posted on Mon, Dec. 13, 2010

Innocent 'felon': Background check gave false info

By STEPHANIE FARR
Philadelphia Daily News
farrs@phillynews.com 215-854-4225

KEVIN HUTCHINSON openly admits that he pleaded guilty in 2002 to misdemeanor charges of simple assault, harassment and related offenses for fighting with his ex's new boyfriend.

"I know what I did was wrong," said Hutchinson, a William Penn High and Thompson Institute grad. "It's the first and only time I've ever been in trouble. It was a dark time in my life, and I put myself through a lot of unnecessary nonsense."

Hutchinson, 32, of North Philadelphia, even put it on his job application in September at GameStop, a video-game store at 22nd Street and Lehigh Avenue in North Philadelphia. So he was stunned when, after a month of employment, his manager called him into his office Oct. 19 and asked if anything was on his record that he hadn't disclosed.

"He said, 'If there was, would you be surprised?'" Hutchinson recalled. "I told him I'd be shocked, and a few minutes later, they fired me for nondisclosure of information."

Through no fault of his own, Hutchinson had fallen victim to what some experts say is a disturbing consequence of background checks - erroneous information gathered by careless or unscrupulous data brokers.

Hutchinson said he repeatedly asked whether he was being fired for the 2002 charges. He said his manager emphatically told him, "No," but refused to tell him why he was being fired. Hutchinson said he never received a copy of his background check or a termination letter from GameStop.

A job sought at Walmart

About the same time, Hutchinson had an interview for an overnight-manager position at a suburban Walmart. After being out of steady work for more than a year, he had planned to work both jobs.

He gave the company permission to do a complete background check and disclosed in writing his misdemeanor convictions, he said.

A week later, Walmart sent him a denial letter and a copy of his background check conducted by General Information Services, a background-screening company based in South Carolina.

That background check said Hutchinson had been convicted in 1996 of felony cocaine possession in Gloucester County, Va., and sentenced to 10 years in prison.

"I have never even been to Gloucester County, Va.," Hutchinson said. "Back then, I was still in high school."

After receiving the report, Hutchinson said, he called GIS to dispute the information.

More than two weeks later, the company cleared his criminal-background check of the false felony-cocaine charge, according to GIS records he received.



ALEJANDRO A. ALVAREZ / Staff photographer

Kevin Hutchinson, 32, of North Philadelphia, was fired from GameStop after a background check revealed a crime he didn't commit.

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On his own, Hutchinson had his fingerprints taken at the Pennsylvania State Police's Belmont Barracks and sent them to the Virginia State Police to demonstrate that he was not the man on their records, he said.

"GIS said they dealt with it, but I didn't want to leave any stone unturned," he said.

It was too late for employment at Walmart, where Hutchinson had been red-flagged not only for the false cocaine charge but also for his legitimate misdemeanors, he said.

And GameStop, where Hutchinson said the bosses knew about his misdemeanors when they hired him, refused to hire him back after the felony-cocaine charge was cleared.

"They told me I had to reapply to see if I could get another position with the company," he said. "Why should I have to reapply when you let me go off of false pretenses? You didn't even give me a chance to explain."

The *Daily News* was unable to confirm that GIS was the company that also conducted Hutchinson's criminal-background check for GameStop. A GIS spokesman said he could not disclose clients' names, and a GameStop corporate spokesman said in an e-mail that the company "does not provide public comment on employment matters."

Hutchinson, however, said a GIS representative told him by phone that the company also had conducted his GameStop background check. Hutchinson added that GameStop's human-resources department confirmed that they had used GIS.

Unemployment in jeopardy

Meanwhile, GameStop also is trying to appeal Hutchinson's unemployment benefits.

In a Dec. 3 letter to Pennsylvania unemployment-compensation authorities, a cost-management agency contracted by GameStop wrote that Hutchinson had been "discharged for falsification of his application. He did not list on his application a felony for drug possession and distributing."

Now, Hutchinson, who has not had steady work since April 2009, wonders how many other jobs for which he applied turned him down because of the inaccurate background check.

"I've applied for many different positions," he said. "God only knows how many positions I applied to and they saw this mistake and it got read over and over and over."

Unfortunately, to Lillie Coney, associate director of the Electronic Privacy Information Center in Washington, D.C., Hutchinson's is a familiar story.

"Background checks are pretty routine now, even for positions that don't require trust that they manage money or things of value," she said. "There's no way to know that the error rates are not off the charts."

Chris Lemens, general counsel for GIS, said the company has "fewer than two errors in 10,000" cases. He declined to say how many cases GIS completes in a day or a month.

And the "two errors," he said, are cases in which people received copies of their criminal-background checks from prospective employers and disputed them themselves.

'There may be thousands'

Coney said many people may never know about an inaccurate background check, especially if an employer never gave them a copy. If a person never got a job, he or she simply may have assumed that someone else was more qualified, she said.

"For every one person you hear this happens to, there may be thousands of people who don't know this happens," she said.

"This the worst-case scenario because you're not going to be brought to trial to argue your innocence because you've already been found guilty and you don't even know it."

Lemens, who said he was prohibited from speaking about specific cases, said GIS' background checks are not guaranteed accurate.

"Of course not," he said. "You know when you see in the movies there's some kind of instantaneous universal background check performed? There is nothing like that. This is a process performed by humans. . . . Whenever there is a human element, there could be inaccuracies."

Lemens said the company has run into situations in which court records are inaccurate or "even made up."

"We, of course, can't make sure the public records are accurate," he said.

That's part of the problem with data brokers, Coney said. "They know the documents they are getting have errors, but it does not stop them from using [them]," she said.

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"The core foundation of their business is telling their customers how many bad people they know about. They are not into telling someone what a wonderful person this is, because they don't want to be held accountable if something goes wrong."

Coney said the only way to manage the unregulated data-broker industry is to make it transparent and allow people to view their backgrounds regularly, as they can with their credit scores.

"Individuals are the only ones who are going to know if the information is accurate," she said.

No one is held accountable when a bad background report is produced and sent to an employer, Coney said.

"The problem is they are not getting penalized for doing this, so they keep using bad data practices," she said. "They are vilifying the names of the people who have no idea their names are even out there."

For Kevin Hutchinson, the problems persist.

"I don't want to be out of work," he said yesterday. "I wanted to work, I wanted to collect a paycheck, I wanted to work two jobs at one time. . . ."

"Overall, it really has put my back against a wall, and the worst thing about it is it wasn't of my doing. I actually wish that some people in higher places could hear my story and see that some people actually do want to work."

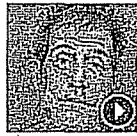
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HOUSING AUTHORITY OF THE CITY OF RALEIGH, NORTH CAROLINA

900 HAYNES STREET
RALEIGH, NORTH CAROLINA 27604
WWW.RHAONLINE.COM
FOR ASSISTANCE, CALL 919.508.1105

NAME _____
FIRST MIDDLE LAST
ADDRESS _____
CITY STATE ZIP CODE

Please list an alternate address and phone number. If we are unable to contact you when your application reaches the top of our list, your application will be WITHDRAWN.

ALTERNATE ADDRESS:

TELEPHONE () _____

CITY STATE ZIP CODE

I WISH TO APPLY FOR: PUBLIC HOUSING _____
SECTION 8 (VOUCHER) _____
BOTH _____
(See Definitions on the back)

ALTERNATE NAME/PHONE CONTACTS:

(SIBLING)
(PARENT)
(CO-WORKER)
(FRIEND)

You **MUST** attach COPIES ONLY of the following verifications when returning your Application:

1. Certified Birth Certificates and Social Security Cards for ALL family members
Mother's copy of Birth Certificate is ONLY acceptable for newborns
2. Marriage License (if applicable, copy only)
3. Request for a preference (if applicable)
4. Driver's License or State-Issued ID for Head of Household and ALL other members 18 years of age and older (copies only)
5. Proof of eligible immigrant status (ex. Naturalization Certificate)

NOTE: Your signature below authorizes RHA to contact you by calling the above alternate contacts.

→ Are you a **CURRENT** Public Housing Resident?
CIRCLE ONE: YES NO

❖ LIST ALL HOUSEHOLD MEMBERS (INCLUDE YOURSELF) —LIST ADDITIONAL FAMILY ON A SEPARATE SHEET IF NECESSARY

NAME LAST, FIRST, MI.	RELATIONSHIP	SEX	DATE OF BIRTH MM-DD-YY	PLACE OF BIRTH	SOCIAL SECURITY #
	HEAD OF HOUSEHOLD				

❖ LIST ALL INCOME IN THE HOME (LIST ADDITIONAL INCOME ON A SEPARATE SHEET IF NECESSARY)

NAME	EMPLOYER/SOURCE OF INCOME	START DATE	MONTHLY (GROSS)	WEEKLY (GROSS)	HOURLY (GROSS)	# of HOURS WORKED

→Do you OR any member of your household need a handicapped accessible unit? YES NO

CIRCLE ONE:

→RACE: 1=WHITE 2=BLACK 3=AMERICAN INDIAN/
NATIVE ALASKAN 4=ASIAN/PACIFIC ISLANDER

→What type of unit do you need? Please indicate below:
a. Wheelchair access YES NO
b. Visual and/or hearing equipped YES NO
c. Other (comments) _____

→ETHNICITY: 1= HISPANIC 2= NON-HISPANIC

→Are you a legal resident of the USA? YES NO

→Are you elderly, disabled or handicapped? YES NO
[DEFINITIONS: Elderly: 62 years or older; Disabled, or Handicapped: As defined by the Social Security Act]
➤ Are you interested in elderly or near-elderly high-rise facilities? YES NO

→Are you a current Wake County TANF (Public Assistance) recipient? YES NO

→ Have you received government assisted housing before? YES NO (If YES, List WHEN & WHERE)
Year(s): _____

→Did you file a Federal Income Tax Return for 2009 and/or 2010? YES NO

Location(s): _____

Past landlord history for the last two (2) years:

Name: _____

Name: _____

Address: _____

Address: _____

Phone # _____

Phone # _____

SIGNATURE: _____ DATE: _____

NOTE: A criminal history report/background check is required to determine eligibility of all applicants. A tenant history will be checked on all past housing tenants. *Fraud Warning: Title 18, Section 1001 of the United States code, states that a person who knowingly and willingly makes false statements to any department or agency of the United States is guilty of a felony.

2011 INCOME LIMITS FOR SECTION 8 AND PUBLIC HOUSING (MAXIMUM amount of household income to qualify for housing assistance)			
1 PERSON - \$27,600	2 PERSON - \$31,550	3 PERSON - \$35,500	4 PERSON - \$39,400
5 PERSON - \$42,600	6 PERSON - \$45,750	7 PERSON - \$48,900	8 PERSON - \$52,050

**HOW DID YOU HEAR ABOUT APPLYING FOR
HOUSING WITH RALEIGH HOUSING AUTHORITY?**

CHECK ONE:

1. ☐ Television/Media 2. ☐ Relative 3. ☐ Shelter 4. ☐ Public Housing Brochure
5. ☐ Church 6. ☐ Friend 7. ☐ Wake County Human Services (WCHS)
9. ☐ Internet 10. ☐ Other _____

PREFERENCES

RHA has implemented preferences for both Public Housing and Section 8 programs. If you wish to claim a preference, you must provide verification(s).

❖ **Check all of the following preferences for which you qualify:**

- ☐ Elderly single (62 years or older)
- ☐ Elderly senior legally responsible for raising minor children
- ☐ Disabled
- ☐ Wake County Resident (*The applicant must provide proof of being a resident or employee of Wake County at time of application.*)
- ☐ Working Family (**Public Housing Applicants ONLY**) ~ Must be working at least 35 hours per week and have been employed for at least the past 6 months.

Name of Employer _____

Telephone Number _____

Start Date _____

Number of Hours per Week _____

CRIMINAL BACKGROUND CHECKS

Raleigh Housing Authority will conduct a criminal background check on **ALL** individuals 18 years of age or older. If the individual has **engaged** in any criminal activities within the time period listed below, the family may not be allowed to remain on the waiting list.

1. Misdemeanor within the last 5 years
2. Felony within the last 7 years

FOR RHA USE ONLY

Pre-eligibility Checklist/Placement on Waiting List(s)

	ELIGIBLE (Y/N)	INITIALS
1. CRIMINAL RECORD CHECK	_____	_____
2. RHA PH DEBT CHECK	_____	_____
3. S/8 TERMINATION CHECK	_____	_____
4. TRESPASSED FROM RHA	_____	_____
5. SEX OFFENDER	_____	_____
ELIGIBLE/PLACE ON WL	DATE PRE-APP KEYED _____	_____
INELIGIBLE/SEND LETTER	DATE LETTER SENT _____	_____

PLEASE TEAR OFF AND KEEP THIS PAGE

IMPORTANT INFORMATION

- ❖ To access information about your position on the "waiting list" or to have an application mailed to you, call the **STATUS LINE NUMBER: (919) 831-6926**.
- ❖ Visit our website at www.rhaonline.com to get additional information on RHA, the Section 8 program and Public Housing Communities.
- ❖ Additional applications can be printed from our website.

WHAT IS SECTION 8?

Section 8 is a HUD-subsidized rental assistance program for very low-income families, also referred to as "Housing Choice Voucher Program" or "HAP" (Housing Assistance Payment Program). This is the program that enables you to secure housing in the private market.

- ❖ Your application will be placed on a waiting list by DATE and TIME of application.
- ❖ A voucher is issued allowing a family to search for affordable housing within program requirements, policies, and regulations.
- ❖ At this time, we are estimating our waiting list for Section 8 to be approximately 4-6 years from date of application.

WHAT IS PUBLIC HOUSING?

Public Housing is a multi-family housing development that is owned and managed by the Housing Authority of the City of Raleigh.

- ❖ Your application will be placed on a waiting list determined by DATE and TIME of application, BEDROOM SIZE and PREFERENCE.
- ❖ Availability of public housing is determined by vacancies in our existing public housing developments.
- ❖ At this time, we are estimating our waiting list for Public Housing to be approximately 1-2 years from date of application.

Our developments are as follows (also refer to photographs in lobby areas and our webpage (www.rhaonline.com) for more information):

- ❖ Kentwood Apartments, The Oaks, Mayview, Heritage Park, Meadowridge, Birchwood, Valleybrook, Eastwood Court, Stonecrest, Terrace Park, and Berkshire
- ❖ Glenwood Towers and Carriage House (High Rise facilities for elderly and near-elderly persons 50 years of age and older).

DEFINITIONS

ELIGIBILITY: Applicants must qualify as a family and/or as an eligible single person. Annual gross income must be within limits as established by HUD for this area, with adjustments for smaller and larger families. An eligible family is two or more persons related by blood, marriage, or operation of law. It includes elderly single persons; the remaining member of a tenant family; a displaced person; or a single individual. An *elderly family* is one whose head, spouse, or sole member is at least 62 years of age, disabled or handicapped, and may include unrelated elderly, disabled or handicapped persons living together.

COMPUTATION OF RENT: Eligible families pay a monthly rent equal to the greater of 30 percent of their monthly-adjusted income or 10% of unadjusted monthly income. If utilities are not included in the rent, the family receives a rent credit equal to the RHA's estimate of the cost of utilities.

WHAT TO BRING TO AN INTERVIEW

Please be prepared to bring copies of the items listed below and any other requested information to your interview once our office has contacted you:

- Verification of current and anticipated income
- Daycare verification
- Child Support printout (payment history for at least 1 year)
- Proof of medical expenses (elderly or disabled persons ONLY)
- Award letters for SS/SSI and TANF/AFDC
- Retirement Benefits notice
- Unemployment Benefits notice
- Four (4) consecutive paycheck stubs

***Fraud Warning:** Title 18, Section 1001 of the United States code, states that a person who knowingly and willingly makes false or fraudulent statements to any department or agency of the United States is guilty of a felony.



HOUSING AUTHORITY OF MONROE COUNTY

1055 W. Main Street

Stroudsburg, PA 18360

570-421-7770

TDD 570-421-6968

FAX: 570-421-6958 & 570-424-9710

Pre-Application for Housing☐ Public HousingClose- Housing Choice Voucher Program (n.l.c.a. Section 8)HEAD OF HOUSEHOLD1. Name _____
(First) (M.I.) (Last)

Mailing Address _____

(City) (State) (Zip)

Social Security _____ Date of Birth _____ Age _____

Telephone # _____ Contact/Cell # _____

2. Other Family Members

First Name	Last Name	Social Security #	Sex	Date of Birth	Relation to Head

(Use other side for additional family members)

3. Race (check one)

- ☐ White
☐ Black/African American
☐ American Indian/Alaska Native
☐ Asian
☐ Native Hawaiian/Other Pacific Islander

Ethnicity (check one)

- ☐ Hispanic or Latino
☐ Not-Hispanic or Latino

4. Is anyone in your family pregnant? ☐ YES ☐ NO5. Do any persons in the household have a disability? ☐ YES ☐ NO

Mobility Impairment ☐ YES ☐ NO Hearing ☐ YES ☐ NO
 Sight Impairment ☐ YES ☐ NO Mental Impairment ☐ YES ☐ NO

If applicable, list special accommodations _____

6. Do you claim any of the following local preferences?

- ☐ Working Preference: Does the head of household or spouse work?
☐ Training Program: Is the head of household or spouse in a work training program?
☐ Disability: Is the head of household or spouse disabled?
☐ Elderly: Is the head of household or spouse 62 years of age or older?
☐ Homeless: Is the family currently homeless?
☐ Victim of Domestic Violence: Is the head of household or spouse a victim?
☐ Veteran: Is the head of household or spouse a veteran?
☐ Resident: Does the family live or work in Monroe County?
☐ Non-Resident: Does the family live outside of Monroe County?

7. FAMILY INCOME: Check all that applies and fill in monthly amount:

Wages \$ _____ Social Security \$ _____
 SSI \$ _____ TANF/Welfare \$ _____
 Other \$ _____ Child Support \$ _____

8. Has anyone in the household ever been arrested? ☐ YES ☐ NO
If YES, who, when and what for _____

9. I CERTIFY THAT THE ABOVE INFORMATION IS ACCURATE AND COMPLETE.

I understand that submission of false information or misrepresentation may result in
 loss of eligibility to participate in the Housing Program.

Signature _____ Date _____

THE HOUSING AUTHORITY OF MONROE COUNTY, PENNSYLVANIA

"ONE STRIKE AND YOU'RE OUT"**Zero Tolerance Policy in Screening Applicants for Admission and Eviction of Tenants**

Purpose - In accordance with provisions of U.S. Department of Housing and Urban Development Notice PIH 96-27 (HA) issued May 15, 1996, the Housing Authority of Monroe County, Pennsylvania (herein referred to as the HA) hereby adopts the Occupancy Provisions of the Housing Opportunity Program Extension Act of 1996, which was signed into law March 28, 1996. Section 9 of this law contains requirements related to safety and security in public housing that go beyond previous requirements related to screening of applicants, lease provisions, and evictions of tenants. These new requirements are consistent with HUD's determination to take every reasonable step to help Public Housing Authorities promote safer public housing. Accordingly the following procedures shall serve as additions, supplements, or changes, as appropriate, to the Authority's Admissions and Continued Occupancy Policies (ACOP), Section 8 Admin. Plan, the Dwelling Lease, and the Grievance Procedure:

SCREENING OF APPLICANTS

Policy - It is the policy of this Housing Authority that each applicant for housing in its dwelling units shall be screened in accordance with its existing policies contained in the Admissions and Continued Occupancy Policies (ACOP), Section 8 Administrative Plan and additionally that appropriate screening shall be conducted so that admission shall be denied to a public housing applicant who:

1. has a history of criminal activity involving crimes to persons or property and/or other criminal acts that affect the health, safety, or right to peaceful enjoyment of the premises by other residents;
2. was evicted from assisted housing within five (5) years of the projected date of admission because of drug-related criminal activity involving the personal use, possession for personal use or illegal manufacture, sale, distribution possession with intent to manufacture, sell, distribute a controlled substance as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802;
3. the HA determines an applicant is illegally using a controlled substance; or
4. the HA has reasonable cause to believe an applicant illegally uses a controlled substance or abuses alcohol in a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

5. Persons will be denied assistance if they have been convicted/evicted from a unit assisted under the Housing Act of 1937 due to **violent criminal activity** within the last ten (10) years prior to the date of the certification interview. (Violent Criminal Activity includes any criminal activity that has as one of its element the use, attempted use, or threatened use of physical force against a person or property, and the activity is being engaged in by any family member.)

Lifetime Denial for Public Housing and Section 8

1. The applicant or tenant was convicted of a sex offense.
2. An Applicant/Tenant was convicted of manufacturing or producing methamphetamine from Public Housing and Section 8 assisted housing where the PHA determines who is admitted.

The term "appropriate screening" refers to the HA's applying discretion to consider all available information when making a decision to deny admission.

To implement this policy, the HA, in addition to existing screening procedures, also will utilize the following procedures:

- A. ***Criminal History*** - Public Housing & Section 8. The applicant, all adult household members, including live-in aides must sign a release allowing the HA to request a copy of a criminal history report from the National Crime Information Center. When a positive result comes back from the NCIC that individual will be given a FBI finger print card and asked to report to the local Sheriff's department to be finger printed. After this is accomplished the individual will bring the FBI finger print card back to the HA where it will be mailed to appropriate agent. The HA will cover the cost incurred with the FBI Finger Print card.

If the HA uses information contained in a criminal history report as grounds for denying housing assistance and the applicant requests an informal hearing on the denial, a copy of the criminal history may be provided to the applicant at the hearing, if permitted by local state, or federal law, and the applicant shall be allowed to dispute the accuracy or relevancy of the criminal history report.

- B. ***Illegal Use of Controlled Substance*** - Admission shall be denied to any person who the HA determines is illegally using a controlled substance. In addition to any information regarding illegal use of a controlled substance that appears on the criminal history report, the HA also shall rely upon information obtained from other sources, such as local police incident reports, landlords, employers, social service agencies, substance abuse centers, acquaintances (including current tenants) who may contact the

HA to volunteer information. The HA shall examine carefully all such information obtained from other sources to determine that there is reasonable cause to believe that the person's pattern of illegal use of a controlled substance may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

- C. ***Alcohol Abuse*** - Admission shall be denied to any person when the HA determines that there is reasonable cause to believe that the person's pattern of abuse of alcohol may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. In making such determination, the HA shall rely upon relevant information obtained from local law enforcement agencies, social service agencies, landlords, employers, alcohol abuse centers, acquaintances (including current tenants) who may contact the HA to volunteer information, or any other appropriate source. The HA shall examine carefully all such information obtained to determine whether it has reasonable cause to believe that the persons pattern of abuse of alcohol may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

- D. ***Waiver of Policies*** - The HA may waive policies prohibiting admission if the person demonstrates to the HA's satisfaction that the person no longer is engaging in illegal use of a controlled substance or abuse of alcohol and:

- ◆ Has successfully completed a supervised drug or alcohol rehabilitation program;
- ◆ Has otherwise been rehabilitated successfully; or
- ◆ Is participating in a supervised drug or alcohol rehabilitation program.

- E. ***Ineligibility if Evicted for Drug-Related Activity*** - Persons evicted from public housing, Indian housing, Section 23, or any Section 8 program because of drug-related criminal activity involving the personal use or possession for personal use are ineligible for admission to public housing for a five (5) year period beginning on the date of such eviction.

Or

Persons will be denied assistance if they have been convicted/evicted from a unit assisted under the Housing Act of 1937 due to violent criminal activity within the last ten (10) years prior to the date of the certification interview.

The HA shall use information contained in its own files, or information obtained from other housing agencies to make a determination that the person is ineligible. This requirement may be waived if:

- ♦ The person demonstrates successful completion of a rehabilitation program approved by the HA, or
- ♦ The circumstances leading to the eviction no longer exist. For example, the individual involved in drugs no longer is in the household because the person is incarcerated.

F. ***Disability Not an Issue*** - The purpose of the above applicant screening procedures is to prohibit admission to the HA's housing of any person that it determines to be likely to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. In considering elements leading to the determination, the HA shall not focus on whether the applicant happens to have a disability; rather, the focus shall be on whether the person's recent behavior indicated that he or she likely would continue to engage in behavior that would be in non-compliance with the dwelling.

Terminating Assistance to Tenants (Evictions)

Policy - It is the policy of this Housing Authority to appropriately evict a public housing resident whom:

- ♦ Engages in any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents;
- ♦ Engages in any drug-related or violent criminal activity on or off the HA's property; or
- ♦ The HA determines is illegally using a controlled substance, or the resident abuses alcohol or uses a controlled substance in such a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- ♦ If while living in public housing or Section 8 assistance program the tenant commits a sexual crime.
- ♦ The HA determines that the tenant is fleeing to avoid prosecution, or custody or confinement after conviction for a felony.
- ♦ Violating a condition of probation or parole imposed under Federal or State law.

The term "appropriately" refers to the HA's consistent application of discretion to consider all known circumstances in making its decision to evict.

The following procedures will be followed in implementing the provisions of this policy:

- A. ***Applicability*** - The policy of the HA is to terminate the lease and evict any person who has been documented as engaging in one or more of the following:
- ♦ Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or employees of the HA;
 - ♦ Any other activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or employees of the HA;
 - ♦ Any drug-related or violent criminal activity on or off the premises,
 - ♦ Illegal use of a controlled substance; or
 - ♦ Alcohol abuse that interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- B. ***Documentation of Activities*** - In documenting instances of activities that may be cause for termination of tenancy and eviction, the HA shall make prompt investigation into reports from other residents, HA employees, local law enforcement officers, the general public, and published reports indication that a tenant is in non-compliance with provisions of this policy and the dwelling lease. In order to ascertain whether to proceed with termination of tenancy and eviction shall utilize the methods contained in the Section, Screening of Applicants, Paragraphs A., B., and C., of this One Strike Policy. In considering documentation obtained during its investigations, the HA should not focus on whether the tenant happens to have a disability.
- C. ***Evictions A Civil Matter*** - In weighing the documentation and deciding whether to proceed with termination of tenancy and eviction proceedings in local court, the HA must determine whether sufficient grounds exist to initiate the action. Evictions are civil, not criminal, matters. The HA is not required to meet the criminal standard of "proof beyond a reasonable doubt." In order to terminate a lease and evict a tenant, a criminal conviction or arrest is not necessary. Before initiating termination of tenancy and eviction action, the HA should have sufficient documentation

to prove in court that a tenant has violated his or her dwelling lease before taking eviction action.

- D. ***Due Process Rights*** - The HA can exclude from its grievance procedures any cases involving termination of tenancy for any activity, not just a criminal activity, that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or employees of the HA; or any drug-related criminal Activity on or off such premises, no just on or near such premises. Therefore, it shall be the policy of this HA to exclude the foregoing from the grievance procedure, and to proceed directly to court for eviction.
- E. ***Notice of Termination of Tenancy and Eviction*** - Once the HA has determined that there is sufficient documented justification to proceed with termination of tenancy and eviction in cases involving (a) any criminal activity or other activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other Residents or employees of the HA, or (b) any drug-related or violent criminal activity on or off the HA's premises, the HA shall promptly issue notification to the tenant specifying:
1. That the tenant is in serious violation of the terms and conditions of the dwelling lease and are grounds for termination of tenancy;
 2. The lease provisions that the tenant has violated;
 3. That the HA is terminating the lease as of a specified date which shall be ten (10) days from the date of the notice;
 4. That the termination action is not subject to the grievance procedure;
 5. That if the tenant has not vacated the premises by the date specified in the notice, then the HA will file eviction proceedings in court; and
 6. That prior to the judicial hearing, the tenant or his/her counsel may request copies of any relevant documents, records (including criminal records) upon which the HA is relying as basis for the termination of tenancy or eviction.

Modifications to the ACOP, Dwelling Lease, and Grievance Procedures

- A. The Admissions and Continued Occupancy Policies (ACOP), the Dwelling Lease, and the Grievance Procedure are being modified to incorporate the provisions of the "One Strike and You're Out" policy.
- B. The modifications referred to in A. above shall become effective following notice to tenants and the 30-day comment period.

- C. Lease modification may be in the form of a new lease or a rider to the existing lease. Tenant will be required to execute the new lease/addendum no later than their next reexamination.

Other Considerations

- A. ***Informing Applicants and Tenants*** - At the time an applicant makes inquiry or presents himself/herself to make application for housing, the HA shall inform the applicant of the "One Strike" provisions related to the application process. When a lease is executed, the explanation of lease provisions that is given to the new tenant will include the importance of abiding all terms of the lease, including the "One Strike" provisions. At the time of adoption of these policies, current residents will have been informed of the "One Strike" policy.
- B. ***Cooperation from Residents*** - Residents shall be encouraged to come forward with complaints and information regarding any residents who are in violation of any provisions of the "One Strike" policy. Residents who furnish such information should be informed that if sufficient grounds for eviction appear to exist, then their testimony may be required in court, and they must agree to testify if needed.
- C. ***Cooperation from Enforcement Agencies*** - Meetings should be arranged between the Housing Authority and the local Police Department to inform the law enforcement agency of public housing needs and problems, and work out administrative arrangements so that full and expeditious cooperation occurs. If such an arrangement is not currently in existence, the Housing Authority should request that police:
1. Promptly provide HA management with relevant incident reports for timely eviction processing;
 2. Help the Housing Authority expedite drug identification in serious cases; and
 3. Prepare for cases as needed with Housing Authority attorneys. To this end, the police personnel must know exactly what criminal activities are grounds for lease termination so they can keep the Housing Authority informed when such behavior occurs. The Police Department should be encouraged to provide police testimony in eviction cases involving criminal and/or disruptive behavior as an important part of the department's mission.

Where appropriate, the Housing Authority should use subpoenas to facilitate police testimony. Additionally, the Police Department should be requested to supply additional patrols to public housing communities with special needs, where it is economically feasible for the Police Departments to do so.

- D. ***Confidentiality of Criminal Records*** - In administering the provisions of the "One Strike" policy, the Housing Authority shall establish a system to ensure that any criminal record received be maintained confidentially, not misused or improperly disseminated, and destroyed once the purpose for which it was requested is accomplished.

Scam Alert
Stop ID Theft
Before It Hits
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Outrage
My Nephew Almost
Got Me Evicted
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Home Alone
You're Retired and Your
Spouse Isn't. Now What?
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AARP Bulletin

YOUR HEALTH • YOUR MONEY • YOUR WORLD

Alzheimer's Discovery

The surprise That could change

SEPTEMBER 2010 Vol. 51 No. 7 aarp.org/bulletin

**Smart
Phone
Madness**
What Are the
Real Costs?
PAGE 14

Exclusive Poll
What Would You

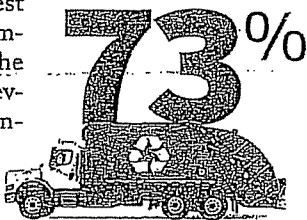
6 in 10

Number of American workers who believe they will get no Social Security benefits when they retire.



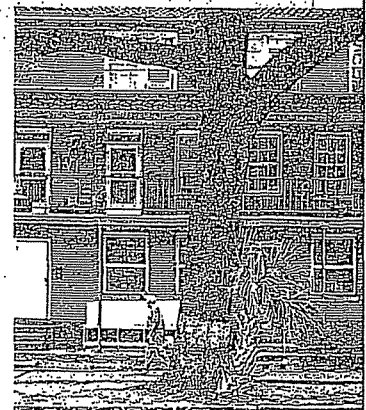
Background noise in public venues often makes hearing aids useless, but an increasingly available technology known as a "hearing loop" can change that. In New York subways, station information booths have recently been fitted with hearing loops, thanks to the efforts of Janice Schacter, chair of the Manhattan-based Hearing Access Program, and Obama's stimulus package. "We had a shovel-ready project that" Schacter says. A hearing loop is created when a wire is installed around a room and plugged into an audio source. That wire then sends a magnetic field that's now standard in most hearing aids. (Older hearing aids retrofitted for about \$250.) The technology is also in use in homes. The cost of a hearing loop system ranges from \$140 to \$270. Find a list of vendors and more information at www.hearingloop.org. —Cathie Gandel

Composting has become a way of life for San Francisco residents since the city passed a law last year requiring residents and businesses to place food scraps into designated bins. The food waste is turned into compost and sold to area farms and vineyards. "This is probably the strongest recycling and composting law in the country," says Kevin Drew, residential and special projects zero waste coordinator for the city. Older residents and senior centers have been enthusiastic about the program, according to city officials. Before the program, San Francisco was eliminating 73 percent of all landfill waste. The goal is zero waste by 2020. Seattle, Portland, Ore., and Dubuque, Iowa, have similar programs. But only San Francisco levies a fine—as much as \$100—for non-compliance. —Tauren Dyson



What an Outrage Eviction Threat for No Reason

Imagine living somewhere more than three decades, then being threatened with eviction because of the actions of a relative you have virtually no interaction with. That's what Barbara Gabriel faced earlier this year, after the Housing Authority of New Orleans (HANO) gave her 10 days to vacate her two-bedroom dwelling. The eviction notice came after a nephew was arrested in connection with selling drugs in Gabriel's complex. His aunt's address came up as his own after a police check. "I did not give him permission to use my address," says Gabriel, 58, who moved into the 600-unit Iberville public housing development in 1975. "He doesn't live with me and he is not on my lease." Gabriel had been targeted under a "one strike and you're out" policy established by the U.S. Department of Housing and Urban Development in 1996. "One strike" allows housing authorities to evict tenants following one drug-related offense. Desperate to stay in her home, Gabriel contacted Southwest Louisiana Legal Services attorney Renae Davis. Aided by three Rutgers School of Law students working pro bono, Davis successfully defended Gabriel against HANO in court in May. "She didn't even know at the time that [her nephew] was anywhere near the premises when he was arrested," Davis says. "She was at work." HANO filed an appeal, but "I'm almost certain that appeal is going to go away," HANO spokesman Keith Pettigrew says. "We're going to make this right." That works for Gabriel. "I prayed so hard the whole time," she says of her legal ordeal. "I was scared I would lose my house." —Blair S. Walker



Barbara Gabriel has lived here for 35 years.

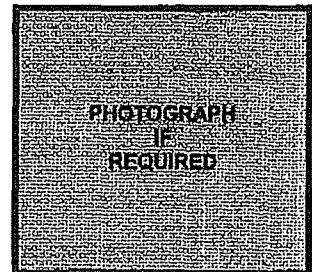
COMMONWEALTH OF PENNSYLVANIA

RENEWAL ☐

COUNTY OF MONROE

APPLICATION FOR A PENNSYLVANIA LICENSE TO CARRY FIREARMS

FOR USE BY ISSUING AUTHORITY: PICS TEMP APP. NO. _____		PICS FINAL APP. NO. _____	
Signature _____	License Number _____	Application Date _____	
Temporary License Approval Date _____		Permanent License Approval Date _____	
Rejection Date _____		Reason for Rejection _____	



APPLICANT INFORMATION - TYPE/PRINT IN BLUE OR BLACK INK

1. LAST NAME		2. JR., ETC.	3. FIRST NAME		4. MIDDLE NAME		5. PHOTO ID/DRIVER LICENSE NO.		6. STATE		
7. DATE OF BIRTH	8. SOCIAL SECURITY NUMBER (Optional, but will help prevent misidentification)			9. AGE	10. SEX	11. RACE		12. HEIGHT	13. WEIGHT	14. HAIR COLOR	15. EYE COLOR
16. STREET ADDRESS					17. CITY		18. STATE	19. ZIP CODE	20. HOME TELEPHONE NO.		
21. EMPLOYER/BUSINESS NAME					22. WORK TELEPHONE NO.			23. OCCUPATION			
24. ADDRESS					25. CITY			26. STATE	27. ZIP CODE		
28. REASON FOR A LICENSE TO CARRY FIREARMS:								29. PLACE OF BIRTH			
☐ SELF-DEFENSE		☐ EMPLOYMENT		☐ HUNTING & FISHING							
☐ TARGET SHOOTING		☐ GUN COLLECTING		☐ OTHER _____							

30. TWO REFERENCES - NOT FAMILY MEMBERS		
NAME	ADDRESS	TELEPHONE NO.
NAME	ADDRESS	TELEPHONE NO.

APPLICANTS ARE DETERMINED TO BE ELIGIBLE FOR LICENSURE BASED UPON CRITERIA SET FORTH WITHIN THE PENNSYLVANIA UNIFORM FIREARMS ACT (18 Pa.C.S. CHAPTER 61) SECTIONS 6104 DEALING WITH INDIVIDUALS NOT TO POSSESS FIREARMS AND SECTION 6105 DEALING WITH THE ISSUANCE OF A LICENSE TO CARRY FIREARMS. REFERENCE THE REVERSE SIDE OF THIS FORM WHERE INDICATED.

31. HAVE YOU EVER BEEN CONVICTED OF A CRIME ENUMERATED IN SECTION 6105(b), OR DO ANY OF THE CONDITIONS UNDER 6105(c) APPLY TO YOU? (READ INFORMATION ON BACK PRIOR TO ANSWERING)	☐ YES ☐ NO
32. ARE YOU NOW CHARGED WITH, OR HAVE YOU EVER BEEN CONVICTED OF A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR? THIS IS THE MAXIMUM SENTENCE THAT YOU "COULD HAVE RECEIVED," NOT THE ACTUAL SENTENCE YOU DID RECEIVE. (THIS DOES NOT INCLUDE FEDERAL OR STATE OFFENSES PERTAINING TO ANTITRUST, UNFAIR TRADE PRACTICES, RESTRAINTS OF TRADE, OR REGULATION OF BUSINESS; OR STATE OFFENSES CLASSIFIED AS MISDEMEANORS AND PUNISHABLE BY A TERM OF IMPRISONMENT NOT TO EXCEED TWO YEARS.) (READ INFORMATION ON BACK PRIOR TO ANSWERING)	☐ YES ☐ NO
33. HAVE YOU EVER BEEN ADJUDICATED A DELINQUENT FOR A CRIME ENUMERATED IN SECTION 6105, OR FOR AN OFFENSE UNDER THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC ACT? (READ INFORMATION ON BACK PRIOR TO ANSWERING)	☐ YES ☐ NO
34. HAVE YOU EVER BEEN CONVICTED OF ANY DRUG OR CONTROLLED SUBSTANCE OFFENSE UNDER THE ACT OF APRIL 14, 1972 (P.L. 233, NO. 64) KNOWN AS THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC ACT? (ALL DRUG-RELATED CONVICTIONS WILL PROHIBIT LICENSING, UNDER SECTION 6109 RELATING TO LICENSES)	☐ YES ☐ NO
35. HAVE YOU EVER BEEN INVOLUNTARILY COMMITTED TO A HEALTH CARE FACILITY FOR A MENTAL CONDITION, OR ADJUDICATED INCOMPETENT/INCAPACITATED?	☐ YES ☐ NO
36. ARE YOU AN INDIVIDUAL WHO IS A HABITUAL DRUNKARD, OR WHO IS ADDICTED TO OR AN UNLAWFUL USER OF MARIJUANA OR A STIMULANT, DEPRESSANT, OR NARCOTIC DRUG?	☐ YES ☐ NO
37. IS YOUR CHARACTER AND REPUTATION SUCH THAT YOU WOULD BE LIKELY TO ACT IN A MANNER DANGEROUS TO PUBLIC SAFETY?	☐ YES ☐ NO
38. ARE YOU A UNITED STATES CITIZEN? IF NO, COUNTRY OF BIRTH _____ COUNTRY OF CITIZENSHIP _____ IMMIGRATION IDENTIFICATION NUMBER _____ (Applications for non-U.S. Citizens must be provided to the Pennsylvania State Police along with a copy of the License to Carry.)	☐ YES ☐ NO
39. HAVE YOU EVER RECEIVED A DISHONORABLE DISCHARGE FROM THE UNITED STATES ARMED FORCES?	☐ YES ☐ NO
40. OTHER THAN PENNSYLVANIA, DO YOU POSSESS A CURRENT LICENSE, PERMIT, OR SIMILAR DOCUMENT TO CARRY A FIREARM ISSUED FROM ANOTHER STATE? IF YES, ATTACH A PHOTOCOPY OF THE DOCUMENT TO THIS FORM.	☐ YES ☐ NO
41. I have never been convicted of a crime that prohibits me from possessing or acquiring a firearm under Federal or State law. I am of sound mind and have never been committed to a mental institution or mental health care facility. I hereby certify that the statements contained herein are true and correct to the best of my knowledge and belief. I understand that if I knowingly make any false statements herein, I am subject to penalties prescribed by law. I authorize the sheriff, or his designee, or, in the case of first class cities, the chief or head of the police department, or his designee, to inspect only those records or documents relevant to information required for this application. <i>If I am issued a license and knowingly become ineligible to legally possess or acquire firearms, I will promptly notify the sheriff of the county in which I reside or, if I reside in a city of the first class, the chief of police of that city.</i> This certification is made subject to both the penalties of section 4904 of the Crimes Code (18 Pa.C.S. 4904) relating to unsworn falsifications to authorities and the Uniform Firearms Act.	

SIGNATURE - APPLICANT

DATE OF APPLICATION

Section 6105(a):

Effective November 22, 1995, 18 Pa.C.S. § 6105(a) prohibits persons convicted of any of the following offenses under 18 Pa.C.S. from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania. A conviction includes a finding of guilty or the entering of a plea of guilty or nolo contendere, whether or not judgement has been imposed, as determined by the law of the jurisdiction in which the prosecution was held. The term does not include a conviction which has been expunged or overturned or for which an individual has been pardoned unless the pardon expressly provides that the individual may not possess or transport firearms.

Section 6105(b)

§908 Prohibited offensive weapons
 §911 Corrupt organizations
 §912 Possession of weapon on school property
 §2502 Murder
 §2503 Voluntary manslaughter
 §2504 Involuntary manslaughter, if the offense is based on the reckless use of a firearm
 §2702 Aggravated assault
 §2703 Assault by prisoner
 §2704 Assault by life prisoner
 §2709.1 Stalking
 §2716 Weapons of mass destruction
 §2901 Kidnapping
 §2902 Unlawful restraint
 §2910 Luring a child into a motor vehicle or structure
 §3121 Rape
 §3123 Involuntary deviate sexual intercourse
 §3125 Aggravated indecent assault
 §3301 Arson and related offenses
 §3302 Causing or risking catastrophe
 §3502 Burglary
 §3503 Criminal trespass, if the offense is graded a felony of the second degree or higher
 §3701 Robbery
 §3702 Robbery of motor vehicle

§3921 Theft by unlawful taking or disposition, upon conviction of the second felony offense
 §3923 Theft by extortion, when the offense is accompanied by threats of violence
 §3925 Receiving stolen property, upon conviction of the second felony offense
 §4906 False reports to law enforcement authorities, if the fictitious report involved the theft of a firearm as provided in 4906(c)(2)
 §4912 Impersonating a public servant if the person is impersonating a law enforcement officer
 §4952 Intimidation of witnesses or victims
 §4953 Retaliation against witness, victim or party
 §5121 Escape
 §5122 Weapons or implements for escape
 §5501(3) Riot
 §5515 Prohibiting of paramilitary training
 §5516 Facsimile weapons of mass destruction
 §6110.1 Possession of firearm by minor
 §6301 Corruption of minors
 §6302 Sale or lease of weapons and explosives

Any offense equivalent to any of the above-enumerated offenses under the prior laws of this Commonwealth or any offense equivalent to any of the above-enumerated offenses under the statutes of any other state or of the United States.

Section 6105(c):

Effective November 22, 1995, 18 Pa.C.S. § 6105(c) also prohibits the following persons from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania.

ARE YOU A PERSON WHO:

1. is a fugitive from justice; or
2. has been convicted of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, that may be punishable by a term of imprisonment exceeding two years; or
3. has been convicted of driving under the influence of alcohol or controlled substance as provided in 75 Pa.C.S. § 3802 (relating to driving under influence of alcohol or controlled substance) or the former 75 Pa.C.S. § 3731, on three or more separate occasions within a five-year period. For the purposes of this paragraph only, the prohibition of Section 6105(a) shall only apply to transfers or purchases of firearms after the third conviction; or
4. has been adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment under section 302, 303, or 304 of the provisions of the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act; or
5. being an alien, is illegally or unlawfully in the United States; or
6. is the subject of an active protection from abuse order issued pursuant to 23 Pa.C.S. § 6108 (relating to relief), which order provides for the relinquishment of firearms during the period of time the order is in effect. This prohibition shall terminate upon the expiration or vacation of an active protection from abuse order or portion thereof relating to the relinquishment of firearms; or
7. was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 (relating to adjudication) or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense under 18 Pa.C.S. sections 2502, 2503, 2702, 2703, 2704, 2901, 3121, 3123, 3301, 3502, 3701, and 3923; or
8. was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense enumerated in 18 Pa.C.S. § 6105(b) with the exception of those crimes set forth in paragraph 7. This prohibition shall terminate 15 years after the last applicable delinquent adjudication or upon the person reaching the age of 30, whichever is earlier.
9. is prohibited from possessing or acquiring a firearm under 18 U.S.C. § 922(g)(9) (relating to unlawful acts) who has been convicted in any court of a misdemeanor crime of domestic violence by a person in any of the following relationships: (i) the current or former spouse, parent or guardian of the victim; (ii) a person with whom the victim shares a child in common; (iii) a person who cohabits with or has cohabited with the victim as a spouse, parent or guardian; or (iv) a person similarly situated to a spouse, parent, or guardian of the victim; then the relationship need not be an element of the offense to meet the requirements of this paragraph.

PRIVACY ACT NOTICE

Solicitation of this information is authorized under Title 18 Pa.C.S. § 6111. Disclosure of your social security number is voluntary. Your social security number, if provided, may be used to verify your identity and prevent misidentification. All information supplied, including your social security number, is confidential and not subject to public disclosure.

Widener University

Choose Your Path - Widener University :: Online Application

[LOG OUT](#)[UPDATE YOUR PROFILE](#)

Additional Information

I am interested in Military ROTC ☐ Yes ☐ No

Have you ever been suspended from school?

☐ Yes ☐ No

Have you ever been convicted of a crime (including alcohol and/or drug offenses), felony, or misdemeanor, or currently have any criminal charges pending or unresolved in any court or tribunal, excluding minor traffic violations?

Convictions include judgments, findings of guilt by a judge or jury, pleas of guilty or nolo contendere, probation without verdict, disposition in lieu of trial and/or ARD.

☐ Yes ☐ No

Certification

Any deliberate falsification or omission of application data will result in denial of admission or dismissal.

☐ By checking this box, I agree with the above statement, and agree that all information on this application is true as of today.

[< PREVIOUS](#)[PRINT >](#)[SAVE](#)[SUBMIT >](#)

A different kind of admissions process

Today's college applications are screening for criminal offenses and bad behavior.

By Kathy Boccella

Inquirer Staff Writer



GERALD S. WILLIAMS / Inquirer Staff Photographer

"If it was a crime of violence we would have to think seriously," says Arcadia University's associate vice president of enrollment, Mark Lapreziosa (left).

Along with SAT scores and extra-curricular activities, college-bound students increasingly are being asked to divulge information that may not be so flattering: their arrest and discipline records.

Since late summer, the Common Application, a form used by about 300 institutions, has asked students and guidance counselors whether the applicant has ever been convicted of a crime or disciplined at school.

Kids with rocky pasts may not make it beyond 12th grade.

In an effort to weed out troublemakers before they hit campus, colleges with their own forms also are requiring prospective students to disclose behavioral black marks. More, including Temple, Rowan and Rutgers Universities, are contemplating it.

The University of Pennsylvania put its admissions policy under review after the discovery in January that a 25-year-old child molester taking graduate courses was commuting from his Bucks County prison cell. Saint Joseph's University will ask about applicants' misdeeds beginning next year.

"It's an issue that's exploding," said Timothy Mann, dean of student affairs at Babson College, who is writing his doctoral dissertation on the subject.

The debate over whether to screen and for what is contentious. Opponents cite privacy issues and the risk of penalizing offenders twice. Education encourages rehabilitation, argues the United States Student Association, the nation's largest student group.

"Are we now putting institutions of higher education in the position of dispensing post-judicial punishment?" Barmak Nassirian of the American Association of Collegiate Registrars and Admissions Officers asked.

Offenders can still slip in. "No background check is foolproof," cautioned Stephanie Hughes, a professor at the University of Northern Kentucky and security expert who owns RiskAware, which runs background checks on college employees.

Federal law prevents most schools from releasing educational records - including disciplinary information - without a parental OK. Counselors can leave the questions blank, a spokesman for the Common Application said. And schools don't always know about the trouble students get into off campus.

Where Mark McGrath, president of the New Jersey School Counselor Association, works, the few kids who have had an incident tend to admit their wrongdoings.

"We try to put it in the best light we can" on the application, said McGrath, a counselor at Lawrence High School in Lawrenceville, N.J. "We're the advocates for the child."

Access to more accurate information and increased expectations about college involvement in students' lives have spurred the trend toward preadmission screening, Mann said.

Though campus crime has not appreciably increased since 2003, according to the U.S. Department of Education, a few high-profile crimes committed by students with rap sheets have led institutions to reexamine their admissions process. The Common Application added its inquiries at the request of schools concerned about liability, executive director Rob Killion said.

Students are warned not to omit information. If they're caught lying, they're disqualified. Administrators believe most comply.

A single after-school detention or graffiti incident isn't what schools look for, anyway.

"We have 9,000 applications and there are eight counselors," said Matt Middleton, assistant director of admissions at the College of New Jersey in Ewing, where students are asked about suspensions and criminal convictions. (No one has copped to the latter.) "We're lucky if we can get more than five to 10 minutes with an application."

A "history of serious misbehavior" is what Villanova University looks for, said Stephen R. Merritt, dean of enrollment.

Several states have taken stricter measures. A new law criticized by privacy advocates forces Virginia colleges to reveal names and birth dates of incoming students so police can cross-check sex-offender lists. If there's a match, the school and local police are told and the offender has three days to register with authorities after moving to campus.

Virginia State Police Lt. Tom Turner said authorities expect to check 80,000 to 100,000 names annually.

In North Carolina, additional precautions have been implemented since students with rape and larceny convictions committed two unrelated murders at the state university in Wilmington in 2004.

In addition to being asked about their pasts, applicants to the University of North Carolina's 16 campuses are checked against a national database of suspended or expelled college students. Those who trigger suspicion are investigated, Leslie Winner, general counsel for the 200,000-student system, said. As a result, 84 applicants were denied entry last fall.

Schools generally ask for a letter of explanation and consult counselors and others when a problem is reported. Though juvenile records are sealed, colleges can run criminal background checks on those 18 or older.

"There's really no need for a university to take a risk," said Joan McDonald, vice president of enrollment at Drexel University, where no more than 10 applicants a year report misdeeds. Serious offenders aren't invited to join the school's 5,000 or so incoming freshmen.

Each school has its idea of a deal-breaking offense, Hughes, the owner of RiskAware, said. Even with murder, she advises not to jump to conclusions.

"What if they were defending themselves?" Hughes said.

"We look at it on a case-by-case basis," said Mark Lapreziosa, associate vice president of enrollment at Arcadia University, which uses the Common Application and which may revise its own form.

"We look for students showing growth or having learned" from their mistakes, he said.

So far only two students have disclosed arrests, one for drugs and the other theft. They never completed their applications, but options Arcadia considered were requiring them to live off-campus and to keep in close contact with administrators.

"If it was a crime of violence we would have to think seriously," Lapreziosa said.

Pennsylvania State University, which has asked students about their criminal pasts since 1991, received an application in 1999 from a man in his 30s who noted an assault conviction. That confession and information the school received from another source prompted an investigation that revealed more time served for manslaughter and sex crimes.

The man was arrested again - on a gun charge - while the background check was underway.

Even in less dramatic cases, the guidelines are obvious: You can't put the campus at risk, said Joe Puzycki, the school's senior director of judicial affairs. Penn State could not say how many

students a year it rejects for security reasons.

Witold Walczak, legal director of the American Civil Liberties Union of Pennsylvania, worries that risk aversion may lead to overzealous enforcement. If getting arrested once was a consideration 35 years ago, he says, "an awful lot of people would never have gotten into college . . . maybe even presidents."

Last year, Justin Layshock got a 10-day suspension from his Hermitage, N.J., high school for creating an online parody of the principal. When he told Penn State, his application was put on hold, said Walczak, who is representing Layshock in a suit against his old school district.

Layshock let his application lapse after getting into a school where he applied pre-prank. With less luck, he could have lost out entirely, Walczak said.

Connie Clery would rather err on the side of caution. She founded Security on Campus after her 19-year-old daughter, Jeanne, was killed by a fellow student during a robbery at Lehigh University in 1986. The Jeanne Clery Act requires all colleges to disclose crime on and around their campuses.

"You never know who's going to be in the room next to you," said Clery, of Bryn Mawr, who has lobbied for background checks for everyone from faculty to students. "This is a violent culture and it extends onto all college campuses."

Something as benign as theft, the No. 1 campus crime, Clery said, can lead to violence, as it did in her daughter's case.

"If you lose one child, there's nothing in the world that can compensate for that and no way you can get over it if you're a parent," she said. "Why risk it?"

The Common App Rap Sheet

The Common Application, accepted at the following local colleges, requires students to detail all criminal convictions and serious school disciplinary actions.

Arcadia University

Bryn Mawr College

The College of New Jersey

Drexel University

Haverford College

Juniata College

Lafayette College

La Salle University

Lehigh University

University of Pennsylvania

Saint Joseph's University

Swarthmore College

Ursinus College

Villanova University

Source: www.commonapp.org

Contact staff writer Kathy Boccella at kboccella@phillynews.com or 610-313-8123.

Find this article at:

http://www.philly.com/philly/education/20070326_A_different_kind_of_admissions_process.html

☐ Check the box to include the list of links referenced in the article.

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APPLICANT

Legal Name _____
Last/Family/Sur (Enter name **exactly** as it appears on official documents.) First/Given Middle (complete) Jr., etc.

Preferred name, if not first name (only one) _____ Former last name(s) _____

Birth Date _____ ☐ Female ☐ Male US Social Security Number, if any _____
mm/dd/yyyy Required for US Citizens and Permanent Residents applying for financial aid via FAFSA

Preferred Telephone ☐ Home ☐ Cell Home (_____) Cell (_____) _____
Area/Country/City Code Area/Country/City Code

E-mail Address _____ IM Address _____

Permanent home address _____
Number & Street Apartment #

City/Town County or Parish State/Province Country ZIP/Postal Code

If different from above, please give your current mailing address for all admission correspondence. (from _____ to _____)
(mm/dd/yyyy) (mm/dd/yyyy)

Current mailing address _____
Number & Street Apartment #

City/Town County or Parish State/Province Country ZIP/Postal Code

If your current mailing address is a boarding school, include name of school here: _____

FUTURE PLANS

Your answers to these questions will vary for different colleges. If the online system did not ask you to answer some of the questions you see in this section, this college chose not to ask that question of its applicants.

College _____ Deadline _____
mm/dd/yyyy

Entry Term: ☐ Fall (Jul-Dec) ☐ Spring (Jan-Jun)

Decision Plan _____

Academic Interests _____

Career Interest _____

Do you intend to apply for need-based financial aid? ☐ Yes ☐ No

Do you intend to apply for merit-based scholarships? ☐ Yes ☐ No

Do you intend to be a full-time student? ☐ Yes ☐ No

Do you intend to enroll in a degree program your first year? ☐ Yes ☐ No

Do you intend to live in college housing? _____

What is the highest degree you intend to earn? _____

DEMOGRAPHICS

Citizenship Status _____

Non-US Citizenship _____

Birthplace _____
City/Town State/Province Country

Years lived in the US? _____ Years lived outside the US? _____

Language Proficiency (Check all that apply.)
S(Speak) R(Read) W(Write) F(First Language) H(Spoken at Home)

S	R	W	F	H
☐	☐	☐	☐	☐
☐	☐	☐	☐	☐
☐	☐	☐	☐	☐

Optional The items with a gray background are optional. No information you provide will be used in a discriminatory manner.

Religious Preference _____

US Armed Services veteran status _____

1. Are you Hispanic/Latino?
☐ Yes, Hispanic or Latino (including Spain) ☐ No If yes, please describe your background.

2. Regardless of your answer to the prior question, please indicate how you identify yourself. (Check one or more and describe your background.)

☐ American Indian or Alaska Native (including all Original Peoples of the Americas)
Are you Enrolled? ☐ Yes ☐ No If yes, please enter Tribal Enrollment Number _____

☐ Asian (including Indian subcontinent and Philippines)

☐ Black or African American (including Africa and Caribbean)

☐ Native Hawaiian or Other Pacific Islander (Original Peoples)

☐ White (including Middle Eastern)

FAMILY

Please list both parents below, even if one or more is deceased or no longer has legal responsibilities toward you. Many colleges collect this information for demographic purposes even if you are an adult or an emancipated minor. If you are a minor with a legal guardian (an individual or government entity), then please list that information below as well. If you wish, you may list step-parents and/or other adults with whom you reside, or who otherwise care for you, in the Additional Information section.

Household

Parents' marital status (relative to each other): ☐ Never Married ☐ Married ☐ Civil Union/Domestic Partners ☐ Widowed ☐ Separated ☐ Divorced (date _____)

With whom do you make your permanent home? ☐ Parent 1 ☐ Parent 2 ☐ Both ☐ Legal Guardian ☐ Ward of the Court/State ☐ Other mm/yyyy

If you have children, how many? _____

Parent 1: ☐ Mother ☐ Father ☐ Unknown

Is Parent 1 living? ☐ Yes ☐ No (Date Deceased _____)
mm/yyyy

Last/Family/Sur	First/Given	Middle	Title (Mr./Mrs./Ms./Dr.)

Country of birth _____

Home address **if different** from yours

Preferred Telephone: ☐ Home ☐ Cell ☐ Work (_____) _____
Area/Country/City Code

E-mail _____

Occupation _____

Employer _____

College (if any) _____ CEEB _____

Degree _____ Year _____

Graduate School (if any) _____ CEEB _____

Degree _____ Year _____

Parent 2: ☐ Mother ☐ Father ☐ Unknown

Is Parent 2 living? ☐ Yes ☐ No (Date Deceased _____)
mm/yyyy

Last/Family/Sur	First/Given	Middle	Title (Mr./Mrs./Ms./Dr.)

Country of birth _____

Home address **if different** from yours

Preferred Telephone: ☐ Home ☐ Cell ☐ Work (_____) _____
Area/Country/City Code

E-mail _____

Occupation _____

Employer _____

College (if any) _____ CEEB _____

Degree _____ Year _____

Graduate School (if any) _____ CEEB _____

Degree _____ Year _____

Legal Guardian (if other than a parent)

Relationship to you _____

Last/Family/Sur	First/Given	Middle	Title (Mr./Mrs./Ms./Dr.)

Country of birth _____

Home address **if different** from yours

Preferred Telephone: ☐ Home ☐ Cell ☐ Work (_____) _____
Area/Country/City Code

E-mail _____

Occupation _____

Employer _____

College (if any) _____ CEEB _____

Degree _____ Year _____

Graduate School (if any) _____ CEEB _____

Degree _____ Year _____

Siblings

Please give names and ages of your brothers or sisters. If they are enrolled in grades K-12 (or international equivalent), list their grade levels. If they have attended or are currently attending college, give the names of the undergraduate institution, degree earned, and approximate dates of attendance. If more than three siblings, please list them in the Additional Information section.

Name	Age & Grade	Relationship

College Attended _____ CEEB _____

Degree earned _____ Dates _____
or expected mm/yyyy – mm/yyyy

Name	Age & Grade	Relationship

College Attended _____ CEEB _____

Degree earned _____ Dates _____
or expected mm/yyyy – mm/yyyy

Name	Age & Grade	Relationship

College Attended _____ CEEB _____

Degree earned _____ Dates _____
or expected mm/yyyy – mm/yyyy

EDUCATION

Secondary Schools

Most recent secondary school attended _____

Entry Date _____ Graduation Date _____ School Type: ☐ Public ☐ Charter ☐ Independent ☐ Religious ☐ Home School
mm/yyyy mm/dd/yyyy

Address _____ CEEB/ACT Code _____
Number & Street

City/Town State/Province Country ZIP/Postal Code

Counselor's Name _____ Counselor's Title _____

E-mail _____ Telephone (_____) _____ Fax (_____) _____
Area/Country/City Code Number Ext. Area/Country/City Code Number

List all other secondary schools you have attended since 9th grade, including summer schools or enrichment programs hosted on a secondary school campus:

School Name & CEEB/ACT Code	Location (City, State/Province, ZIP/Postal Code, Country)	Dates Attended (mm/yyyy)

Community Program/Organization. _____

If your education was or will be interrupted, please indicate so here: _____

Colleges & Universities Report all college attendance (including online) since 9th grade and indicate as College Course (CO) or Enrichment Program (EP) hosted on a college campus.

College/University Name & CEEB/ACT Code	Location (City, State/Province, ZIP/Postal Code, Country)	Degree Candidate?	CO	EP	Dates Attended mm/yyyy – mm/yyyy	Degree Earned
		Yes ☐	☐	☐		
		☐	☐	☐		
		☐	☐	☐		

Were you issued a transcript for any work listed above? ☐ Yes ☐ No If yes, please have an official transcript sent as soon as possible.

ACADEMICS

The self-reported information in this section is not intended to take the place of your official records. Please note the requirements of each institution to which you are applying and arrange for official transcripts and score reports to be sent from your secondary school and the appropriate testing agencies. Where "Best Scores" are requested, please report the highest individual scores you have earned so far, even if those scores are from different test dates.

Grades Class Rank _____ Class Size _____ Weighted? ☐ Yes ☐ No GPA _____ Scale _____ Weighted? ☐ Yes ☐ No
(if available) (if available)

ACT Exam Dates: _____ Best Scores: _____
(past & future) mm/yyyy mm/yyyy mm/yyyy (so far)

COMP	mm/yyyy	English	mm/yyyy	Math	mm/yyyy
Reading	mm/yyyy	Science	mm/yyyy	Writing	mm/yyyy

SAT Exam Dates: _____ Best Scores: _____
(past & future) mm/yyyy mm/yyyy mm/yyyy (so far)

Critical Reading	mm/yyyy	Math	mm/yyyy	Writing	mm/yyyy

TOEFL/IELTS Exam Dates: _____ Best Score: _____
(past & future) mm/yyyy mm/yyyy mm/yyyy (so far)

Test	Score	mm/yyyy

AP/IB/SAT Subjects Best Scores: _____
(per subject, so far) mm/yyyy

Type & Subject	Score	mm/yyyy	Type & Subject	Score	mm/yyyy

Current Courses Please indicate title, level (AP, IB, advanced honors, etc.) and credit value of all courses you are taking this year. Indicate quarter classes taken in the same semester on the appropriate semester line.

Full Year/First Semester/First Trimester	Second Semester/Trimester	Third Trimester or additional first/second term courses if more space is needed

Honors Briefly list any academic distinctions or honors you have received since the 9th grade or international equivalent (e.g., National Merit, Cum Laude Society).

S(School) S/R(State or Regional) N(National) I(International)

Grade level or post-graduate (PG)					Honor	Highest Level of Recognition			
9	10	11	12	PG		S	S/R	N	I
☐	☐	☐	☐	☐	_____	☐	☐	☐	☐
☐	☐	☐	☐	☐	_____	☐	☐	☐	☐
☐	☐	☐	☐	☐	_____	☐	☐	☐	☐
☐	☐	☐	☐	☐	_____	☐	☐	☐	☐
☐	☐	☐	☐	☐	_____	☐	☐	☐	☐

EXTRACURRICULAR ACTIVITIES & WORK EXPERIENCE

Extracurricular Please list your **principal** extracurricular, volunteer, and work activities in their order of importance to you. Feel free to group your activities and paid work experience separately if you prefer. Use the space available to provide details of your activities and accomplishments (specific events, varsity letter, musical instrument, employer, etc.). **To allow us to focus on the highlights of your activities, please complete this section even if you plan to attach a résumé.**

Grade level or post-graduate (PG)					Approximate time spent		When did you participate in the activity?		Positions held, honors won, letters earned, or employer	If applicable, do you plan to participate in college?
9	10	11	12	PG	Hours per week	Weeks per year	School year	Summer/School Break		
☐	☐	☐	☐	☐	_____	_____	☐	☐	_____	☐
Activity _____										
☐	☐	☐	☐	☐	_____	_____	☐	☐	_____	☐
Activity _____										
☐	☐	☐	☐	☐	_____	_____	☐	☐	_____	☐
Activity _____										
☐	☐	☐	☐	☐	_____	_____	☐	☐	_____	☐
Activity _____										
☐	☐	☐	☐	☐	_____	_____	☐	☐	_____	☐
Activity _____										
☐	☐	☐	☐	☐	_____	_____	☐	☐	_____	☐
Activity _____										
☐	☐	☐	☐	☐	_____	_____	☐	☐	_____	☐
Activity _____										
☐	☐	☐	☐	☐	_____	_____	☐	☐	_____	☐
Activity _____										

WRITING

Please briefly elaborate on one of your extracurricular activities or work experiences in the space below.

Please write an essay of 250 – 500 words on a topic of your choice or on one of the options listed below, and attach it to your application before submission. **Please indicate your topic by checking the appropriate box.** This personal essay helps us become acquainted with you as a person and student, apart from courses, grades, test scores, and other objective data. It will also demonstrate your ability to organize your thoughts and express yourself. *NOTE: Your Common Application essay should be the same for all colleges. Do not customize it in any way for individual colleges. Colleges that want customized essay responses will ask for them on a supplement form.*

- ☐ ① Evaluate a significant experience, achievement, risk you have taken, or ethical dilemma you have faced and its impact on you.
- ☐ ② Discuss some issue of personal, local, national, or international concern and its importance to you.
- ☐ ③ Indicate a person who has had a significant influence on you, and describe that influence.
- ☐ ④ Describe a character in fiction, a historical figure, or a creative work (as in art, music, science, etc.) that has had an influence on you, and explain that influence.
- ☐ ⑤ A range of academic interests, personal perspectives, and life experiences adds much to the educational mix. Given your personal background, describe an experience that illustrates what you would bring to the diversity in a college community or an encounter that demonstrated the importance of diversity to you.
- ☐ ⑥ Topic of your choice.

Additional Information Please attach a separate sheet if you wish to provide details of circumstances or qualifications not reflected in the application.

Disciplinary History

- ① Have you ever been found responsible for a disciplinary violation at any educational institution you have attended from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in a disciplinary action? These actions could include, but are not limited to: probation, suspension, removal, dismissal, or expulsion from the institution. ☐ Yes ☐ No
- ② Have you ever been adjudicated guilty or convicted of a misdemeanor, felony, or other crime? ☐ Yes ☐ No
[Note that you are not required to answer “yes” to this question, or provide an explanation, if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, destroyed, erased, impounded, or otherwise ordered by a court to be kept confidential.]

If you answered “yes” to either or both questions, please attach a separate sheet of paper that gives the approximate date of each incident, explains the circumstances, and reflects on what you learned from the experience.

Note: Applicants are expected to immediately notify the institutions to which they are applying should there be any changes to the information requested in this application, including disciplinary history.

SIGNATURE

Application Fee Payment If this college requires an application fee, how will you be paying it?

- ☐ Online Payment ☐ Will Mail Payment ☐ Online Fee Waiver Request ☐ Will Mail Fee Waiver Request

Required Signature

- ☐ I certify that all information submitted in the admission process—including the application, the personal essay, any supplements, and any other supporting materials—is my own work, factually true, and honestly presented, and that these documents will become the property of the institutions to which I am applying and will not be returned to me. I understand that I may be subject to a range of possible disciplinary actions, including admission revocation, expulsion, or revocation of course credit, grades, and degree, should the information I have certified be false.
- ☐ I acknowledge that I have reviewed the application instructions for each college receiving this application. I understand that all offers of admission are conditional, pending receipt of final transcripts showing work comparable in quality to that upon which the offer was based, as well as honorable dismissal from the school.
- ☐ I affirm that I will send an enrollment deposit (or equivalent) to only one institution; sending multiple deposits (or equivalent) may result in the withdrawal of my admission offers from all institutions. [Note: students may send an enrollment deposit (or equivalent) to a second institution where they have been admitted from the waitlist, provided that they inform the first institution that they will no longer be enrolling.]

Signature 

Date _____
mm/dd/yyyy

Common Application member institution admission offices do not discriminate on the basis of race, color, ethnicity, national origin, religion, creed, sex, age, marital status, parental status, physical disability, learning disability, political affiliation, veteran status, or sexual orientation.

Common Application - All Members

There are now 456 Common Application members in 46 states and the District of Columbia, as well as in France, Germany, Italy, Scotland, and Switzerland. They represent an enormously diverse variety of institutions: small and large, public and private, coed and single-sex, highly selective and relatively open enrollment. However, they all share a commitment to the mission of promoting access through holistic admission.

1. Adelphi University	230. Ohio Northern University
2. Agnes Scott College	231. Ohio Wesleyan University
3. Alaska Pacific University	232. Oklahoma City University
4. Albany College of Pharmacy and Health Sciences	233. Otterbein University
5. Albion College	234. Pace University
6. Albright College	235. Pacific Lutheran University
7. Alfred University	236. Pacific University
8. Allegheny College	237. Pepperdine University
9. American University	238. Philadelphia University
10. Amherst College	239. Pitzer College
11. Arcadia University	240. Plymouth State University
12. Assumption College	241. Polytechnic Institute of New York University
13. Augsburg College	242. Pomona College
14. Augustana College (Illinois)	243. Presbyterian College
15. Augustana College (South Dakota)	244. Prescott College
16. Austin College	245. Princeton University
17. Babson College	246. Providence College
18. Baldwin-Wallace College	247. Quinnipiac University
19. Bard College	248. Ramapo College of New Jersey
20. Barnard College	249. Randolph College
21. Bates College	250. Randolph-Macon College
22. Belmont University	251. Reed College
23. Beloit College	252. Regis College
24. Bennington College	253. Regis University
25. Bentley University	254. Rensselaer Polytechnic Institute
26. Berry College	255. Rhode Island College
27. Birmingham Southern College	256. Rhodes College
28. Boston College	257. Rice University
29. Boston University	258. Richard Stockton College of New Jersey
30. Bowdoin College	259. Rider University
31. Bradley University	260. Ringling College of Art and Design
32. Brandeis University	261. Ripon College
33. Brown University	262. Rochester Institute of Technology
34. Bryant University	263. Roger Williams University
35. Bryn Mawr College	264. Rollins College
36. Bucknell University	265. Rosemont College
37. Burlington College	266. Russell Sage College
38. Butler University	267. Sacred Heart University
39. Caldwell College	268. Sage College of Albany
40. California Institute of Technology (Caltech)	269. Saint Anselm College
41. California Lutheran University	270. Saint Francis University
42. Canisius College	271. Saint John's University (College of Saint Benedict)
43. Carleton College	272. Saint Joseph's College of Maine
44. Carnegie Mellon University	273. Saint Joseph's University
45. Carroll College (Montana)	274. Saint Leo University
46. Carroll University	275. Saint Louis University
47. Case Western Reserve University	276. Saint Martin's University
48. Castleton State College	277. Saint Mary's College of California
49. Cazenovia College	278. Saint Mary's College of Indiana
50. Cedar Crest College	279. Saint Mary's University of Minnesota
51. Centenary College (Louisiana)	280. Saint Michael's College
52. Centenary College (NJ)	281. Saint Peter's College
53. Centre College	282. Saint Vincent College
54. Champlain College	283. Salem College
55. Chapman University	284. Salisbury University
56. Chatham University	285. Salve Regina University
57. Christian Brothers University	286. Samford University
58. Christopher Newport University	287. Santa Clara University
59. Claremont McKenna College	288. Sarah Lawrence College
60. Clarkson University	289. School of the Art Institute of Chicago
61. Clark University	290. Scripps College
62. Coe College	291. Seattle Pacific University
63. Colby College	292. Seattle University
64. Colby-Sawyer College	293. Seton Hall University
65. Colgate University	294. Seton Hill University
66. College of Mount Saint Vincent	295. Sewanee: The University of the South
67. College of Notre Dame of Maryland	296. Siena College
68. College of the Atlantic	297. Sierra Nevada College
69. College of the Holy Cross	298. Simmons College
70. College of William & Mary	299. Skidmore College
71. College of Wooster	300. Smith College
72. Colorado College	301. Southern Methodist University
73. Colorado State University	302. Southern New Hampshire University
74. Columbia College Chicago	303. Southwestern University
75. Columbia University	304. Spelman College
76. Concordia College	305. Spring Hill College
77. Concordia University	306. Stanford University
78. Connecticut College	307. St. Bonaventure University
79. Converse College	308. St. Catherine University
80. Cornell College	309. St. Edward's University
81. Cornell University	310. Stephens College
82. Creighton University	311. Stetson University
83. Curry College	312. Stevens Institute of Technology
84. Daemen College	313. Stevenson University
85. Dartmouth College	314. St. John Fisher College
86. Davidson College	315. St. John's College (MD)
87. Denison University	316. St. John's College (NM)
88. DePaul University	317. St. Joseph's College - Brooklyn Campus
89. DePauw University	318. St. Joseph's College - Long Island Campus
90. DeSales University	

91.	Dickinson College	319.	St. Lawrence University
92.	Dominican University of California	320.	St. Mary's College of Maryland
93.	Dowling College	321.	St. Norbert College
94.	Drake University	322.	St. Olaf College
95.	Drew University	323.	Stonehill College
96.	Drexel University	324.	St. Thomas Aquinas College
97.	Drury University	325.	Suffolk University
98.	Duke University	326.	SUNY Binghamton University
99.	Earlham College	327.	SUNY Buffalo State College
100.	Eastern Connecticut State University	328.	SUNY College at Brockport
101.	Eckerd College	329.	SUNY College at Geneseo
102.	Elizabethtown College	330.	SUNY College at Old Westbury
103.	Elmira College	331.	SUNY College at Oneonta
104.	Emerson College	332.	SUNY College of Environmental Science & Forestry
105.	Emmanuel College	333.	SUNY Cortland
106.	Emory University	334.	SUNY Fredonia
107.	Fairfield University	335.	SUNY Institute of Technology
108.	Fisk University	336.	SUNY Maritime College
109.	Flagler College	337.	SUNY Morrisville State College
110.	Florida Institute of Technology	338.	SUNY New Paltz
111.	Florida Southern College	339.	SUNY Oswego
112.	Fontbonne University	340.	SUNY Plattsburgh
113.	Fordham University	341.	SUNY Potsdam
114.	Franklin and Marshall College	342.	SUNY Purchase College
115.	Franklin College Switzerland	343.	SUNY Stony Brook University
116.	Franklin Pierce University	344.	SUNY University at Albany
117.	Franklin W. Olin College of Engineering	345.	SUNY University at Buffalo
118.	Furman University	346.	Susquehanna University
119.	Gannon University	347.	Swarthmore College
120.	Gettysburg College	348.	Sweet Briar College
121.	Gonzaga University	349.	Syracuse University
122.	Goshen College	350.	Texas Christian University
123.	Goucher College	351.	The American University of Paris
124.	Green Mountain College	352.	The American University of Rome
125.	Grinnell College	353.	The Catholic University of America
126.	Guilford College	354.	The College of Idaho
127.	Gustavus Adolphus College	355.	The College of New Jersey
128.	Hamilton College	356.	The College of New Rochelle
129.	Hamline University (Minnesota)	357.	The College of Saint Rose
130.	Hampden-Sydney College	358.	The George Washington University
131.	Hampshire College	359.	The University of Maine
132.	Hanover College	360.	The University of Rhode Island
133.	Hartwick College	361.	The University of Scranton
134.	Harvard University	362.	The University of Tulsa
135.	Harvey Mudd College	363.	Thiel College
136.	Haverford College	364.	Thomas College
137.	Hendrix College	365.	Towson University
138.	Hillsdale College	366.	Transylvania University
139.	Hiram College	367.	Trinity College
140.	Hobart and William Smith Colleges	368.	Trinity University
141.	Hofstra University	369.	Tufts University
142.	Hollins University	370.	Union College
143.	Hood College	371.	University of Chicago
144.	Hope College	372.	University of Connecticut
145.	Howard University	373.	University of Dallas
146.	Husson University	374.	University of Dayton
147.	Illinois College	375.	University of Delaware
148.	Illinois Institute of Technology	376.	University of Denver
149.	Illinois Wesleyan University	377.	University of Evansville
150.	Immaculata University	378.	University of Findlay
151.	Iona College	379.	University of Great Falls
152.	Ithaca College	380.	University of Hartford
153.	Jacobs University Bremen	381.	University of Kentucky
154.	John Cabot University in Rome	382.	University of LaVerne
155.	John Carroll University	383.	University of Maine at Farmington
156.	Johns Hopkins University	384.	University of Maine at Machias
157.	Johnson State College	385.	University of Maryland, Baltimore County
158.	Juniata College	386.	University of Mary Washington
159.	Kalamazoo College	387.	University of Massachusetts Amherst
160.	Keene State College	388.	University of Massachusetts Boston
161.	Kenyon College	389.	University of Massachusetts Dartmouth
162.	Keystone College	390.	University of Massachusetts Lowell
163.	King's College	391.	University of Miami
164.	Knox College	392.	University of Michigan
165.	Lafayette College	393.	University of New England
166.	Lake Erie College	394.	University of New Hampshire
167.	Lake Forest College	395.	University of New Haven
168.	La Salle University	396.	University of New Orleans
169.	Lasell College	397.	University of North Carolina Asheville
170.	Lawrence Technological University	398.	University of North Carolina at Chapel Hill
171.	Lawrence University	399.	University of North Carolina at Wilmington
172.	Lehigh University	400.	University of Notre Dame
173.	Le Moyne College	401.	University of Pennsylvania
174.	Lesley College	402.	University of Portland
175.	Lewis & Clark College	403.	University of Puget Sound
176.	Linfield College	404.	University of Redlands
177.	Lipscomb University	405.	University of Richmond
178.	List College The Jewish Theological Seminary	406.	University of Rochester
179.	Long Island University Brooklyn Campus	407.	University of San Diego
180.	Long Island University - C.W. Post Campus	408.	University of San Francisco
181.	Loyola Marymount University	409.	University of Southern California
182.	Loyola University Maryland	410.	University of Southern Maine
183.	Loyola University New Orleans	411.	University of St Andrews
184.	Luther College	412.	University of Tampa
185.	Lycoming College	413.	University of the Pacific
186.	Lyndon State College	414.	University of the Sciences
187.	Lynn University	415.	University of Vermont
188.	Macalester College	416.	University of Virginia
189.	Manhattan College	417.	Ursinus College

190. Manhattanville College	418. Utica College
191. Marietta College	419. Valparaiso University
192. Marist College	420. Vanderbilt University
193. Marlboro College	421. Vassar College
194. Marquette University	422. Villanova University
195. Marymount Manhattan College	423. Wabash College
196. Maryville University of St. Louis	424. Wagner College
197. Massachusetts College of Pharmacy and Health Sciences	425. Wake Forest University
198. McDaniel College	426. Wartburg College
199. Menlo College	427. Washington and Lee University
200. Mercyhurst College	428. Washington College
201. Meredith College	429. Washington & Jefferson College
202. Merrimack College	430. Washington University in St. Louis
203. Miami University (Ohio)	431. Webster University
204. Middlebury College	432. Wellesley College
205. Millsaps College	433. Wells College
206. Mills College	434. Wentworth Institute of Technology
207. Moravian College	435. Wesleyan University
208. Morehouse College	436. Western New England University
209. Mount Holyoke College	437. Westminster College (Missouri)
210. Mount Saint Mary College	438. Westminster College (Pennsylvania)
211. Mount St. Mary's College	439. Westminster College (Utah)
212. Muhlenberg College	440. Westmont College
213. Naropa University	441. Wheaton College
214. Nazareth College	442. Wheeling Jesuit University
215. Newbury College	443. Wheelock College
216. New College of Florida	444. Whitman College
217. New England College	445. Whittier College
218. New School - Eugene Lang College	446. Whitworth University
219. New York Institute of Technology (NYIT)	447. Willamette University
220. New York University	448. William Jewell College
221. Niagara University	449. Williams College
222. Nichols College	450. Wilson College
223. Northeastern University	451. Wittenberg University
224. Northland College	452. Wofford College
225. Northwestern University	453. Worcester Polytechnic Institute
226. Notre Dame de Namur University	454. Xavier University
227. Oberlin College	455. Xavier University of Louisiana
228. Occidental College	456. Yale University
229. Oglethorpe University	
* public institution	

STATE OF NORTH CAROLINA		APPLICATION			
Name of Applicant (Last, First, Middle, Maiden) (Attach listing of all previous addresses and all name changes including location and court title number., if applicable.)		FOR CONCEALED HANDGUN PERMIT			
		☐ New Permit ☐ Emergency Temporary Permit ☐ Duplicate ☐ Renewal Permit			
Street Address		Date of Birth		Social Security No. (see notification on back of form)	
City	State	Zip	State DL No. (State Id No. If No Drivers License)		State
Mailing Address			Military Status ☐ Active ☐ Reserve ☐ Discharged ☐ N/A		Race Sex Hair
Telephone No.	County of Residence		Eyes	Height	Weight Other Physical Description
APPLICATION					
I, the undersigned applicant, being duly sworn, hereby make application for a concealed handgun permit and state that the following information is correct to the best of my knowledge. I am a citizen of the United States and have been a resident of North Carolina 30 days or longer immediately preceding the filing of this Application. I am 21 years of age or older. I do not suffer from a physical or mental infirmity that prevents the safe handling of a handgun. 1. Have you successfully completed an approved firearms safety and training course which involved the actual firing of handguns and instruction in the laws of North Carolina governing the carrying of a concealed handgun and the use of deadly force? (If yes, attach certificate of completion.) (check applicable boxes) (1) ☐ Yes ☐ No 2. Are you ineligible to own, possess, or receive a firearm under the provisions of state or federal law? (2) ☐ Yes ☐ No 3. Are you under indictment or has a finding of probable cause been entered for a pending felony charge? (3) ☐ Yes ☐ No 4. Have you been adjudicated guilty in any court of a felony? (4) ☐ Yes ☐ No 5. Are you a fugitive from justice? (5) ☐ Yes ☐ No 6. Are you an unlawful user of, or addicted to marijuana, alcohol, or any depressant, stimulant, or narcotic drug, or any other controlled substance as defined in 21 U.S.C. 802? (6) ☐ Yes ☐ No 7. Are you currently, or have you been previously adjudicated or administratively determined to be lacking mental capacity or mental ill? (7) ☐ Yes ☐ No 8. Have you been discharged from the armed forces under conditions other than honorable? (8) ☐ Yes ☐ No 9. Have you been adjudicated guilty of or received a prayer for judgment continued or suspended sentence (9) ☐ Yes ☐ No 10. Have you had an entry of a prayer for judgment continued for a criminal offense which would disqualify from obtaining a concealed handgun permit? (10) ☐ Yes ☐ No 11. Are you free on bond or personal recognizance pending trial, appeal, or sentencing for a crime which would disqualify you from obtaining a concealed handgun permit? (11) ☐ Yes ☐ No 12. Have you been convicted of an impaired driving offense under G.S. 20-138.2 or 20-138.3 within three years prior to the date of this application? (12) ☐ Yes ☐ No					
☐ I hereby apply for a temporary emergency permit for a nonrenewable period of up to 90 days based upon the information set forth below. I reasonably believe that an emergency situation exists which may constitute a risk of safety to me, my family or my property. State Grounds For Temporary Emergency Permit (use attachment if necessary)					
SWORN AND SUSCRIBED TO BEFORE ME			DATE		
DATE	Signature Of Authorized To Administer Oaths		Signature of Applicant		
Title			CAUTION: Federal Law and State law on the possession of handguns and firearms differ. If you are prohibited by federal law from possessions a handgun or a firearm, You may be prosecuted in federal court. A State permit is not a defense to a federal Prosecution.		
My Commission Expires SEAL					
			SHERIFF USE ONLY		
(check list - check applicable boxes) ☐ 1. Nonrefundable permit fee paid ☐ 2. Two full sets of fingerprints administered by the Sheriffs Department ☐ 3. Original certificate of completion of approved firearms safety and training course ☐ 4. Renewal - Waiver of Application Firearm Safety and Training Course ☐ 5. Attachment(s) (specify) _____ ☐ 6. temporary documentation ☐ 7. Other _____ ☐ 8. Date temporary permit issued _____ 9. Date Temporary permit denied _____ ☐ 10. Date permit issued _____ ☐ Permit No. _____ ☐ 11. Date Permit denied _____ ☐ 12. Date submitted to SBI _____ ☐ 13. NCIS Transaction Number (NTN) _____ Signature of Sheriff _____					
Original -Sheriff Copy -SBI Copy - Applicant (over)					

	LIST OF DISQUALIFYING CRIMINAL OFFENSES	

1. Harassment of and communication with jurors {G.S. 14-225.2}
2. Violating orders of court {14-226.1}
3. Furnishing poison, controlled substances, dangerous weapons, cartridges, ammunition of alcoholic beverages to inmates of charitable, mental or penal institutions or local confinement facilities {14-258.1}
4. Weapons on campus or other educational property {14-269.2}
5. Carrying weapons into assemblies and establishments where alcoholic beverages are sold and consumed {4269.3}
6. Weapons on state property and courthouses {14-269.4}
7. Possession and sale of spring-loaded projectile knives {14-269.6}
8. Impersonation of fireman or emergency medical services personnel {14-276.1}
9. Impersonation of a law enforcement or other public officer {14.2771}
10. Communicating threats {14-277.1}
11. Weapons at parades, and other public gatherings {14-277.2}
12. Stalking {14-277.3}
13. Throwing or dropping of objects at sporting events {14-281.1}
14. Exploding dynamic cartridges and bombs {14-283}
15. Riot and inciting to riot {14-288.2}
16. Fighting or conduct creating a threat of imminent fighting or other violence {14.288,4(a)(1)}
17. Making or using any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby create a breach of peace {14-28.4(a)(2)}
18. Looting and trespassing during an emergency {14-288.6}
19. Assault on emergency personnel {14-288.9}
20. Violations of city State of Emergency Ordinances {14.288.12}
21. Violation of county State of Emergency Ordinances {14-288.13}
22. Violation of State of Emergency Ordinances {14-288.14}
23. Child abuse {14-318.2}
24. Violations of the standards for carrying a concealed weapon {14-415.2(b)}
25. Any crime of violence found in Article 14 in the North Carolina General Statutes.

Social Security Number:

The disclosure of your social security number as a part of the pistol purchase or concealed handgun permit application is voluntary. The purpose of requesting the social security number is to assist in your identification and to help distinguish you from other persons with similar names. No pistol purchase or concealed handgun permit will be denied for failing to disclose a social security number.

DO NOT MAIL THIS WORKSHEET.

You must complete and submit a *Free Application for Federal Student Aid* (FAFSA) to apply for federal student aid and to apply for most state and college aid. Applying online with *FAFSA on the Web* at www.fafsa.gov is faster and easier than using a paper FAFSA.

This worksheet has been designed to provide a preview of the questions that you may be asked on *FAFSA on the Web*. Write down notes to help you easily complete your FAFSA anytime after January 1, 2010.

See the table to the right for state deadlines. Check with your high school counselor or your college's financial aid administrator about other deadlines.

- This Worksheet is optional and should only be completed if you plan to use *FAFSA on the Web*.
- Sections in grey are for parent information.
- This Worksheet does not include all the questions from the FAFSA. The questions that are included are ordered as they appear on *FAFSA on the Web*. When you are online you may be able to skip some questions based on your answers to earlier questions.

Apply Faster—Sign your FAFSA with a Federal Student Aid PIN.

If you do not have a PIN, you can apply for one at www.pin.ed.gov. Your PIN allows you to electronically sign when you submit your FAFSA. If you are providing parent information, one parent must also sign your FAFSA. To sign electronically, your parent should also apply for a PIN.

You do not have to pay to get help or submit your FAFSA.
Submit your FAFSA for **free** online at www.fafsa.gov.
Federal Student Aid provides **free** help online at www.fafsa.gov or you can call 1-800-4-FED-AID.
TTY users (hearing impaired) may call 1-800-730-8913.

NOTES:

STATE AID DEADLINES

Check with your financial aid administrator for these states and territories:

AL, AS *, AZ, CO, FM *, GA, GU *, HI *, MH *, MP *, NC, NE, NM, NV *, PR, PW *, SD *, TX *, UT, VA *, VI *, VT *, WA, WI and WY *.

Pay attention to the symbols that may be listed after your state deadline.

AK	April 15, 2010 (date received)
AR	Academic Challenge - June 1, 2010 (date received) Workforce Grant - Contact the financial aid office. Higher Education Opportunity Grant - June 1, 2010 (fall term) (date received) - November 1, 2010 (spring term) (date received)
CA	Initial awards - March 2, 2010 + * Additional community college awards - September 2, 2010 (date postmarked) + *
CT	February 15, 2010 (date received) # *
DC	June 30, 2010 (date received by state) # *
DE	April 15, 2010 (date received)
FL	May 15, 2010 (date processed)
IA	July 1, 2010 (date received)
ID	Opportunity Grant - March 1, 2010 (date received) # *
IL	As soon as possible after 1/1/2010. Awards made until funds are depleted.
IN	March 10, 2010 (date received)
KS	April 1, 2010 (date received) # *
KY	March 15, 2010 (date received) #
LA	July 1, 2010 (date received)
MA	May 1, 2010 (date received) #
MD	March 1, 2010 (date received)
ME	May 1, 2010 (date received)
MI	March 1, 2010 (date received)
MN	30 days after term starts (date received)
MO	April 1, 2010 (date received) #
MS	MTAG and MESG Grants - September 15, 2010 (date received) # HELP Scholarship - March 31, 2010 (date received) #
MT	March 1, 2010 (date received) #
ND	March 15, 2010 (date received)
NH	May 1, 2010 (date received)
NJ	2009-2010 Tuition Aid Grant recipients - June 1, 2010 (date received) All other applicants - October 1, 2010, fall & spring terms (date received) - March 1, 2011, spring term only (date received)
NY	May 1, 2011 (date received) + *
OH	October 1, 2010 (date received)
OK	April 15, 2010 (date received) #
OR	OSAC Scholarship - March 1, 2010 Oregon Opportunity Grant - Contact the financial aid office.
PA	All 2009-2010 State Grant recipients & all non-2009-2010 State Grant recipients in degree program - May 1, 2010 (date received) * All other applicants - August 1, 2010 (date received) *
RI	March 1, 2010 (date received) #
SC	Tuition Grants - June 30, 2010 (date received) SC Commission on Higher Education - no deadline
TN	State Grant - February 15, 2010 (date received) # State Lottery - September 1, 2010 (date received) #
WV	April 15, 2010 (date received) # *

For priority consideration, submit application by date specified.

+ Applicants encouraged to obtain proof of mailing.

* Additional form may be required.

SECTION 1 - STUDENT INFORMATION

After you are online, you can add up to ten colleges on your FAFSA. The colleges will receive the information from your processed FAFSA.

Student's Last Name

First Name

Social Security Number

Student Citizenship Status (check one of the following)

☐ U.S. citizen (U.S. national)

☐ Neither citizen nor eligible noncitizen

☐ **Eligible noncitizen** (Enter your Alien Registration Number in the box to the right.)

Your Alien Registration Number

Generally, you are an eligible noncitizen if you are:

- A permanent U.S. resident with a Permanent Resident Card (I-551);
- A conditional permanent resident (I-551C); or
- The holder of an Arrival-Departure Record (I-94) from the Department of Homeland Security showing any of the following designations: "Refugee," "Asylum Granted," "Parolee" (I-94 confirms paroled for a minimum of one year and status has not expired), "Victim of human trafficking," T-Visa holder (T-1, T-2, T-3, etc.) or "Cuban-Haitian Entrant."

A									

Student Marital Status (check one of the following)

☐ Single

☐ Married or remarried

☐ Separated

☐ Divorced or widowed

You will be asked to provide information about your spouse if you are married or remarried.

Selective Service Registration

If you are male and 25 or younger, you can use the FAFSA to register with Selective Service.

Student Aid Eligibility Drug Convictions

☐ I have never attended college

☐ I have never received federal student aid

☐ I have never had a drug conviction

If you did not check any of these boxes, you will be asked more questions online.

Highest school your father completed

☐ Middle school/Jr. high

☐ College or beyond

☐ High school

☐ Other/unknown

Highest school your mother completed

☐ Middle school/Jr. high

☐ College or beyond

☐ High school

☐ Other/unknown

SECTION 2 - STUDENT DEPENDENCY STATUS

If you can check ANY of the following boxes, you will not have to provide parental information. Skip to page 4.

If you check NONE of the following boxes, you will be asked to provide parental information. Go to the next page.

☐ I was born before January 1, 1987	☐ I am married	☐ I will be working on a master's or doctorate program (e.g., MA, MBA, MD, JD, PhD, EdD, graduate certificate)	
☐ I am serving on active duty in the U.S. Armed Forces	☐ I am a veteran of the U.S. Armed Forces	☐ I have children and I provide more than half of their support	
☐ Since I turned age 13, both of my parents were deceased	☐ I was in foster care since turning age 13	☐ I have dependents (other than children or my spouse) who live with me and I provide more than half of their support	
☐ I was a dependent or ward of the court since turning age 13	☐ I am currently or I was an emancipated minor	☐ I am currently or I was in legal guardianship	☐ I am homeless or I am at risk of being homeless

NOTES:

SECTION 3 - PARENT INFORMATION

Who is considered a parent? "Parent" refers to a biological or adoptive parent. Grandparents, foster parents, legal guardians, older siblings, and uncles or aunts are **not** considered parents on this form unless they have legally adopted you. In case of divorce or separation, give information about the parent you lived with most in the last 12 months. If you did not live with one parent more than the other, give information about the parent who provided you the most financial support during the last 12 months or during the most recent year you received support. If your divorced or widowed parent has remarried, also provide information about your stepparent.

Providing your father's information? You will need:

Father's/Stepfather's Social Security Number

Father's/Stepfather's name

Father's/Stepfather's date of birth

☐ Check here if your father/stepfather is a dislocated worker

Providing your mother's information? You will need:

Mother's/Stepmother's Social Security Number

Mother's/Stepmother's name

Mother's/Stepmother's date of birth

☐ Check here if your mother/stepmother is a dislocated worker

Did your parents file or will they file a 2009 income tax return?

- ☐ My parents have already completed a tax return
- ☐ My parents will file, but have not yet completed a tax return
- ☐ My parents are not going to file an income tax return

Your parents will need their tax returns and/or W-2 forms to complete the FAFSA.

What was your parents' adjusted gross income for 2009?

Skip this question if your parents did not file taxes. Adjusted gross income is on IRS Form 1040—Line 37; 1040A—line 21; or 1040EZ—line 4.

\$

The following questions ask about earnings (wages, salaries, tips, etc.) in 2009. Answer the questions whether or not a tax return was filed. This information may be on the W-2 forms, or on the IRS Form 1040—Line 7 + 12 + 18 + Box 14 of IRS Schedule K-1 (Form 1065); 1040A—line 7; or 1040EZ—line 1

How much did your father/stepfather earn from working in 2009?

\$

How much did your mother/stepmother earn from working in 2009?

\$

In 2008 or 2009, did anyone in your parents' household receive:

- ☐ Supplemental Security Income
- ☐ Temporary Assistance for Needy Families (TANF)
- ☐ Food Stamps
- ☐ Special Supplemental Nutrition Program for Women, Infants and Children (WIC)
- ☐ Free or Reduced Price School Lunch

Note: Food Stamps and TANF may have a different name in your state. Call 1-800-4-FED-AID to find out the name of the state's program.

Did your parents have any of the following items in 2009?

Check all that apply. Once online, you may be asked to report amounts paid or received by your parents.

Additional Financial Information

- ☐ Hope and Lifetime Learning tax credits
- ☐ Child support paid
- ☐ Taxable earnings from work-study, assistantships or fellowships
- ☐ Grant and scholarship aid reported to the IRS
- ☐ Combat pay or special combat pay
- ☐ Cooperative education program earnings

Untaxed Income

- ☐ Payments to tax-deferred pension and savings plans
- ☐ Child support received
- ☐ IRA deductions and payments to self-employed SEP, SIMPLE and Keogh
- ☐ Tax exempt interest income
- ☐ Untaxed portions of IRA distributions
- ☐ Untaxed portions of pensions
- ☐ Housing, food and other living allowances paid to members of the military, clergy and others
- ☐ Veterans noneducation benefits
- ☐ Other untaxed income not reported, such as workers' compensation or disability

Your parents may be asked to provide more information about their assets.

Your parents may need to report the net worth of their current businesses and/or investment farms.

NOTES:

SECTION 4 - STUDENT INFORMATION

Did you file or will you file a 2009 income tax return?

- ☐ I have already completed my tax return
- ☐ I will file, but I have not completed my tax return
- ☐ I'm not going to file an income tax return

You will need your tax returns and/or W-2 forms to complete the FAFSA.

What was your (and spouse's) adjusted gross income for 2009?

Skip this question if you or your spouse did not file taxes. Adjusted gross income is on IRS Form 1040—Line 37; 1040A—line 21; or 1040EZ—line 4.

\$

The following questions ask about earnings (wages, salaries, tips, etc.) in 2009. Answer the questions whether or not a tax return was filed. This information may be on the W-2 forms, or on the IRS Form 1040—Line 7 + 12 + 18 + Box 14 of IRS Schedule K-1 (Form 1065); 1040A—line 7; or 1040EZ—line 1.

How much did you earn from working in 2009?

- ☐ Check here if you are a dislocated worker

\$

How much did your spouse earn from working in 2009?

- ☐ Check here if your spouse is a dislocated worker

\$

In 2008 or 2009, did anyone in your household receive:

- ☐ Supplemental Security Income
- ☐ Food Stamps
- ☐ Free or Reduced Price School Lunch
- ☐ Temporary Assistance for Needy Families (TANF)
- ☐ Special Supplemental Nutrition Program for Women, Infants and Children (WIC)

Note: Food Stamps and TANF may have a different name in your state. Call 1-800-4-FED-AID to find out the name of the state's program.

Did you or your spouse have any of the following items in 2009?

Check all that apply. Once online you may be asked to report amounts paid or received.

Additional Financial Information

- ☐ Hope and Lifetime Learning tax credits
- ☐ Child support paid
- ☐ Taxable earnings from work-study, assistantships or fellowships
- ☐ Grant and scholarship aid reported to the IRS
- ☐ Combat pay or special combat pay
- ☐ Cooperative education program earnings

Untaxed Income

- ☐ Payments to tax-deferred pension and savings plans
- ☐ Child support received
- ☐ IRA deductions and payments to self-employed SEP, SIMPLE and Keogh
- ☐ Tax exempt interest income
- ☐ Untaxed portions of IRA distributions

- ☐ Untaxed portions of pensions
- ☐ Housing, food and other living allowances paid to members of the military, clergy and others
- ☐ Veterans noneducation benefits
- ☐ Other untaxed income not reported, such as workers' compensation or disability
- ☐ Money received or paid on your behalf

You may be asked to provide more information about your (and spouse's) assets.

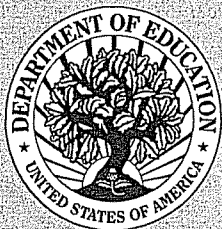
You may need to report the net worth of current businesses and/or investment farms.

NOTES:

Do not mail this Worksheet. Go to www.fafsa.gov to complete and submit your application.

For more information on federal student aid, visit www.FederalStudentAid.ed.gov.
You can also talk with your college's financial aid office about other types of student aid that may be available.

2010-2011



Student Aid Report (SAR)

Student Aid Eligibility Worksheet for Question 23

You are receiving this worksheet with your **Student Aid Report** (SAR) because you reported on your **Free Application for Federal Student Aid** (FAFSA) that you had a conviction for possessing or selling illegal drugs or because you left question 23 blank.

Complete this worksheet to determine if you are eligible for federal student aid. These are the possible eligibility results:

- "1"** means your eligibility for federal student aid is not affected by question 23.
- "2"** means your drug conviction(s) affect eligibility for federal student aid for part of this school year. To receive federal student aid, you need to tell the financial aid office at your college your "eligibility date" from question 11 on this worksheet. You can become eligible earlier in the school year if you complete an acceptable drug rehabilitation program or pass two unannounced drug tests administered by an acceptable drug rehabilitation program. Even if you are not eligible for federal student aid, you may still be eligible for aid from your state or college.
- "3"** means you are not eligible for federal student aid for this school year unless you complete an acceptable drug rehabilitation program or pass two unannounced drug tests administered by an acceptable drug rehabilitation program. Even if you are not eligible for federal student aid, you may still be eligible for aid from your state or college.

If you need help with this worksheet, or have questions, call us at 1-800-4-FED-AID (1-800-433-3243).

Answer the questions below and follow the instructions after each answer.

1 Have you ever received federal student aid?

Answer "No" if you have never received federal student grants, federal student loans or federal work-study. You should also answer "No" if you have never attended college.

NO ☐

If No, change your answer to question 23 on your SAR to "1," and sign and send us your SAR.

YES ☐

If Yes, go to question 2 on this worksheet.

2 Have you been convicted for **possessing** or **selling** illegal drugs?

Only include federal and state convictions. Do not count any convictions that have been removed from your record or that occurred before you turned age 18, unless you were tried as an adult.

NO ☐

If No, change your answer to question 23 on your SAR to "1," and sign and send us your SAR.

YES ☐

If Yes, go to question 3 on this worksheet.

3 Did the offense for **possessing** or **selling** illegal drugs occur during a period of enrollment for which you were receiving federal student aid (grants, loans and/or work-study)?

NO ☐

If No, change your answer to question 23 on your SAR to "1," and sign and send us your SAR.

YES ☐

If Yes, go to question 4 on this worksheet.



4 Have you completed an acceptable drug rehabilitation program since your conviction?
 An acceptable drug rehabilitation program must include at least two unannounced drug tests, and:
 Be qualified to receive funds from a federal, state or local government or from a federally or state-licensed insurance company;
 or
 Be administered or recognized by a federal, state or local government agency or court, or a federally or state-licensed hospital,
 health clinic or medical doctor.

YES *If Yes, change your answer to question 23 on your SAR to "1," and sign and send us your SAR.*

NO *If No, go to question 5 on this worksheet.*

5 Do you have more than two convictions for possessing illegal drugs?
 Only count convictions for offenses that occurred during a period of enrollment for which you were receiving federal student aid (grants, loans and/or work-study).

YES *If Yes, change your answer to question 23 on your SAR to "3," and sign and send us your SAR.*

NO *If No, go to question 6 on this worksheet.*

6 Do you have more than one conviction for selling illegal drugs?
 Only count convictions for offenses that occurred during a period of enrollment for which you were receiving federal student aid (grants, loans and/or work-study).

YES *If Yes, change your answer to question 23 on your SAR to "3," and sign and send us your SAR.*

NO *If No, go to question 7 on this worksheet.*

7 Write the date of your last conviction for possessing illegal drugs here: **7** / /
If you have no convictions for possessing drugs, skip to question 9 on this worksheet.

8 If you have only one conviction for possessing drugs, add **one year** to the date in question 7, and write that date here:
 If you have two convictions for possessing drugs, add **two years** to the date in question 7, and write that date here:

8 / /

9 Write the date of your last conviction for selling illegal drugs here: **9** / /
If you have no convictions for selling drugs, skip to question 11 on this worksheet.

10 If you have only one conviction for selling drugs, add **two years** to the date in question 9, and write that date here:

10 / /

11 Look at the dates you wrote in questions 8 and 10.
If there is only one date, copy that date here:
If there are two dates, write the later one here:

11 / /
YOUR ELIGIBILITY DATE

What to do with your eligibility date:

- If your eligibility date in question 11 is before July 1, 2010, change your answer to question 23 to "1," and sign and send us your SAR.
- If your eligibility date falls between July 1, 2010 and June 30, 2011, change your answer to question 23 to "2," and sign and send us your SAR. Save this worksheet for your records. Contact your financial aid office at your college, and tell them your eligibility date.
- If your eligibility date is after June 30, 2011, change your answer to question 23 to "3," and sign and send us your SAR.

STATE OF DELAWARE, Respondent Below, Appellant, v. RAY M. FLETCHER, Petitioner Below, Appellee. STATE OF DELAWARE, Respondent Below, Appellant, v. BETHANY L. ELLIS, Petitioner Below, Appellee.

* The Court, sua sponte, has assigned pseudonyms to the parties under Supr. Ct. R. 7(d).

Nos. 85/147, 2008 (Consolidated)

SUPREME COURT OF DELAWARE

974 A.2d 188; 2009 Del. LEXIS 250

April 30, 2009, Submitted

May 27, 2009, Decided

PRIOR HISTORY: [**1]

Court Below: Family Court of the State of Delaware, in and for Sussex County. No. 0404010640, Petition No. 07-31677. No. 0107013712, Petition No. 07-34845.

DISPOSITION: AFFIRMED.

COUNSEL: Paul R. Wallace (argued) and Abby Adams, Esquires, Department of Justice, Wilmington, Delaware; for Appellant.

Bethany L. Ellis, Ellendale, Delaware; Pro se, Appellee.

Richard H. Morse (argued) and Megan C. Haney, Esquires, of Young Conaway Stargatt & Taylor, Wilmington, Delaware, Amicus Curiae for Appellees. "

** The amicus curiae were court appointed. We commend counsel for the quality of their presentation on this appeal.

JUDGES: Before STEELE, Chief Justice, HOLLAND, BERGER, JACOBS and RIDGELY, Justices, constituting the Court en Banc.

OPINION BY: JACOBS

OPINION

[*190] **JACOBS, Justice:**

These consolidated appeals explore the interplay between *10 Del. C. § 1001* (the "Expungement Statute"), which authorizes the Family Court to order the expungement of all evidence of an adjudication of a juvenile's delinquency and the destruction of all indicia of arrest; and *11 Del. C. §§ 4120 and 4121* (the "Sex Offender Registration Statutes"), which mandate the designation and registration of adjudicated sex offenders.

Two issues, both of first impression, are presented.¹ Subject [**2] to exceptions not applicable here, the Expungement Statute permits expungement if: (i) three years have elapsed with no subsequent adjudication being entered against the child, (ii) there is no "material objection," and (iii) no reason appears to the contrary. The first question is whether a juvenile's statutorily-mandated designation and registration as a sex offender constitutes, as a matter of law, a "material objection" that precludes the Family Court from issuing an order of expungement. The second issue is whether, if expungement is not precluded, the juvenile whose record is expunged must continue to maintain his or her registration as a sex offender under the Sex Offender Registration Statutes.

1 Rulings by the Family Court on the first issue have been inconsistent. *Compare State v. Brown*, Del. Fam., No. JK99-0084 (Sept. 25, 2006), and *State v. Fisher*, Del. Fam., No. JK 97-1478, *aff'd*, 901 A.2d 120 (Del. 2006) (Table) (in both cases, expunging record over State's objection that Expungement Statute was superseded by state and federal Sex Offender Registration Statutes, and that sex offender designation was a "material objection" to expungement) *with In re A.W.M.*, 2005 Del. Fam. Ct. LEXIS 134, 2005 WL 3662341 (Del. Fam. Ct. Apr. 29, 2005) [**3] (exercising discretion to deny expungement because the juvenile was a registered sex offender), and *State v. Turkett*, Del. Fam., JK99-0069 (Apr. 20, 2005) (refusing to expunge juvenile adjudication record because Registration Statutes superseded Expungement Statute, thereby precluding expungement).

We conclude that the answer to both questions is no. The fact that a juvenile is a registered sex offender, alone and without more, does not as a matter of law constitute a "material objection" under the Expungement Statute.

Nor is a juvenile whose record as a sex offender is expunged required to maintain in effect his or her statutory sex offender registration. We therefore affirm the Family Court judgments expunging the delinquency adjudication records of the two appellees in these cases.

FACTUAL AND PROCEDURAL BACKGROUND

On March 28, 2002, appellee "Bethany Ellis" was adjudicated delinquent of one [*191] count of Second Degree Rape, and four counts of Second Degree Unlawful Sexual Conduct, for conduct that occurred when she was less than fourteen years old. As a result, she was required to register as a Tier III sex offender. Bethany successfully completed the treatment to which she was assigned, [**4] and was released from aftercare services. She has not been adjudicated delinquent of any charges since her 2002 adjudication.

On October 30, 2007, Bethany petitioned for expungement of her juvenile record. In support of her petition, she testified that she had been terminated as a junior member of the local fire department when the department discovered that she was a registered sex offender. She also testified that she was told that a store where she had applied for work would not hire her because of her sex offender registration. Because Bethany wishes to go into nursing, she sought expungement because she believes her record will prevent her from obtaining employment at a hospital. By orders dated January 14 and March 5, 2008,² the Family Court granted her petition.

2 Order in Family Court Case No. 0107013712, Petition No. 07-34845.

On July 21, 2004, appellee "Ray M. Fletcher" pled guilty to two counts of Second Degree Unlawful Sexual Conduct for conduct that occurred when he was 13 and 14 years old. He was adjudicated delinquent and required to register as a Tier II sex offender. Fletcher completed the terms of his probation, was granted an early termination from probation, and has [**5] not been adjudicated delinquent of any charges since his 2004 adjudication.

On October 1, 2007, Fletcher filed a petition for expungement of his juvenile record. In support of his petition, he testified that while he was attending a public high school in Ohio under an "open enrollment" program, the school discovered his juvenile record and refused to allow him to return for the following school year. Fletcher testified that he wanted to expunge his record so that he could be rid of the stigma associated with his sex offender status. By order dated January 15, 2008, the Family Court granted his petition.³

3 Order in Family Court Case No. 0404010640, Petition No. 07-31677.

The State of Delaware, represented by the Department of Justice, opposed both applications at the trial court level, and has appealed from the orders granting the appellees' petitions for expungement of their respective juvenile records. The appeals were consolidated by order of this Court. Neither appellee is represented by counsel. After the State filed its opening brief, appellee "Bethany Ellis" filed an answering brief *pro se*. The other appellee, "Ray M. Fletcher," did not file an answering brief.

On December 3, 2008, [**6] this Court appointed Richard H. Morse and Megan C. Haney, Esquires, as *amicus curiae* to file an answering brief in response to the State's opening brief. The *amicus curiae* filed their answering brief on December 24, 2008, after which the case was orally argued.

We turn to the two issues presented on this appeal.

ANALYSIS

I. Sex Offender Registration, Without More, Is Not A "Material Objection" That Automatically Precludes Relief Under The Expungement Statute.

The Expungement Statute relevantly provides:

[*192] (a) In any case wherein an adjudication has been entered upon the status of a child under 18 years of age and 3 years have elapsed since the date thereof and no subsequent adjudication has been entered against such child, the child or the parent or guardian may present a duly verified petition to the Court setting forth all the facts in the matter and praying for the relief provided for in this section;

(c) *...if no material objection is made and no reason appears to the contrary, an order may be granted directing the Clerk of the Court to expunge from the records all evidence of such adjudication, excepting adjudications involving the following crimes: Second degree murder, first degree [**7] arson, and first degree burglary, and further directing that all indicia of arrest, including fingerprints and photographs, be destroyed.*⁴

4 10 Del. C. §§ 1001(a), (c) (italics added).

The State's sole objection to the petitions for expungement, in both the Family Court and this Court, is that the petitioners were registered sex offenders. The State claims that each petitioner's designation as a sex offender constitutes a "material objection" that, as a matter of law, precludes expungement of their juvenile adjudication records under *Section 1001(c)*. Because this claim, which the Family Court rejected, involves questions of law and of statutory construction, we review the trial court's adjudication of that claim *de novo*.⁵

5 *Outten v. State*, 720 A.2d 547, 551 (Del. 1998); *Poteat v. State*, 840 A.2d 599, 603 (Del. 2003).

We begin our analysis with the observation that the term "material objection" is not defined in the Expungement Statute, and that the State cites no authority that directly supports its interpretation of that term.⁶ Nor does any language or provision in *Section 1001* forbid expungement relief to a juvenile who is a registered sex offender but otherwise satisfies the statute's [**8] requirements. Indeed, the only provision of *Section 1001* that limits the Family Court's discretion to grant expungement relief is *subsection (c)*, which excepts from the statute's reach, adjudications of Second Degree Murder, First Degree Arson, and First Degree Burglary. None of those exceptions is applicable here. The statute contains no exception for sex offender adjudications.

6 The State concedes that "there is no case law directly settling the issue." Appellant's Op. Br., at 19.

The State asks us to interpret the term "material objection" in the Expungement Statute as precluding relief to juveniles who otherwise qualify therefor, solely because they are registered sex offenders. Were we to adopt that interpretation, we would be adding to the list of offenses that the General Assembly has expressly declared cannot be expunged, all sex offenses for which registration and designation are required. The General Assembly is empowered to expand that list. We are not.

To avoid having to confront head on that obstacle, the State attempts to reach its goal by a more circuitous route. In substance, the State claims that, by enacting the Sex Offender Registration Statutes, the General Assembly [**9] has essentially already modified the Expungement Statute, albeit by implication. The State's argument runs as follows: the expungement statute is inconsistent with the Sex Offender Registration Statutes. The rules of statutory construction require that any such inconsistencies be resolved in favor of the Sex Offender Registration Statutes because, [*193] to the extent of any conflict, the expression of legislative intent in a more

specific and later-enacted statute controls the former, more general statute.⁷

7 Appellant's Op. Br., at 21.

The principle of statutory construction upon which the State stakes its case is well established:

It is assumed that when the General Assembly enacts a later statute in an area covered by a prior statute, it has in mind the prior statute and therefore statutes on the same subject must be construed together so that effect is given to every provision unless there is an irreconcilable conflict between the statutes, in which case the later supersedes the earlier.⁸

8 *State, Dep't of Labor v. Minner*, 448 A.2d 227, 229 (Del. 1982); see also *State v. Cook*, 600 A.2d 352, 355 ("Generally accepted principles of statutory construction provide that, to the extent of any [**10] conflict, the expression of legislative intent in a more specific and later-enacted statute controls the former, more general statute.")

What is disputed is not this principle but its application. For the State to prevail it must establish, first, that the Expungement Statute "irreconcilably conflict[s]" with the later-enacted Sex Offender Registration Statutes; and second, that the latter statutes are more specific than the former with respect to their common subject matter. The State has failed to satisfy either condition for the application of its argued-for statutory construction rule.

A. The Statutes Are Not Irreconcilably In Conflict.

Although the State asserts that the Expungement and the Sex Offender Designation and Registration Statutes are irreconcilably in conflict, nowhere does the State actually identify any irreconcilably conflicting provisions. As noted, the Expungement statute contains no exception or "carve out" for crimes that require sex offender designation and registration. Nor does any provision in the Sex Offender Registration Statutes purport to limit the discretion of the Family Court to grant expungement relief in a proper case.

That perhaps is why the arguments [**11] the State offers to satisfy the irreconcilable conflict requirement are diffuse and difficult to parse. The State's position, as best as we can fathom it, is as follows: the initial version of Delaware's sex offender registration law contained a requirement that certain registration records be destroyed

for juveniles adjudicated delinquent of sex offenses, who reach age twenty-five without committing any other offenses.⁹ That provision was eliminated in 1998 when *Section 4120* was re-written and *Sections 4121* and *4122* were added.¹⁰ From this history, the State asserts that:

The inclusion, and later elimination, of this section further clarifies the intent of the General Assembly to prohibit a juvenile sex offender from having his or her sex offenses expunged or any concomitant relief from sex offender designation and registration in any way other than as specifically provided in the sex offender registration statutes [*i.e.*, by the Superior Court as provided in *Section 4121*].¹¹

9 11 Del. C. § 4120(d) (1994) (repealed by 71 Del. Laws. ch. 429).

10 See 71 Del. Laws ch. 429.

11 Appellant's Op. Br., at 15-16.

The difficulty with this assertion is that although it may arguably suggest, at first [*12] blush, a statutory conflict, the conflict is only apparent and in any event is not [*194] irreconcilable. Indeed, the statutes are easily harmonized. A juvenile who is adjudicated delinquent in connection with a sex offense will be designated a sex offender and be required to register.¹² Then, three years later, the Family Court may order, in an appropriate case, expungement of the juvenile record, including "*all evidence of such adjudication*."¹³ Because sex offender registration is "evidence" of an adjudication that a juvenile committed a sex offense requiring registration, that evidence may be expunged as well.

12 Del. C. §§ 4120 and 4121.

13 10 Del. C. § 1001(c) (italics added).

Thus, the Expungement Statute and the Sex Offender Registration Statutes are neither inconsistent nor irreconcilable. To be sure, *Section 4121* establishes a process, independent of *Section 1001* expungement, under which the Superior Court may relieve an individual of his or her sex offender designation. Even if that were somehow viewed as inconsistent with the Expungement Statute, this Court should be:

reluctant to find repeal by implication even when the later statute is not entirely harmonious with the earlier one. [*13] If two statutes conflict somewhat, the court must, if possible, read them so as to

give effect to both, unless the text or legislative history of the later statute shows that [the legislature] intended to repeal the earlier one and simply failed to do so expressly.¹⁴

14 Sutherland, Statutory Construction § 23.09 at 338 (5th ed.) (quoted in *Hubbard v. Dunkleberger*, 659 A.2d 227 (Table), 1995 WL 131789, at *6-7 (Del. Supr. Mar. 16, 1995).

Here, there is no showing that the General Assembly intended to repeal in part the Expungement Statute when it adopted and later amended the Sex Offender Registration Statutes. Had the General Assembly intended to prohibit expungement of a juvenile's sex offender registration, it could have so provided directly and explicitly. "The underlying purpose of allowing expungement is to afford a juvenile the opportunity of starting [] life 'anew' once having reached the age of majority and otherwise having come within the compliance requirements of the [expungement] statute."¹⁵ This policy has been Delaware law for over fifty years,¹⁶ and should not be changed in the absence of a clear statutory mandate. There is no such clear mandate. This Court will not [*14] do by judicial implication what the General Assembly itself has declined to do by express legislation.

15 *Martin v. State*, 1986 Del. Fam. Ct., LEXIS 199, at *3 (Del. Fam. Ct.).

16 See *Turkett v. State*, JK99-00687 (Del. Fam. Ct., Apr. 20, 2005) (Order) (recognizing that a juvenile expungement statute has been part of Delaware law since 1953).

B. The Sex Offender Registration Statutes Do Not Evidence A More Specific Legislative Intent As To Expungement of A Sex Offender's Registration.

For its amendment-by-implication argument to prevail, the State must also show that the Sex Offender Registration Statutes evidence, more specifically than the Expungement Statute, a legislative intent to prohibit the expungement of sex offender registration. But those later-enacted statutes cannot fairly be read to evidence any such specific legislative intent.

The State claims that the Registration Statutes are more specific, because 11 Del. C. § 4121(e)(2) expressly provides a particular mechanism to alter or lift a sex offender's registration requirement, namely, petitioning the Superior Court for a reduction [*195] in the offender's Risk Assessment Tier. *Section 4121(e)(2)*, like 10 Del. C. § 1001, prescribes a [*15] minimum time period

that must lapse before such a petition can be filed, and requires that the offender must not have been convicted of any additional crimes during that time period. Lastly, the State points to *Section 4121(q)*, which provides that "This section [4121] shall be effective notwithstanding any law, rule or regulation to the contrary."

Although re-packaged to address the "greater specificity" prong of its statutory construction claim, the State's argument is basically a re-formulation of its initial claim that the Expungement and the Sex Offender Registration statutes are in irreconcilable conflict. About specificity the argument proves nothing, because the latter statutes nowhere specifically mention or even refer, directly or indirectly, to the Expungement Statute. At best, any arguable conflict between *Section 4121(q)* and *Section 1001* is inferential, but even the inference cannot support the State's amendment-by-implication position, because *Section 4121(q)* is easily reconciled with *Section 1001*. The Sex Offender Registration Statutes are intended to cover all persons—including juveniles—who commit sex offenses that merit designating the offender as a "sex offender" [**16] and requiring him or her to register as such. *Section 4121(q)* may be viewed as intended to preclude any judicial interpretation that would exempt juveniles from the category of persons subject to those statutes. From this it does not follow, however, that a juvenile, once designated and registered as a sex offender, is forever precluded from seeking relief under the Expungement Statute, and must resort exclusively to the pathway for relief afforded by *Section 4121*. To so conclude would turn the applicable rule of construction—which would permit a finding that a later-enacted statute has amended an earlier one by implication only where (*inter alia*) the two statutes are in irreconcilable conflict—on its head.

We conclude, for these reasons, that the fact that a juvenile is a registered sex offender, of itself and without more, does not constitute a "material objection" to expungement within the meaning of *10 Del. C. § 1001*.

II. Juveniles Whose Adjudication Records Are Expunged Are Not Required To Maintain Their Registration As Sex Offenders Under 11 Del. C. §§ 4120 and 4121.

The State next argues, in the alternative, that even if this Court rules (as it now has) that the Sex Offender [**17] Registration Statutes do not trump the Expungement Statute, those statutes should be read to operate independently of each other, so that the Family Court's expungement of a juvenile adjudication will not eliminate that sex offender's designation and the attendant statutory registration and notification requirements. The State's alternative argument involves questions of law

and of statutory construction, that are reviewed *de novo*.¹⁷

17 See authorities cited at note 5, *supra*. Although this question was not preserved below and the Family Court did not decide it, the interests of justice require that this Court decide the issue, because otherwise the full significance of the Family Court's order, *i.e.*, the petitioners' removal from the sex offender registry will remain uncertain. See, *e.g.*, *In re Ikard*, 2007 Del. Fam. Ct. LEXIS 43, 2007 WL 1574527, at 3, n.7 (Del. Fam. Ct. Mar. 23, 2007).

This argument labors under two insuperable burdens. The first is that it is in substance identical to the State's "material objection" argument, only packaged in different words. The second is that it [**196] amounts to little more than *ipse dixit*. In that portion of its brief devoted to this argument, the State re-asserts that "[d]esignation [**18] as a 'sex offender' is a 'material objection' that precludes a sex offender from having his or her juvenile record expunged pursuant to [10 Del. C. § 1001]." The State then insists that "if the Court does not agree that *Sections 4120* and *4121* prevail, [then] it *must* find that an expungement of an adjudication of delinquency for a sex offense is separate and distinct from the application of *Delaware's Megan's Law [Sections 4120 and 4121]* to a sex offender, and cannot nullify the statutorily-mandated designation of that person as a 'sex offender' or the related registration requirement." ¹⁸ But, the State nowhere shows why this Court, having rejected the predicate for its argument, *must* nonetheless validate that argument clothed in different words.

18 Appellant's Op. Br., at 29-30 (*italics added*).

Although the analysis could end at this point, we pause to mention that the State's apparent inability to offer reasoned argument in place of *ipse dixit* comes as little surprise. The State's alternative contention ignores the intent and the effect of expungement. A "sex offender" is defined to include "[a]ny juvenile who is adjudicated delinquent of [enumerated sexual] offenses...." ¹⁹ Once expungement [**19] of a juvenile's record is granted, it is as if the adjudication never occurred:

As used in the criminal law, "expungement" means the "eradication of a record of conviction or adjudication upon the fulfillment of prescribed conditions.... It is *not simply the lifting of disabilities* attendant upon conviction and a restoration of civil rights.... It is rather a redefinition of status, a process of *erasing the legal event of conviction* or adjudication and thereby

restoring to the regenerative offender his *status quo ante*." ²⁰

19 See 11 Del. C. § 4121(a)(4).

20 *People v. Frawley*, 82 Cal. App. 4th 784, 98 Cal. Rptr. 2d 555, 559 (Cal. App. 2000) (citations omitted, ellipses and emphasis in original); see also, *Stephens v. Van Arsdale*, 227 Kan. 676, 608 P.2d 972, 983-84 (Kan. 1980) ("[A]nnulment of conviction statutes, often called expungement statutes, do not merely lift disabilities resulting from conviction and restore civil rights; they have the legal effect of restoring the reformed offender to his status quo existing prior to the conviction") (internal quotation marks omitted.)

An expunged adjudication cannot coexist with a requirement of continued maintenance of sex offender registration, because the adjudication itself becomes [^{**20}] a nullity. That is manifestly the intent of *Section 1001*, which requires not only the expungement from the records of "all evidence of [the] adjudication," but also "the destruction of all indicia of arrest including finger-

prints and photographs," ²¹ to prevent an expunged adjudication from being used for any purpose. To interpret the Sex Offender Registration Statutes as trumping that provision of *Section 1001* would not only contravene the legislative intent, but also would create an exception to *Section 1001* not found in the language of either that statute or of *Section 4121*. Had the General Assembly intended for the expungement of a juvenile's record no longer to result in the destruction of "all indicia of arrest," it could have expressed that intent by amending *Section 1001* or by addressing expungement in *Sections 4120* and *4121*. The role of this Court when construing a statute is to give effect to the [^{*197}] policy intended by the General Assembly. ²² It is not to effectuate the inconsistent policy preferences of other branches of government.

21 10 Del. C. § 1001(a).

22 *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982).

CONCLUSION

For the foregoing reasons, the judgments of the Family [^{**21}] Court expunging the juvenile offense adjudication records of the appellees are affirmed.

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IN THE INTEREST OF: A.B.; APPEAL OF: A.B.

No. 2149 EDA 2006

SUPERIOR COURT OF PENNSYLVANIA

2009 PA Super 252; 987 A.2d 769; 2009 Pa. Super. LEXIS 4985

**October 23, 2008, Argued
December 24, 2009, Filed**

PRIOR HISTORY: [***1]

Appeal from the Order of the Court of Common Pleas of Monroe County, Criminal Division, No. CP-45-JV-0030033-1999. Before WORTHINGTON, J.
In re A.B., 2007 Pa. Super. LEXIS 2113 (Pa. Super. Ct., July 18, 2007)

DISPOSITION: Order reversed; case remanded. Jurisdiction is relinquished.

COUNSEL: Michael A. Ventrella, Tannersville, for appellant.

Michael T. Rakaczewski, Assistant District Attorney, Stroudsburg, for Commonwealth, appellee.

JUDGES: BEFORE: STEVENS, MUSMANNO, KLEIN, BENDER, BOWES, GANTMAN, SHOGAN, FREEDBERG, AND CLELAND, JJ. OPINION BY GANTMAN, J. DISSENTING OPINION BY KLEIN, J.

OPINION BY: GANTMAN

OPINION

[**771] OPINION BY GANTMAN, J.:

[*P1] Appellant, A.B., appeals from the order entered in the Monroe County Court of Common Pleas, which denied his petition to expunge his juvenile record. Specifically, Appellant asks us to determine whether the court committed an error of law or an abuse of discretion when it denied Appellant's petition, after he had fulfilled all of the requirements for expungement under *18 Pa.C.S.A. § 9123(a)(3)*. After careful review of the certified record as well as the relevant law pertaining to expungement of juvenile records, we hold the trial court misapplied the law in denying Appellant's expungement petition, where Appellant fulfilled the requirements under *Section 9123(a)(3)*; and the Commonwealth failed to show cause to deny expungement and retain Appellant's juvenile record. Accordingly, we reverse and remand with directions to expunge [***2] Appellant's juvenile record.

[*P2] The trial court opinion set forth the relevant facts and some of the procedural history of this case as follows:

On or about January 29, 1999, a Juvenile Petition was filed against [Appellant], alleging that on or about January 26, 1999 at Pocono Mountain Senior High School, [Appellant] knowingly or intentionally possessed 185 white pills, knowing that he was not licensed or privileged to do so; [Appellant] knowingly or intentionally possessed 185 white pills with the intent to manufacture or deliver the same, knowing that he was not licensed or privileged to do so; and that [Appellant] used or possessed with intent to use drug paraphernalia. [Appellant] subsequently made an admission to one count of Possession with Intent to Deliver a Controlled Substance ["PWID"], an ungraded felony if he had been an adult. On March 8, 1999, [the court] entered an Order placing [Appellant] with Youth Services of Pennsylvania. On June 24, 1999, Appellant was released from Youth Services of Pennsylvania and placed on probation for a period of six months.

On April 20, 2006, [Appellant] filed a Petition to Expunge. A hearing on [Appellant's] Petition to Expunge was held on [***3] June 28, 2006. On June 29, 2006, [Appellant] and the Commonwealth submitted memoranda of law in support of their respective positions. On July 7, 2006, [the court] entered an order denying [Appellant's] Petition to Expunge.

[**772] [Appellant] filed a notice of appeal...on August 1, 2006. On August 7, 2006, [Appellant] filed a Statement pursuant to *Pa.R.A.P. 1925(b)*.

(Trial Court Opinion, filed October 2, 2006, at 1-2).

[*P3] On June 1, 2007, a unanimous panel of this Court initially reversed and remanded the matter to the trial court to expunge Appellant's juvenile record. On June 13, 2007, the Commonwealth filed an application for reargument. In response, the original panel first allowed panel reconsideration but subsequently recommended *en banc* reargument, which this Court granted.

[*P4] Appellant presents the following issue for review:

DID THE [TRIAL] COURT ABUSE ITS DISCRETION WHEN, AFTER [APPELLANT] HAD FULFILLED ALL THE REQUIREMENTS OF 18 PA.C.S.A. § 9123, IT DENIED THE PETITION TO EXPUNGE?

(Appellant's Brief on Reargument at 4).

[*P5] Appellant argues he is entitled to expungement of his juvenile record as a matter of law, because he met the requirements under 18 Pa.C.S.A. § 9123(a)(3). Specifically, Appellant [***4] alleges five (5) years elapsed since his final discharge from probation, he has not been convicted of a subsequent felony, misdemeanor or adjudication of delinquency, and no proceeding is pending seeking a conviction or adjudication. Appellant maintains he finished high school, works a steady job, takes courses at a community college, and has had no further encounters with the legal system since the one in 1999. Appellant contends the court overlooked the statutory mandate to expunge his record under Section 9123(a)(3) and, instead, relied solely on the statutory language that provides for denial of expungement "upon cause shown" to support its decision that the disposition of a juvenile expungement petition is wholly discretionary. Appellant insists the court's application of the statute is flawed. Appellant reasons the meaning of the phrase "except upon cause shown" does not render the entire statute a matter of judicial discretion, as the Commonwealth suggests. Appellant maintains the application of the juvenile expungement statute in his case raises a question of statutory construction and interpretation, which is a pure question of law.

[*P6] Alternatively, Appellant asserts that even [***5] if this Court agrees the process of juvenile record expungement is wholly a matter of judicial discretion, the court nonetheless abused its discretion in this case. Appellant submits the court erroneously referred to the criminal code at 35 P.S. § 780-119(a) in making its decision to deny his petition for expungement, where that statute applies only to criminal offenses. Appellant posits

the court's reliance on Section 780-119(a) is counter to the clear intent of Pennsylvania juvenile law, which is primarily to provide juveniles with an opportunity to correct their behavior, continue with their lives without the stigma of an adjudication, obtain treatment, and achieve rehabilitation. Appellant claims the Commonwealth's focus on the "nature" of his juvenile offense is inappropriate as the nature of the juvenile offense alone is insufficient to overcome the statutory mandate for expungement. Appellant reiterates he met the requirements of Section 9123(a)(3), and the court should have granted his expungement petition on that basis. Appellant concludes the court erred as a matter of law or abused its discretion in denying his petition, and this Court should reverse and remand with a directive [***6] to expunge his juvenile record.

[*P7] In response, the Commonwealth argues the denial of Appellant's expungement [***773] petition was a proper exercise of the court's discretionary powers, based on society's interest in retaining Appellant's records for the protection of the public. The Commonwealth concedes Appellant satisfied the statutory requirements specified in Section 9123(a)(3). Nevertheless, the Commonwealth contends it "showed cause" to deny Appellant's expungement petition because: Appellant was seventeen (17) years old at the time of the offense; he admitted to the offense of PWID; and the offense involved selling drugs in school and possessing one-hundred eighty-five (185) Ecstasy pills. The Commonwealth further submits Appellant failed to present evidence of adverse consequences arising from his juvenile record; instead, Appellant is now employed and attends college. The Commonwealth directs this Court's attention to the factors set forth in Section 9123(a)(4) to determine the meaning of "cause shown," such as the nature of the Appellant's offense, his age, history of employment, criminal activity and drug or alcohol problems, adverse consequences he might suffer if the records are [***7] not expunged, and the protection of public safety. The Commonwealth suggests consideration of factors related to substantive due process, including the factors set forth in *Commonwealth v. Wexler*, 494 Pa. 325, 431 A.2d 877 (1981), provides additional guidance for the meaning of the term "cause shown." The Commonwealth concludes the court properly denied Appellant's expungement petition. For the following reasons, we hold the relief Appellant requests is warranted.

[*P8] A challenge to the court's interpretation and application of a statute raises a question of law. *Commonwealth v. Williams*, 2005 PA Super 105, 871 A.2d 254, 262 (Pa. Super. 2005). "As with all questions of law, the appellate standard of review is *de novo* and the appellate scope of review is plenary." *In re Wilson*, 2005 PA

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Super 211, 879 A.2d 199, 214 (Pa.Super. 2005) (en banc).

[*P9] This case involves the interpretation and application of *Section 9123* of the Criminal History Record Information Act ("CHRIA"), which governs expungement of juvenile records and provides, in relevant part, as follows:

§ 9123. Juvenile Record

(a) **Expungement of juvenile records.**— Notwithstanding the provisions of section 9105 (relating to other criminal justice information) and **except upon [***8] cause shown**, expungement of records of juvenile delinquency cases wherever kept or retained **shall occur** after 30 days' notice to the district attorney, whenever the court upon its motion or upon the motion of a child or the parents or guardian finds:

(1) a complaint is filed which is not substantiated or the petition which is filed as a result of a complaint is dismissed by the court;

(2) six months have elapsed since the final discharge of the person from supervision under a consent decree and no proceeding seeking adjudication or conviction is pending;

(3) five years have elapsed since the final discharge of the person from commitment, placement, probation or any other disposition and referral and since such final discharge, the person has not been convicted of a felony, misdemeanor or adjudicated delinquent and no proceeding is pending seeking such conviction or adjudication; or

(4) the individual is 18 years of age or older, the attorney for the Commonwealth consents to the expungement and a court orders the expungement after giving consideration to the following factors:

(i) the type of offense;

[**774] (ii) the individual's age, history of employment, criminal activity and drug or alcohol [***9] problems;

(iii) adverse consequences that the individual may suffer if the records are not expunged; and

(iv) whether retention of the record is required for purposes of protection of the public safety.

18 Pa.C.S.A. § 9123(a)(1-4) (emphasis added).

[*P10] We begin our analysis with a review of various doctrines of statutory construction, the polestar of which is to determine the intent of the Legislature. *1 Pa.C.S.A. § 1921(a)*. *Section 1921* in full provides:

§ 1921. Legislative intent controls

(a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.

(b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

(c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

(1) The occasion and necessity for the statute.

(2) The circumstances under which it was enacted.

(3) The mischief to be remedied.

(4) The object to be attained.

(5) The former law, if any, including [***10] other statutes upon the same or similar subjects.

(6) The consequences of a particular interpretation.

(7) The contemporaneous legislative history.

(8) Legislative and administrative interpretations of such statute.

(7) Provisions decreasing the jurisdiction of a court of record.

[**775] (8) Provisions enacted finally prior to September 1, 1937 which are in derogation of the common law.

(c) All other provisions of a statute shall be liberally construed to effect their objects and to promote justice.

1 Pa.C.S.A. § 1921. *See also Commonwealth v. Menezes*, 2005 PA Super 90, 871 A.2d 204, 209 (Pa.Super. 2005), appeal denied, 586 Pa. 724, 890 A.2d 1057 (2005); *Commonwealth v. Reaser*, 2004 PA Super 148, 851 A.2d 144, 148 (Pa.Super. 2004), appeal denied, 581 Pa. 674, 863 A.2d 1145 (2004).

When interpreting a statute, the court must give plain meaning to the words of the statute. It is not a court's place to imbue the statute with a meaning other than that dictated by the plain and unambiguous language of the statute. Moreover, we presume the legislature did not intend an absurd or unreasonable result.

In re R.D.R., 2005 PA Super 204, 876 A.2d 1009, 1016 (Pa.Super. 2005). Section 1928 further describes the rule of strict and liberal construction as follows:

§ 1928. Rule of strict and liberal construction

(a) The rule that statutes in derogation of the common law are to be strictly construed, shall have no application to the statutes of this Commonwealth enacted finally after September 1, 1937.

(b) All provisions of a statute of the classes [***11] hereafter enumerated shall be strictly construed:

(1) Penal provisions.

(2) Retroactive provisions.

(3) Provisions imposing taxes.

(4) Provisions conferring the power of eminent domain.

(5) Provisions exempting persons and property from taxation.

(6) Provisions exempting property from the power of eminent domain.

1 Pa.C.S.A. § 1928.

[*P11] Pursuant to 18 Pa.C.S.A. § 9102, the term "expunge" means: "(1) To remove information so that there is no trace or indication that such information existed; (2) to eliminate all identifiers which may be used to trace the identity of an individual, allowing remaining data to be used for statistical purposes; or (3) maintenance of certain information required or authorized under the provisions of section 9122(c) (relating to [adult criminal record] expungement), when an individual has successfully completed the conditions of any pretrial or posttrial diversion or probation program." 18 Pa.C.S.A. § 9102; [***12] *Schmidt v. Deutsch Larrimore Farnish & Anderson, LLP*, 2005 PA Super 212, 876 A.2d 1044, 1047 n.2 (Pa.Super. 2005). Section 9123 pertaining to juveniles provides the remedy of record expungement upon satisfaction of the statutory criteria, "except upon cause shown." 18 Pa.C.S.A. 9123(a). Remedial legislation enjoys liberal construction, while any exceptions to its remedial provisions must be narrowly construed. *See generally Borough of Youngwood v. Pennsylvania Prevailing Wage Appeals Board*, 596 Pa. 603, 615, 947 A.2d 724, 731 (2008); *Commonwealth v. Wilgus*, 2009 PA Super 116, 975 A.2d 1183, 1187 (Pa.Super. 2009).

[*P12] Moreover, when a statute contains the word "shall," it is "by definition mandatory, and is generally applied as such." *Chanceford Aviation Properties L.L.P. v. Chanceford Tp. Bd. of Supervisors*, 592 Pa. 100, 108, 923 A.2d 1099, 1104 (2007). The Pennsylvania Supreme Court "has recognized that the term 'shall' is mandatory for purposes of statutory construction when a statute is unambiguous." *Id.* Under the "shall" rule, Section 9123(a) favors expungement whenever a juvenile offender has met the requirements of any subsection under the statute. 18 Pa.C.S.A. § 9123(a). The Commonwealth bears the burden to meet the [***13] "show cause" exception for denial of expungement. *Id.*

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[*P13] In Pennsylvania, "juvenile proceedings are not criminal proceedings." *In re S.A.S.*, 2003 PA Super 494, 839 A.2d 1106, 1108 (Pa.Super. 2003) (citing *In re R.A.*, 2000 PA Super 323, 761 A.2d 1220, 1223 (Pa.Super. 2000)).

Under the Juvenile Act, juveniles are not charged with crimes; they are charged with committing delinquent acts. They do not have a trial; they have an adjudicatory hearing. If the charges are substantiated, they are not convicted; they are adjudicated delinquent. Indeed, the Juvenile Act expressly provides an adjudication under its provisions is not a conviction of a crime. 42 Pa.C.S.A. 6354(a). . . . These are not insignificant differences or the transposing of synonyms. The entire juvenile system is different, with different purposes and different rules.

In re S.A.S., *supra* at 1108-09 (some internal citations omitted).

[*P14] The stated purpose of the Juvenile Act is as follows:

Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the [***14] development of competencies to enable children to become responsible and productive members of the community.

42 Pa.C.S.A. § 6301(b)(2). [**776] "This section evidences the Legislature's clear intent to protect the community while rehabilitating and reforming juvenile delinquents. The rehabilitative purpose of the Juvenile Act is attained through accountability and the development of personal qualities that will enable the juvenile offender to become a responsible and productive member of the community." *In re R.D.R.*, *supra* at 1013 (internal citations and quotation marks omitted). *See also Commonwealth v. Hooks*, 2007 PA Super 85, 921 A.2d 1199, 1206 (Pa.Super. 2007), *appeal denied*, 594 Pa. 695, 934 A.2d 1276 (2007) (stating specific goal of Juvenile Act is to provide care, protection and wholesome mental and physical development of children within provisions of Act; Act protects juvenile offenders until their eighteenth

birthday, not just until day before). The express purpose of the Juvenile Act is to allow for treatment, reformation and rehabilitation of juvenile offenders, not to punish them. *In re K.J.V.*, 2007 PA Super 390, 939 A.2d 426, 428 (Pa.Super. 2007). "To this end, the juvenile court system was designed to provide [***15] [a] distinctive procedure and setting to deal with the problems of youth." *Id.*

[*P15] This Court has already ascertained the clear intent of CHRIA with respect to juveniles as follows:

The purpose of [CHRIA] is to provide an opportunity for children who crash upon the reef of criminal behavior to leave behind the damaging effect of such collision upon a showing that they had exercised sufficient restraint as to reasonably assure the authorities that total redemption was justified. [CHRIA] gave the delinquent and dependent child something they never before had. Although the intent and promise of the juvenile justice movement in this State and Country since the Act of April 23, 1903, P.L. 274 was declared constitutional in *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905), was to insulate the child from the harshness of the criminal law and to provide treatment and rehabilitation instead of punishment, there was always an elusive stigma attached to an adjudication of delinquency and/or dependency, which the expungement act sought to eliminate. The balance clearly proposed by the legislature was to give the child this additional benefit, but only if deserving, for there is an equal consideration [***16] of protection of public safety by having the record of the child available if his chronic behavior and course of conduct presage adult criminal behavior.

In Interest of Jacobs, 334 Pa. Super. 613, 483 A.2d 907, 909 (Pa.Super. 1984) (emphasis added).

[*P16] Prior to the enactment of CHRIA in 1980, the court was left to decide whether to expunge a juvenile record by balancing the Commonwealth's interest in preserving the record against the juvenile's interest in avoiding the numerous disadvantages of retention of the juvenile record. *In Interest of John W.*, 300 Pa. Super. 293, 446 A.2d 621 (Pa.Super. 1982). CHRIA, however, states the court "shall" expunge a juvenile record where the petitioner meets the requirements of any subsection

under *Section 9123(a)(3)*, unless the Commonwealth successfully justifies retention of the juvenile record, otherwise stated as "except upon cause shown." ¹ 18 Pa.C.S.A. § 9123(a); *In Interest of Jacobs, supra*.

1 CHRIA contains no precise definition for the words "except upon cause shown" in *Section 9123*, although *Section 9123(a)(4)* sets forth several factors for the court to consider upon review of a juvenile expungement petition filed under that subsection, **where the Commonwealth consents** to expungement [***17] and the petitioner is at least eighteen (18) years old: (1) the type of offense; (2) the individual's age, history of employment, criminal activity and drug or alcohol problems; (3) adverse consequences that the individual may suffer if the records are not expunged; and (4) whether retention of the record is required for purposes of protection of the public safety. *See 18 Pa.C.S.A. 9123(a)(4)(i-iv)*. The Commonwealth suggests we rely on these factors to review the court's decision under *Section 9123(a)(3)*. We observe, however, that *Section 9123(a)* is set forth in the disjunctive. Therefore, we decline the Commonwealth's invitation to overlook the explicit terms of the statute.

[**777] [*P17] In denying Appellant's petition, the court relied heavily on *Section 780-119(a)* of the Controlled Substance, Drug, Device and Cosmetic Act, referring to the expungement of criminal records for offenses under certain circumstances, which in part provides:

§ 780-119. Expunging criminal records

(a) Any records of arrest or prosecution or both for a criminal offense under this act, **except for persons indicted for [PWID]** or under the provisions previously governing controlled substances in the Commonwealth of Pennsylvania [***18] or any political subdivision thereof **shall be promptly expunged** from the official and unofficial arrest and other criminal records pertaining to that individual when the charges are withdrawn or dismissed or the person is acquitted of the charges: Provided, That such expungement shall be available as a matter of right to any person only once. . .

* * *

35 P.S. § 780-119(a) (emphasis added).

[*P18] Instantly, the court entered a disposition order on March 8, 1999, based upon Appellant's admission. Appellant was released from Youth Services of Pennsylvania on June 24, 1999, and placed on probation for six months. Appellant successfully completed the probation without incident. Over six years later, Appellant filed his expungement petition on April 20, 2006. At that time, more than five (5) years had elapsed since Appellant's discharge from probation, and Appellant did not have any subsequent criminal convictions or delinquency adjudications pending. Therefore, Appellant met the criteria under *Section 9123(a)(3)*. *See 18 Pa.C.S.A. § 9123(a)(3)*. Thus, expungement was mandatory under *Section 9123*, unless the Commonwealth successfully justified retention of Appellant's juvenile record, otherwise [***19] stated as "except upon cause shown." *See 18 Pa.C.S.A. § 9123(a); In Interest of Jacobs, supra*.

[*P19] In deciding the Commonwealth had carried that burden, the trial court stated:

At the time [Appellant] petitioned this court to expunge his record, he was twenty-four years old. Since his final discharge from probation, [Appellant] has not been convicted of a felony or misdemeanor or adjudicated delinquent and no proceeding was pending seeking such conviction or adjudication. For the past five years, [Appellant] has been attending Northampton Community College. According to [Appellant], he has been self-employed as a roofer. . .since he was eighteen years old. At the hearing on his Petition to Expunge, [Appellant] argued that this [c]ourt should expunge his record so that he can go on with his life and seek better employment; however, [Appellant] failed to present any substantive evidence of adverse consequences that he has suffered as a result of his juvenile record.

The Commonwealth was opposed to the expungement. In support of its position, the Commonwealth **focused on the age** of [Appellant] at the time he committed the offense, as well as **the serious nature of the offense**. At the [**778] hearing [***20] the Commonwealth argued ". . .[Appellant] was basically selling drugs in school, [and] not just a minor amount. We're talking over a hundred pills of Ecstasy. I think that's very significant."

Additionally, the Commonwealth drew the [c]ourt's attention to [35 P.S. § 780-119(a)]. . . .

* * *

Although [35 P.S. § 780-119(a)] does not specifically address the expungement of juvenile records, the Commonwealth argued since the Controlled Substance, Drug, Device and Cosmetic Act specifically prohibits the expungement of records where a person was charged with [PWID], we should not grant [Appellant's] Petition for Expungement.

After carefully considering the [*Wexler* factors], we found that the Commonwealth had shown cause why [Appellant's] record should not be expunged. Although we commend [Appellant] on his efforts to turn his life around, we find that the particular facts of this case do not warrant an expungement. [Appellant] was seventeen years old when he committed the felony offense. This was not a situation where [Appellant] entered into a [c]onsent [d]ecree, rather [Appellant] admitted that he had committed the offense. Furthermore, we find it significant that the drafters of the Controlled [***21] Substance, Drug, Device and Cosmetic Act chose to prohibit the expungement of records where a person was charged with [PWID]. As such, we find that [Appellant's] criminal record in this matter should not be expunged because there is a societal interest in retaining his record, namely, the protection of the public safety.

(Trial Court Opinion at 4-6) (emphasis added). We respectfully disagree with the court's analysis.

[*P20] Essentially, the court focused its review of Appellant's expungement petition on: (1) the nature of Appellant's juvenile offense in relation to *Section 780-119(a)* of the Controlled Substance, Drug, Device and Cosmetic Act; (2) the *Wexler* factors; (3) Appellant's age at the time of the offense; (4) Appellant's failure to articulate specific adverse consequences he has suffered as a result of his juvenile record; and (5) the fact that Appellant "admitted" to his juvenile offense.

[*P21] Initially, we observe the court's reliance on *Section 780-119(a)* is misplaced. *Section 780-119(a)* expressly relates to expungement of criminal offenses

under the Controlled Substance, Drug, Device and Cosmetic Act, whereas *Section 9123(a)* specifically deals with expungement of juvenile adjudications. [***22] As both statutes address the subject of expungement, we must limit our application of the *Section 780-119(a)* to criminal offenses, not delinquent acts and juvenile proceedings. *See In re J.H.*, 1999 PA Super 200, 737 A.2d 275, 278 (Pa.Super. 1999), appeal denied, 562 Pa. 671, 753 A.2d 819 (2000) (stating generally statute that expressly applies to crimes and criminal offenses must be limited to crimes and criminal offenses, whereas comparable juvenile statute on same subject will apply to juvenile acts and proceedings). To tolerate the court's reliance on *Section 780-119(a)*, we would have to ignore the express terms of that provision. *See id.* Under the Juvenile Act, however, Appellant was not charged with, indicted for, or convicted of committing PWID or any other criminal offense. Rather, the juvenile court adjudicated Appellant delinquent on a juvenile offense. *See 42 Pa.C.S.A. § 6354(a); In re R.D.R., supra.* In relying on *Section 780-119(a)*, the Commonwealth [***779] essentially treated Appellant's juvenile adjudication as synonymous with a criminal record, which blurred the fundamental and material differences between the Juvenile Code and the Crimes Code. *See id.* We expressly reject that parallel between [***23] Appellant's juvenile offense and *Section 780-119*. *See In re K.J.V., supra; In re R.D.R., supra; In re S.A.S., supra.*

[*P22] Similarly, we observe the *Wexler*² factors contributed to the court's decision to deny Appellant's petition for expungement. We emphasize, however, that even the *Wexler* Court applied its factors test only to the adult expungement petitions before that Court, and declined to extend that analysis to the juvenile expungement petition at issue in the case. *See Wexler, supra* (holding hearing court abused its discretion by denying juvenile expungement petition where Commonwealth failed to assert sufficient overriding interest in retaining juvenile's arrest record; juvenile was seventeen at time of offense and had no prior criminal record, juvenile had not been involved in further criminal activity since her juvenile offense four years earlier, and juvenile gained employment as cashier). Thus, the court's consideration of the *Wexler* factors to deny Appellant's petition was also misplaced.

2 The *Wexler* Court set forth a non-exhaustive list of factors for the court's consideration on review of an adult expungement petition as follows: (1) the strength of the Commonwealth's case [***24] against the petitioner; (2) the reasons the Commonwealth gives for wishing to retain the records; (3) the petitioner's age, criminal record, and employment history; (4) the length of time that has elapsed between the arrest and the peti-

tion to expunge; and (5) the adverse consequences the petitioner may endure should expungement be denied. *Wexler, supra* at 330, 431 A.2d at 879.

[*P23] Both the Commonwealth and the court also focused on Appellant's age at the time of the juvenile offense and the facts of the offense. *Section 9123(a)(3)* places no limitations or restrictions on the type of juvenile offenses, which can be expunged under the statute. The Juvenile Act has already designated certain offenses, which are to be treated as adult crimes even if committed by a minor and fall outside the aegis of *Section 9123(a)*; and Appellant's offense was not one of them. *See 42 Pa.C.S.A. § 6302*.

[*P24] The Commonwealth failed to present any specific legal theory to justify retention of Appellant's juvenile record. The focus on Appellant's age at the time of the offense is unavailing because the Juvenile Act and its derivative benefits specifically protect Appellant until his eighteenth birthday. *See Hooks, supra*. [***25] Thus, we cannot agree that Appellant's age at the time of his offense and the facts of his offense alone supplied sufficient "cause" to justify denial of his expungement petition.³ To the contrary, the record makes clear Appellant did not evidence any unlawful behavior since his 1999 offense, and his conduct since his disposition appeared unlikely to presage adult criminal conduct. *Compare In Interest of Jacobs, supra* (holding Commonwealth showed cause to deny expungement petition of juvenile record where authorities had apprehended juvenile in women's dormitory in possession of butcher knife, length of clothes line, cloth, and wire gag; following completion of probation, juvenile displayed chronic delinquent behavior and course of conduct, including second arrest within less than two years on charges of burglary and related offenses). Moreover, Appellant had [**780] no record before his adjudications, he was a juvenile at the time of the offense, and subsequently he is living a law-abiding life. When Appellant filed his expungement petition, he worked a steady job, resided with his mother, and attended community college. Thus, Appellant demonstrated the conditions necessary to reasonably [***26] assure his redemption, consistent with the criteria in *Section 9123(a)(3)*. *See id.*

3 The fact that Appellant "admitted" his offense should not be used against him at this juncture, where Appellant's admission streamlined the juvenile adjudication and spared the Commonwealth the time and expense associated with substantiating the charge.

[*P25] Further, we recognize there are numerous adverse consequences inherent in the existence of a juvenile record, including the elusive stigma attached to an

adjudication of delinquency, which the expungement statute sought to eliminate. *Id.* Appellant met the statutory requirements for expungement; he had no additional burden to show specific adverse consequences suffered before relief could be granted.⁴

4 Questions regarding his juvenile record could arise in applications for military service, for higher education, as well as other contexts.

[*P26] Given the remedial nature of *Section 9123(a)*, Appellant was entitled to a liberal construction and application of the statute, while the "show cause" exception to the remedial provisions should have been narrowly construed against the Commonwealth as its proponent. *See Wilgus, supra*. Likewise, under the "shall" rule, *Section 9123(a)* [***27] favored expungement of Appellant's juvenile record because he met the criteria of *Section 9123(a)(3)*. Thus, we now hold if a juvenile petitioner satisfies the statutory requirements of *Section 9123(a)(3)*, the record must be expunged, unless the Commonwealth can show specific reasons to justify retention of that particular record. Mere assertion of generic policies such as accurate record keeping or public safety will not satisfy the "cause shown" exception. *See In Interest of Jacobs, supra*.

[*P27] Based on the foregoing, we hold the trial court misapplied the law in denying Appellant's expungement petition, where Appellant met the criteria for expungement under *Section 9123(a)(3)*; and the Commonwealth failed to show cause to deny expungement and retain Appellant's juvenile record. Accordingly, we reverse and remand the matter with directions to expunge Appellant's juvenile record.

[*P28] Order reversed; case remanded. Jurisdiction is relinquished.

[*P29] JUDGE KLEIN FILES A DISSENTING OPINION IN WHICH JUDGE STEVENS JOINS.

DISSENT BY: KLEIN

DISSENT

DISSENTING OPINION BY KLEIN, J.:

[*P1] I agree with the majority that there is no automatic expungement of juvenile records if five years have elapsed from the juvenile disposition and [***28] the person has no further convictions or adjudications and no criminal actions are pending. *18 Pa.C.S.A. § 9123(a)(3)*. "Cause shown" is an exception which, if established by the Commonwealth, preempts *subsections (1)-(4)*.

[*P2] The standard of review then becomes whether the trial judge in this case abused her discretion

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in finding that the Commonwealth has shown cause why this adjudication should not be expunged. However, I disagree with the majority's conclusion that there was an abuse of discretion in this case. I believe that the distinguished trial judge, the Honorable Margherita Patti Worthington, was well within her discretion in finding that because of the nature of the crime and the fact that the defendant was less than a year shy of his 18th birthday when the offenses occurred, the Commonwealth did show due cause.

[**781] [*P3] If the crime were committed a few months later, then it is clear that there could be no expungement. As Judge Worthington noted in her 1925(a) opinion, under *Section 780-119* of the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-119(a), even arrests without convictions for the crime committed in the instance case would prohibit an adult from obtaining [***29] expungement. This was not just

an arrest with a dismissal of charges or a consent decree. There was an adjudication of delinquency based on the possession with intent to deliver drugs. The crime was serious. It involved the possession with intent to deliver a large number of illegal drugs at a school by a 17- year-old.

[*P4] Therefore, Judge Worthington, after considering the statutory factors, in particular the seriousness of the crime, as well as the fact that an adult charged with this offense is precluded from expungement even if acquitted and that A.B. was less than one year shy of adulthood, properly denied expungement. Whether or not I or any other judge would have made the same determination, such a conclusion was well within Judge Worthington's discretion in determining that the Commonwealth established cause to deny expungement. Accordingly, I believe the trial judge's order should be affirmed, and I must respectfully dissent.

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JOSE PADILLA, Petitioner v. KENTUCKY

No. 08-651

SUPREME COURT OF THE UNITED STATES

130 S. Ct. 1473; 176 L. Ed. 2d 284; 2010 U.S. LEXIS 2928; 22 Fla. L. Weekly Fed. S 211

**October 13, 2009, Argued
March 31, 2010, Decided**

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [***1]

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY.

Commonwealth v. Padilla, 253 S.W.3d 482, 2008 Ky. LEXIS 3 (Ky., 2008)

DISPOSITION: Reversed and remanded.

DECISION:

[**284] Counsel's alleged failure to correctly advise alien legal permanent resident of United States, before he pleaded guilty to trafficking in marijuana, that this was deportable offense under Immigration and Naturalization Act provision (8 U.S.C.S. § 1227(a)(2)(B)(i)) held to be deficient assistance under *Sixth Amendment*.

SUMMARY:

Procedural posture: Defendant, who pleaded guilty to drug charges, sought postconviction relief based on ineffective assistance of counsel. The Supreme Court of Kentucky denied relief. The United States Supreme Court granted certiorari.

Overview: Defendant was a lawful permanent resident who pleaded guilty to transporting marijuana. His crime was a removable offense under 8 U.S.C.S. § 1227(a)(2)(B)(i). He claimed that his counsel incorrectly told him prior to entry of his plea that he did not have to worry about immigration status because he had been in the United States for so long. The state court held that the *Sixth Amendment* did not protect defendant from erroneous advice about deportation because it was merely a collateral consequence of his conviction. The Supreme Court held that the distinction between collateral and direct consequences was ill-suited to the deportation context, so advice regarding deportation was not categorically removed from the ambit of the *Sixth Amendment*.

Counsel's alleged failure to correctly advise defendant of the deportation consequences of his guilty plea amounted to constitutionally deficient assistance under prevailing professional norms, as the consequences could easily have been determined from reading the removal statute. Whether defendant was entitled to relief depended on whether he could demonstrate prejudice, a matter for the state courts to consider in the first instance.

[**285] **Outcome:** The state court's judgment was reversed, and the matter was remanded for further proceedings. 7-2 decision; one concurrence in the judgment, one dissent.

LAWYERS' EDITION HEADNOTES:

[**LEdHN1]

ALIENS §25.5

REMOVABLE OFFENSE -- RELIEF -- CONTROLLED SUBSTANCE

Headnote:[1]

If a noncitizen has committed a removable offense after the 1996 effective date of amendments to the Immigration and Nationality Act, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. 8 U.S.C.S. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. 8 U.S.C.S. §§1101(a)(43)(B), 1228. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN2]

ALIENS §25.5

DEPORTATION -- SPECIFIED CRIMES

Headnote:[2]

As a matter of federal law, deportation is an integral part--indeed, sometimes the most important part--of the

penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN3]

CRIMINAL LAW §46.4

GUILTY PLEA -- COUNSEL

Headnote:[3]

Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN4]

ALIENS §33

DEPORTATION -- CRIMINAL SANCTION -- CIVIL PROCEEDING

Headnote:[4]

Deportation is a particularly severe "penalty," but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN5]

CRIMINAL LAW §46.4 CRIMINAL LAW §46.7

DEPORTATION -- ASSISTANCE OF COUNSEL -
- EFFECTIVENESS

Headnote:[5]

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. Advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN6]

CRIMINAL LAW §46.7

COUNSEL -- INEFFECTIVE ASSISTANCE -- STANDARDS

Headnote:[6]

Under Strickland, a court first determines whether counsel's representation fell below an objective standard of reasonableness. Then the court asks whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have [**286] been different. The first prong--constitutional deficiency--is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable. Although they are only guides and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN7]

CRIMINAL LAW §46.7

DEPORTATION -- ADVICE FROM COUNSEL

Headnote:[7]

Counsel must advise a criminal client regarding the risk of deportation. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN8]

ALIENS §25.5

DEPORTABILITY -- CONTROLLED SUBSTANCE

Headnote:[8]

See 8 U.S.C.S. § 1227(a)(2)(B)(i), which provides in part: "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN9]

CRIMINAL LAW §46.7

ADVICE FROM COUNSEL -- DEPORTATION

Headnote:[9]

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When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, the duty to give correct advice is equally clear. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN10]

CRIMINAL LAW §46.7

INEFFECTIVE ASSISTANCE OF COUNSEL -- DEPORTATION

Headnote:[10]

It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the Strickland analysis. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN11]

CRIMINAL LAW §46.7

COUNSEL'S PERFORMANCE -- SCRUTINY

Headnote:[11]

Judicial scrutiny of counsel's performance must be highly deferential. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN12]

CRIMINAL LAW §46.7

INEFFECTIVE ASSISTANCE OF COUNSEL -- GUILTY PLEA

Headnote:[12]

To obtain relief on an ineffective assistance claim involving a guilty plea, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.) [**287]

[**LEdHN13]

CRIMINAL LAW §46.7

COUNSEL -- EFFECTIVE ASSISTANCE -- PLEA BARGAIN -- DEPORTATION

Headnote:[13]

The negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel. The severity of deporta-

tion--the equivalent of banishment or exile--only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[**LEdHN14]

CRIMINAL LAW §46.7

INCOMPETENT COUNSEL -- CLIENT'S RISK OF DEPORTATION

Headnote:[14]

It is the United States Supreme Court's responsibility under the U.S. Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the mercies of incompetent counsel. Counsel must inform her client whether his plea carries a risk of deportation. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

SYLLABUS

[*1475] [**288] Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived [*1476] in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the *Sixth Amendment's* effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether he has been prejudiced, a matter not addressed here. Pp. ____-____, 176 L. Ed. 2d, at 290-299.

(a) Changes to immigration law have dramatically raised [***2] the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges' authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has

never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. Pp. ____-____, 176 L. Ed. 2d, at 290-293.

(b) *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, applies to Padilla's claim. Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and [***3] collateral consequences in defining the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. Pp. ____-____, 176 L. Ed. 2d, at 293-294.

(c) To satisfy *Strickland's* two-prong inquiry, counsel's representation [**289] must fall "below an objective standard of reasonableness," 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674, and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The first, constitutional deficiency, is necessarily linked to the legal community's practice and expectations. *Id.*, at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The weight of prevailing professional norms supports [***4] the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of "[p]reserving the . . . right to remain in the United States" and "preserving the possibility of" discretionary relief from deportation. *INS v. St. Cyr*, 533 U.S. 289, 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined [*1477] from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a

noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla's allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland's* first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. [***5] Pp. ____-____, 176 L. Ed. 2d, at 294-296.

(d) The Solicitor General's proposed rule--that *Strickland* should be applied to Padilla's claim only to the extent that he has alleged affirmative misadvice--is unpersuasive. And though this Court must be careful about recognizing new grounds for attacking the validity of guilty pleas, the 25 years since *Strickland* was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not open the floodgates to challenges of convictions obtained through plea bargains. Cf. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203. Pp. ____-____, 176 L. Ed. 2d, at 296-299.

253 S. W. 3d 482, reversed and remanded.

COUNSEL: Stephen B. Kinnaird argued the cause for petitioner.

Michael R. Dreeben argued the cause for the United States, as amicus curiae, by special leave of court.

Wm. Robert Long, Jr., argued the cause for respondent.

JUDGES: Stevens, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment, in which Roberts, C. J., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined.

OPINION BY: STEVENS

OPINION

Justice Stevens delivered [***6] the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served [**290] this Nation with honor as a member of the U. S. Armed Forces dur-

ing the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.¹

1 Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i).

[*1478] In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he " 'did not have to worry about immigration status since he had been in the country so long.' " 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky [***7] denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the *Sixth Amendment's* guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction. *Id.*, at 485. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari, 555 U.S. ___, 129 S. Ct. 1317, 173 L. Ed. 2d 582 (2009), to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority [***8] to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L. Ed. 433 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation's first 100 years was "a period of unimpeded immigration." C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 1.2(a), p. 5 (1959). An early effort to empower the President to order the deportation of those immigrants he "judge[d] dangerous to the peace and safety of the United States," Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon § 1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. Gordon § 1.2b, at 6. In 1891, Congress added to the list of excludable persons those "who have been [***291] convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.²

2 In 1907, Congress expanded the class [***9] of excluded persons to include individuals who "admit" to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 899.

The Immigration and Nationality Act of 1917 (1917 Act) brought "radical changes" [*1479] to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 54-55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. *Id.*, at 55. Section 19 of the 1917 Act authorized the deportation of "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States" 39 Stat. 889. And § 19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. *Ibid.* Congress did not, however, define the term "moral turpitude."

While the 1917 Act was "radical" because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing [***10] or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported." *Id.*, at 890.³ This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation," *Janvier v. United States*, 793 F.2d 449, 452 (CA2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of

deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

3 As enacted, the statute provided:

"That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days [***11] thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act." 1917 Act, 39 Stat. 889-890.

This provision was codified in 8 U.S.C. § 1251(b) (1994 ed.) (transferred to § 1227 (2006 ed.)). The judge's nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier v. United States*, 793 F.2d 449, 452 (CA2 1986).

Although narcotics offenses--such as the offense at issue in this case--provided a distinct basis for deportation as early as 1922,⁴ the JRAD procedure was generally available [**292] to avoid deportation in narcotics convictions. See *United States v. O'Rourke*, 213 F.2d 759, 762 (CA8 1954). Except for "technical, inadvertent and insignificant violations of the laws relating to narcotics," *ibid.*, it appears that courts treated narcotics offenses as crimes involving [*1480] moral turpitude for purposes of the 1917 Act's broad JRAD provision. See *ibid.* (recognizing that until 1952 a JRAD in a narcotics case "was effective to prevent deportation" (citing *Dang Nam v. Bryan*, 74 F.2d 379, 380-381 (CA9 1934))).

4 Congress [***12] first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of May 26, 1922, ch. 202, 42 Stat. 596. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. See *Weedin v. Moy Fat*, 8 F.2d 488, 489 (CA9 1925) (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was "special," *Chung Que Fong v. Nagle*, 15 F.2d 789, 790 (CA9 1926); thus, a narcotics offense did not need also to be a crime of moral turpitude (or to satisfy other requirements of the 1917 Act) to

trigger deportation. See *United States ex rel. Grimaldi v. Ebey*, 12 F.2d 922, 923 (CA7 1926); *Todaro v. Munster*, 62 F.2d 963, 964 (CA10 1933).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Second Circuit held that the *Sixth Amendment* right to effective [***13] assistance of counsel applies to a JRAD request or lack thereof, see *Janvier*, 793 F.2d 449. See also *United States v. Castro*, 26 F.3d 557 (CA5 1994). In its view, seeking a JRAD was "part of the sentencing" process, *Janvier*, 793 F.2d, at 452, even if deportation itself is a civil action. Under the Second Circuit's reasoning, the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process--not merely a collateral matter outside the scope of counsel's duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),⁵ and in 1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, 110 Stat. 3009-596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996, *INS v. St. Cyr*, 533 U.S. 289, 296, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001). Under contemporary law, [**LEdHR1] [1] if a noncitizen has committed a removable offense after the 1996 effective [***14] date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.⁶ See 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See § 1101(a)(43)(B); § 1228.

5 The Act separately codified the moral turpitude offense provision and the narcotics offense provision within 8 U.S.C. § 1251(a) (1994 ed.) under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204, 206. The JRAD procedure, codified in 8 U.S.C. § 1251(b) (1994 ed.), applied only to the "provisions of subsection (a)(4)," the crimes-of-moral-turpitude provision. 66 Stat. 208; see *United States v. O'Rourke*, 213 F.2d 759, 762 (CA8 1954) (recognizing that, under the 1952 Act, narcotics offenses were no longer eligible for JRADs).

6 The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term "removal" rather than "deportation." See *Calcano-Martinez v. INS*, 533 U.S. 348, 350, n. 1, 121 S. Ct. 2268, 150 L. Ed. 2d 392 (2001).

These [***15] changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of [**293] crimes has never been more important. These changes confirm our view that, [**LEdHR2] [2] as a matter of federal law, deportation is an integral part--indeed, sometimes the most important part⁷--of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

7 See Brief for Asian American Justice Center et al. as *Amici Curiae* 12-27 (providing real-world examples).

II

[**LEdHR3] [3] Before deciding whether to plead guilty, a defendant is entitled to "the effective [*1481] assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *Strickland*, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those matters not within the sentencing authority of the state trial court.⁸ 253 S. W. 3d, at 483-484 (citing *Commonwealth v. Fuartado*, 170 S. W. 3d 384 (2005)). In its view, "collateral consequences are outside the scope of representation required by the *Sixth Amendment*," [***16] and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." 253 S. W. 3d, at 483. The Kentucky high court is far from alone in this view.⁹

8 There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 *Iowa L. Rev.* 119, 124, n. 15 (2009). The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even Justice Alito agrees, counsel must, at the very least, advise a noncitizen "defendant that a criminal conviction may have adverse immigration consequences," *post*, at ___, 176 L. Ed. 2d, at 299 (opinion concurring in judgment). See also *post*, at ___, 176 L. Ed. 2d, at 307 ("I do not mean to

suggest that the *Sixth Amendment* does no more than require defense counsel to avoid misinformation"). In his concurring opinion, Justice Alito has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, *post*, at ___, 176 L. Ed. 2d, at 300.

9 See, e.g., [***17] *United States v. Gonzalez*, 202 F.3d 20 (CA1 2000); *United States v. Del Rosario*, 902 F.2d 55, 284 U.S. App. D.C. 90 (CADC 1990); *United States v. Yearwood*, 863 F.2d 6 (CA4 1988); *Santos-Sanchez v. United States*, 548 F.3d 327 (CA5 2008); *Broomes v. Ashcroft*, 358 F.3d 1251 (CA10 2004); *United States v. Campbell*, 778 F.2d 764 (CA11 1985); *Oyekoya v. State*, 558 So. 2d 990 (Ala. Ct. Crim. App. 1989); *State v. Rosas*, 183 Ariz. 421, 904 P.2d 1245 (App. 1995); *State v. Montalban*, 2000-2739 (La. 2/26/02), 810 So. 2d 1106; *Commonwealth v. Frometa*, 520 Pa. 552, 555 A.2d 92 (1989).

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that [**LEdHR4] [4] deportation is a particularly severe "penalty," *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S. Ct. 1016, 37 L. Ed. 905 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984), deportation [***18] is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation [**294] for nearly a century, see Part I, *supra*, at ___, 176 L. Ed. 2d, at 290-293. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F.2d 35, 38, 222 U.S. App. D.C. 313 (CADC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U.S., at 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the [*1482] immigration consequences of their convictions").

130 S. Ct. 1473, *; 176 L. Ed. 2d 284, **;
2010 U.S. LEXIS 2928, ***; 22 Fla. L. Weekly Fed. S 211

[**LEdHR5] [5] Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that [***19] advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. *Strickland* applies to Padilla's claim.

III

[**LEdHR6] [6] Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The first prong--constitutional deficiency--is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . ." *Ibid.*; *Bobby v. Van Hook*, 558 U.S. ___, ___, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (*per curiam*); *Florida v. Nixon*, 543 U.S. 175, 191, and n. 6, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Although they are "only guides," *Strickland*, 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674, and [***20] not "inexorable commands," *Bobby*, 558 U.S., at ___, 130 S. Ct. 13, 175 L. Ed. 2d 255, these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that [**LEdHR7] [7] counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation § 6.2 (1995); G. Herman, *Plea Bargaining* § 3.03, pp. 20-21 (1997); Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *Cornell L. Rev.* 697, 713-718 (2002); A. Campbell, *Law of Sentencing* [**295] § 13:23, pp. 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 *Compendium of Standards for Indigent Defense Systems*, Standards for Attorney Performance, pp. D10, H8-H9, J8 (2000) (providing survey of guidelines

across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d [***21] ed. 1999). "[A]uthorities of every stripe--including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications--universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients" Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12-14 (footnotes omitted) (citing, *inter alia*, National Legal Aid and Defender Assn., Guidelines, *supra*, §§ 6.2-6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 *The Champion* 61 (Jan./Feb. 2007); N. Tooby, Criminal Defense of Immigrants [*1483] § 1.3 (3d ed. 2003); 2 *Criminal Practice Manual* §§ 45:3, 45:15 (2009)).

We too have previously recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *St. Cyr*, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (quoting 3 *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed [***22] by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347. We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8 U.S.C. § 1227(a)(2)(B)(i) ([**LEdHR8] [8] "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands [***23] removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his

removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, [**296] and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. [**LEdHR9] [9] When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.¹⁰ But when the deportation consequence [***24] is truly clear, as it was in this case, the duty to give correct advice is equally clear.

10 As Justice Alito explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, [*1484] a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . .," though counsel is required to provide accurate advice if she chooses to discuss these matters. Brief for United States as *Amicus Curiae* 10.

Respondent and Padilla both find the Solicitor [***25] General's proposed rule unpersuasive, although it has support among the lower courts. See, e.g., *United States v. Couto*, 311 F.3d 179, 188 (CA2 2002); *United States v. Kwan*, 407 F.3d 1005 (CA9 2005); *Sparks v. Sowders*, 852 F.2d 882 (CA6 1988); *United States v. Russell*, 686 F.2d 35, 222 U.S. App. D.C. 313 (CADC 1982); *State v. Rojas-Martinez*, 2005 UT 86, 125 P. 3d 930, 935; *In re Resendiz*, 25 Cal. 4th 230, 105 Cal. Rptr.

2d 431, 19 P. 3d 1171 (2001). Kentucky describes these decisions isolating an affirmative misadvice claim as "result-driven, incestuous . . . [and] completely lacking in legal or rational bases." Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference "between an act of commission and an act of omission" in this context. *Id.*, at 30; *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"); see also *State v. Paredes*, 2004-NMSC-036, 2004 NMSC 36, 136 N. M. 533, 538-539, 101 P.3d 799.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even [***26] when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti* [**297] v. *United States*, 516 U.S. 29, 50-51, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.¹¹ Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. [**LEdHR10] [10] It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis." *Hill v. Lockhart*, 474 U.S. 52, 62, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (White, J., concurring in judgment).

11 As the Commonwealth conceded at oral argument, were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client [***27] of the consequences of his plea. Tr. of Oral Arg. 37-38. We think the same result should follow when the stakes are not life and death but merely "banishment or exile," *Delgadillo v. Carmichael*, 332 U.S. 388, 390-391, 68 S. Ct. 10, 92 L. Ed. 17 (1947).

We have given serious consideration to the concerns that the Solicitor General, respondent, and amici have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar "floodgates" concern in *Hill*, see *id.*, at 58, 106 S. Ct. 366, 88 L. Ed. 2d 203, but nevertheless

applied [*1485] *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.¹²

12 However, we concluded that, even though *Strickland* applied to petitioner's claim, he had not sufficiently alleged prejudice to satisfy *Strickland*'s second prong. *Hill*, 474 U.S., at 59-60, 106 S. Ct. 366, 88 L. Ed. 2d 203. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong.

Justice Alito believes that the Court misreads *Hill*, *post*, at ____-, 176 L. Ed. 2d, at 305. In *Hill*, the Court recognized--for the first time--that *Strickland* applies to advice respecting a guilty plea. [***28] 474 U.S., at 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 ("We hold, therefore, that the two-part *Strickland* v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel"). It is true that *Hill* does not control the question before us. But its import is nevertheless clear. Whether *Strickland* applies to Padilla's claim follows from *Hill*, regardless of the fact that the *Hill* Court did not resolve the particular question respecting misadvice that was before it.

A flood did not follow in that decision's wake. Surmounting *Strickland*'s high bar is never an easy task. See, e.g., 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 ([**LEdHR11] [11] "Judicial scrutiny of counsel's performance must be highly deferential"); *id.*, at 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (observing that "[a]ttorney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial"). Moreover, [**LEdHR12] [12] to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). There is no reason to doubt that lower courts--now quite experienced with applying *Strickland*--can effectively and efficiently use its framework to separate [***29] specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at [**298] least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See, *supra*, at ____-, 176 L. Ed. 2d, at 295-296. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients consid-

ered pleading guilty. *Strickland*, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.¹³ But they account for only approximately 30% of the habeas petitions filed.¹⁴ The nature of relief secured by a successful collateral challenge to a guilty plea--an opportunity to withdraw the plea and proceed to trial [***30] --imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs [*1486] whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

13 See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); *id.*, at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

14 See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36-38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. [***31] By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead

guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that [**LEdHR13] [13] the negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel. *Hill*, 474 U.S., at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203; see also *Richardson*, 397 U.S., at 770-771, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763. The severity of deportation--"the equivalent of [**299] banishment [***32] or exile," *Delgadillo v. Carmichael*, 332 U.S. 388, 390-391, 68 S. Ct. 10, 92 L. Ed. 17 (1947)--only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.¹⁵

15 To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration consequences. Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC-491 (Rev. 2/2003), <http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf> (as visited Mar. 29, 2010, and available in Clerk of Court's case file). Further, many States require trial courts to advise defendants of possible immigration consequences. See, e.g., Alaska Rule Crim. Proc. 11(c)(3)(C) (2009-2010); *Cal. Penal Code Ann.* § 1016.5 (West 2008); *Conn. Gen. Stat.* § 54-1j (2009); *D. C. Code* § 16-713 (2001); *Fla. Rule Crim. Proc.* 3.172(c)(8) (Supp. 2010); *Ga. Code Ann.* § 17-7-93(c) (1997); *Haw. Rev. Stat. Ann.* § 802E-2 (2007); *Iowa Rule Crim. Proc.* 2.8(2)(b)(3) (Supp. 2009); *Md. Rule* 4-242 (Lexis 2009); *Mass. Gen. Laws*, ch. 278, § 29D (2009); *Minn. Rule Crim. Proc.* 15.01 (2009); *Mont. Code Ann.* § 46-12-210 (2009); *N. M. Rule Crim. Form* 9-406 (2009); *N. Y. Crim. Proc. Law Ann.* § 220.50(7) [***33] (West Supp. 2009); *N. C. Gen. Stat. Ann.* § 15A-1022 (Lexis 2007); *Ohio Rev. Code Ann.* § 2943.031 (West 2006); *Ore. Rev. Stat.* § 135.385 (2007); *R. I. Gen. Laws* § 12-12-22 (Lexis Supp. 2008); *Tex. Code Ann. Crim. Proc.*, Art. 26.13(a)(4) (Vernon Supp. 2009); *Vt. Stat. Ann.*, Tit. 13, § 6565(c)(1) (Supp. 2009); *Wash. Rev. Code* § 10.40.200 (2008); *Wis. Stat.* § 971.08 (2005-2006).

V

[**LEdHR14] [14] It is our responsibility under the Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the "mercies of incompetent counsel." *Richardson*, 397 U.S., at 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding *Sixth*

Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty [*1487] concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as [***34] a result thereof, a question we do not reach because it was not passed on below. See *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 530, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002).

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CONCUR BY: ALITO

CONCUR

Justice Alito, with whom The Chief Justice joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt [**300] to explain what those consequences may be. As the Court concedes, "[i]mmigration law can be complex"; "it is a legal specialty of its own"; and "[s]ome members of the bar who represent clients facing [***35] criminal charges, in either state or federal court or both, may not be well versed in it." *Ante*, at ___, 176 L. Ed. 2d, at 295. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is "succinct and straightforward"--but not, perhaps, in other situations. *Ante*, at ___, 176 L. Ed. 2d, at 296. This vague, halfway test will lead to much confusion and needless litigation.

I

Under *Strickland*, an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards. 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Until today, the longstand-

ing and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. See, e.g., *United States v. Gonzalez*, 202 F.3d 20, 28 (CA1 2000) (ineffective-assistance-of-counsel claim fails if "based on an attorney's failure to advise a client of his plea's immigration consequences"); *United States v. Banda*, 1 F.3d 354, 355 (CA5 1993) (holding that "an [***36] attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel"); see generally Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *Cornell L. Rev.* 697, 699 (2002) (hereinafter Chin & Holmes) (noting that "virtually all jurisdictions"--including "eleven federal circuits, more than thirty states, and the District of Columbia"--"hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation). While the line between "direct" and "collateral" consequences is not always clear, see *ante*, at ___, n. 8, 176 L. Ed. 2d, at 293, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess--and very often do not possess--expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on [*1488] matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction [***37] and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. *Chin & Holmes* 705-706. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are "serious[s]," see *ante*, at ___, 176 L. Ed. 2d, at 299, but this Court has never held that a criminal defense attorney's *Sixth Amendment* duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See *ante*, at ___, 176 L. Ed. 2d, at 289 ("The weight of prevailing professional [**301] norms supports the view that counsel must advise her client regarding the risk of deportation"). However, ascertaining the level of professional competence required by the *Sixth Amendment* is ultimately a task for the courts. E.g., *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Although we

may appropriately consult standards promulgated by private bar groups, we cannot [***38] delegate to these groups our task of determining what the Constitution commands. See *Strickland*, *supra*, at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (explaining that "[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides"). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were "prevailing professional norms," it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see *ante*, at ___, 176 L. Ed. 2d, at 295, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client of a general risk of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante*, at ___-___, 176 L. Ed. 2d, at 296.

The Court's new approach is particularly problematic because providing advice on whether [***39] a conviction for a particular offense will make an alien removable is often quite complex. "Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*." M. Garcia & L. Eig, CRS Report for Congress, *Immigration Consequences of Criminal Activity* (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an "aggravated felony" or a "crime involving moral turpitude [(CIMT)]" is not an easy task. See R. McWhirter, ABA, *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* 128 (2d ed. 2006) (hereinafter ABA Guidebook) ("Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject"); *id.*, § 5.2, at 146 (stating that the aggravated felony list at 8 U.S.C. § 1101(a)(43) is not clear [*1489] with respect to several of the listed categories, that "the term 'aggravated felonies' can include misdemeanors," and that the determination of whether a crime is an "aggravated felony" is made "even [***40] more difficult" because "several agencies and courts interpret the statute," including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and district courts considering immigration-law and criminal-law issues);

ABA Guidebook § 4.65, at 130 ("Because nothing is ever simple with immigration law, the terms 'conviction,' 'moral turpitude,' and 'single scheme of criminal misconduct' are terms of art"); *id.*, § 4.67, at 130 ("[T]he term 'moral turpitude' evades precise definition").

[**302] Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained." For example, the ABA Guidebook answers the question "Does simple possession count as an aggravated felony?" as follows: "Yes, *at least in the Ninth Circuit.*" § 5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit's view, the ABA Guidebook continues: "Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)." [***41] *Id.*, § 5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony "for immigration purposes" or for "sentencing purposes"). The ABA Guidebook then proceeds to explain that "*attempted possession,*" *id.*, § 5.36, at 161 (emphasis added), of a controlled substance *is* an aggravated felony, while "[c]onviction under the federal *accessory* after the fact statute is *probably not* an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine *is* an aggravated felony," *id.*, § 5.37, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but "[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony." *Id.*, § 5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 ("Writing bad checks *may or may not* be a CIMA" (emphasis added)); *ibid.* ("[R]eckless assault coupled with an element of injury, but not serious injury, is *probably not* a CIMA" (emphasis added)); *id.*, at 135 (misdemeanor driving [***42] under the influence is generally not a CIMA, but may be a CIMA if the DUI results in injury or if the driver knew that his license had been suspended or revoked); *id.*, at 136 ("If there is no element of actual injury, the endangerment offense *may not* be a CIMA" (emphasis added)); *ibid.* ("Whether [a child abuse] conviction involves moral turpitude *may* depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence *probably* is not a CIMA" (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel

even to determine whether a client is an alien,¹ or whether a [*1490] particular state disposition will result in a "conviction" for purposes of federal immigration law.² The task of offering advice about the immigration [**303] consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration [***43] consequences of juvenile, first-offender, and foreign convictions; and the relationship between the "length and type of sentence" and the determination "whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen," Immigration Law and Crimes § 2:1, at 2-2 to 2-3.

1 Citizens are not deportable, but "[q]uestions of citizenship are not always simple." ABA Guidebook § 4.20, at 113 (explaining that U.S. citizenship conferred by blood is "derivative," and that "[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents' and/or defendant's birth, and the parents' marital status").

2 "A disposition that is not a 'conviction,' under state law may still be a 'conviction' for immigration purposes." *Id.*, § 4.32, at 117 (citing *Matter of Salazar*, 23 I. & N. Dec. 223, 231 (BIA 2002) (en banc)). For example, state law may define the term "conviction" not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook § 4.37; accord, [***44] D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes § 2:1, p. 2-2 (2008) (hereinafter Immigration Law and Crimes) ("A practitioner or respondent will not even know whether the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal").

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that "nothing is ever simple with immigration law"--including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook § 4.65, at 130; Immigration Law and Crimes § 2:1. I therefore cannot agree with the Court's apparent

view that the *Sixth Amendment* requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences may turn on how hard it is to determine [***45] those consequences. Where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]" of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. *Ante*, at ___, 176 L. Ed. 2d, at 295. But "[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Ante*, at ___-___, 176 L. Ed. 2d, at 296. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is "succinct, clear, and explicit." How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes § 2:1, at 2-2 ("Unfortunately, a practitioner or respondent cannot tell easily whether a conviction [***46] is for a removable offense. . . . [T]he cautious practitioner or apprehensive respondent will not know [*1491] conclusively the future immigration consequences of a guilty plea").

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged [**304] with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook § 4.14, at 111 ("Often the alien is both *excludable* and *removable*. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in" (emphasis in original)). Incomplete legal advice [***47] may be worse than no advice at all because it may mislead and

may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem--such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As *amici* point out, "28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas." Brief for State of Louisiana et al. 25; accord, *Chin & Holmes* 708 ("A growing number of states require advice about deportation by statute or court rule"). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting [***48] the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. *United States v. Russell*, 686 F.2d 35, 39-40, 222 U.S. App. D.C. 313 (CADC 1982) (explaining that a district court's discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, "the possible existence of prejudice to the government's case as a result of the defendant's untimely request to stand trial" and "the strength of the defendant's reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge").

Fourth, the Court's decision marks a major upheaval in *Sixth Amendment* law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's *Sixth Amendment* right to counsel. As noted above, the [***49] Court's view has been rejected by every Federal Court of Appeals to have considered the issue thus far. See, e.g., *Gonzalez*, 202 F.3d, at 28; *Banda*, 1 F.3d, at 355; *Chin & Holmes* 697, 699. The majority appropriately acknowledges that the lower courts [*1492] are "now quite experienced with applying *Strickland*," *ante*, at [**305] ___, 176 L. Ed. 2d, at 297, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the *Sixth Amendment* by claiming that this Court in *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), similarly "applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty." *Ante*, at ___, 176 L. Ed. 2d, at 297. That characterization of *Hill* obscures much more than it reveals. The issue in *Hill* was whether a criminal defendant's *Sixth Amendment* right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it "unnecessary to determine whether there may be circumstances under which erroneous [***50] advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice.' 474 U.S., at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203. Given that *Hill* expressly and unambiguously refused to decide whether criminal defense counsel must *avoid misinforming* his or her client as to *one* consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must *affirmatively advise* his or her client as to *another* collateral consequence (removal). By the Court's strange logic, *Hill* would support its decision here even if the Court had held that misadvice concerning parole eligibility does *not* make counsel's performance objectively unreasonable. After all, the Court still would have "applied *Strickland*" to the facts of the case at hand.

II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting [***51] affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the *Sixth Amendment* duty this Court has recognized in its past cases. In particular, we have explained that "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Strickland*, 466 U.S., at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (quoting *McMann v. Richardson*, 397 U.S. 759, 770, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not "within the range of competence demanded of attorneys in criminal cases." See *ante*, at ___, 176 L. Ed.

2d, at 295 ("Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it"). By contrast, reasonably competent attorneys [***306] should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are [***52] not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on [*1493] the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.'" 253 S. W. 3d 482, 485 (2008).

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See *Strickland*, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 ("In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose--to ensure a fair trial--as the guide"). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered [***53] with the advice of constitutionally competent counsel--or that it embodies a voluntary and intelligent decision to forsake constitutional rights. See *ibid.* ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. As the Solicitor General points out, "[t]he vast majority of the lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice." [***54] Brief for

United States as *Amicus Curiae* 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances.³ And several other Circuits have held that affirmative [*307] misadvice concerning nonimmigration consequences of a conviction can violate the *Sixth Amendment* even if those consequences might be deemed "collateral."⁴ By contrast, it appears that [*1494] no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance. In short, the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that that Kentucky Supreme Court's position goes too far.

3 See *United States v. Kwan*, 407 F.3d 1005, 1015-1017 (CA9 2005); *United States v. Couto*, 311 F.3d 179, 188 (CA2 2002); *Downs-Morgan v. United States*, 765 F.2d 1534, 1540-1541 (CA11 1985) (limiting holding to the facts of the case); see also *Santos-Sanchez v. United States*, 548 F.3d 327, 333-334 (CA5 2008) (concluding that counsel's advice was [***55] not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of "possible" deportation consequence; use of the word "possible" was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

4 See *Hill v. Lockhart*, 894 F.2d 1009, 1010 (CA8 1990) (en banc) ("[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*"; *Sparks v. Sowders*, 852 F.2d 882, 885 (CA6 1988) ("[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel"); *id.*, at 886 (Kennedy, J., concurring) ("When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject"); *Strader v. Garrison*, 611 F.2d 61, 65 (CA4 1979) ("[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived [***56] of his constitutional right to counsel").

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest

that the *Sixth Amendment* does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect [***57] information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's *Sixth Amendment* right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

DISSENT BY: SCALIA

DISSENT

Justice **Scalia**, with whom Justice **Thomas** joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in [***308] order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The *Sixth Amendment* guarantees the accused a lawyer "for his defense" against a "criminal prosecutio[n]"--not for sound advice about the collateral consequences of conviction. [***58] For that reason, and for the practical reasons set forth in Part I of Justice Alito's concurrence, I dissent from the Court's conclusion that the *Sixth Amendment* requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about

those consequences renders [*1495] an attorney's assistance in defending against the prosecution constitutionally inadequate; or that the *Sixth Amendment* requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.

* * *

The *Sixth Amendment* as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See, *United States v. Van Duzee*, 140 U.S. 169, 173, 11 S. Ct. 758, 11 S. Ct. 941, 35 L. Ed. 399 (1891); W. Beaney, *Right to Counsel in American Courts* 21, 28-29 (1955). We have held, however, that the *Sixth Amendment* requires the provision of counsel to indigent defendants at government expense, *Gideon v. Wainwright*, 372 U.S. 335, 344-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), [***59] and that the right to "the assistance of counsel" includes the right to effective assistance, *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the *Sixth Amendment's* textual limitation to criminal prosecutions. "[W]e have held that 'defence' means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery v. Gillespie County*, 554 U.S. 191, ___, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) (Alito, J., concurring) (summarizing cases). We have limited the *Sixth Amendment* to legal advice directly related to defense against prosecution of the charged offense--advice at trial, of course, but also advice at post-indictment interrogations and lineups, *Massiah v. United States*, 377 U.S. 201, 205-206, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); *United States v. Wade*, 388 U.S. 218, 236-238, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran v. Burbine*, 475 U.S. 412, 430, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). [***60] Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be present when the defendant is interrogated in connection with another possible prosecution arising from the same event. *Texas v. Cobb*, 532 U.S. 162, 164, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001).

There is no basis in text or in principle [***309] to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the crimi-

nal prosecution at hand--to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within "the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). See *id.*, at 769-770, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court's opinion assumes, that once counsel is appointed all professional responsibilities of counsel--even those extending beyond defense against the prosecution--become constitutional commands. Cf. *Cobb*, *supra*, at 171, n. 2, 121 S. Ct. 1335, 149 L. Ed. 2d 321; [***61] *Moran*, *supra*, at 430, 106 S. Ct. 1135, 89 L. Ed. 2d 410. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the *Sixth Amendment* has no application.

[*1496] Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping-point. As the concurrence observes,

"[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are 'serious,'" *Ante*, at ___, 176 L. Ed. 2d, at 300 (Alito, J., concurring in judgment).

But it seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that counsel must warn defendants of potential removal consequences, see *ante*, at ___, 176 L. Ed. 2d, at 307--what would come to be known as the "*Padilla* warning"--cannot be limited to those consequences [***62] except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e). We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-

expanding categories of plea-invalidating misadvice and failures to warn--not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence's treatment of misadvice seems driven by concern about the voluntariness of Padilla's guilty plea. See *ante*, at ___, 176 L. Ed. 2d, at 306. But that concern properly relates to the *Due Process Clauses* of the Fifth and Fourteenth Amendments, not to the Sixth Amendment. See *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of [*310] his claim (and if he has properly preserved it) the state court can address it on remand.¹ But we should not smuggle [***63] the claim into the Sixth Amendment.

1 I do not mean to suggest that the *Due Process Clause* would surely provide relief. We have indicated that awareness of "direct consequences" suffices for the validity of a guilty plea. See *Brady*, 397 U.S., at 755, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by *Federal Rule of Criminal Procedure* 11(b) (formerly *Rule* 11(c)), which we have said approximates the due process requirements for a valid plea, see *Libretti v. United States*, 516 U.S. 29, 49-50, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995), does not mention collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the *Due Process Clause*.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given. [***64]² Moreover, legislation could provide consequences for the misadvice, [*1497] nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses

and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

2 As the Court's opinion notes, *ante*, at ___-___, n. 15, 176 L. Ed. 2d, at 299, many States--including Kentucky--already require that criminal defendants be warned of potential removal consequences.

In sum, the *Sixth Amendment* guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

REFERENCES

U.S.C.S., *Constitution*, Amendment 6; 8 U.S.C.S. § 1227(a)(2)(B)(i)

27 Moore's Federal Practice § 644.61 (Matthew Bender 3d ed.)

L Ed Digest, Criminal Law §§46.4, 46.7

L Ed Index, Deportation or Exclusion of Aliens; Plea Bargaining

When is attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel--Supreme Court cases. 83 L. Ed. 2d 1112.

Supreme Court's views as to plea bargaining and its effects. 50 L. Ed. 2d 876.

Validity of guilty pleas--Supreme Court cases. 25 L. Ed. 2d 1025.

Accused's right to counsel under the Federal Constitution--Supreme Court cases. 93 L. Ed. 137, 2 L. Ed. 2d 1644, 9 L. Ed. 2d 1260, 18 L. Ed. 2d 1420.

**Addressing Disproportionate Minority Contact (DMC) in
Juvenile Delinquency Court**

**Office of the Juvenile Defender
August 2011**

Youth of Color in Juvenile Court: Introduction

Research indicates that youth of color are disproportionately represented in the juvenile justice system.¹ This problem has been termed “disproportionate minority contact” (“DMC”). In an effort to help defense counsel better understand the experiences of youth of color, this document provides a compilation of recent research regarding youth of color in the juvenile justice system, and suggests strategies for defense counsel to utilize to address DMC.

Youth of Color in Juvenile Court: A Brief Overview of National Data

As youth of color move from one point in the juvenile justice system to another, they suffer a cumulative disadvantage compared to White youth.² For instance, a study completed by the National Council of Crime and Delinquency, in 2007, found that youth of color are disproportionately arrested and are more likely to go further in the system than White youth for the same offense.³ Moreover, although nearly half of the drug cases involving White youth resulted in formal processing, over three-quarters of those cases involving youth of color, specifically African American youth, resulted in formal processing, and thereafter involvement in the justice system.⁴ Similarly, youth of color are also more likely to be transferred to adult court,⁵ be incarcerated in state facilities,⁶ and spend more time incarcerated than White youth, with this disparate treatment resulting in DMC.⁷

Youth of Color in Juvenile Court: An Overview of State Data

In recent years, the Governor’s Crime Commission Division of the North Carolina Department of Crime Control and Public Safety (GCC) has compiled and analyzed data to determine at which stages of delinquency proceedings DMC occurred. In its research, the GCC utilized the “Relative Rate Index” (RRI) to examine DMC. The RRI compares the percentage of youth of color at one stage of the juvenile justice system to the percentage of youth of color at the previous stage.⁸ As an example, a study evaluating the confinement rates of African American youth as compared to White youth with a RRI of one at the confinement stage would indicate that African American youth are just as likely as White youth to be confined.⁹ Similarly, a RRI of two indicates that African American youth are twice as likely as White youth to be confined, and a RRI of one-half indicates that African American youth are half as likely to be confined as White youth.¹⁰

¹ Mark Soler, *Missed Opportunity: Waiver, Race, Data, and Policy Reform*, 71 LA. L. REV. 17, at 23 (2010).

² *Id.*

³ *Id.* at 24. See CHRISTOPHER HARTNEY & FABIANA SILVIA, NAT’L COUNCIL ON CRIME & DELINQ., AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM (2007), 1, available at http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf (last visited June 20, 2011).

⁴ HARTNEY ET AL., *supra* note 3, at 1.

⁵ *Id.*

⁶ *Id.*

⁷ Soler, *supra* note 1, at 23.

⁸ Devon J. Green, et al., *Realizing the Promise of Electricity Deregulation: Empirical Study: The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System*, 40 WAKE FOREST L. REV. 727, 730 (2005).

⁹ *Id.* at 730-731.

¹⁰ *Id.*

As indicated in the table below, over the last three fiscal years, DMC occurred as youth of color were referred to juvenile court, placed in secure detention, and confined in secure juvenile correctional facilities.¹¹

DATA ITEMS	RELATIVE RATE INDEX (2007-2008)	RELATIVE RATE INDEX (2008-2009)	RELATIVE RATE INDEX (2009-2010)
CASES REFERRED TO JUVENILE COURT	2.39	2.45	2.46
CASES DIVERTED	0.88	0.91	0.88
CASES INVOLVING SECURE DETENTION	1.67	1.62	1.65
CASES PETITIONED (CHARGES FILED)	1.08	1.06	1.09
CASES RESULTING IN DELINQUENT FINDINGS	0.94	0.95	0.92
CASES RESULTING IN PROBATION PLACEMENT	1.01	1.02	0.98
CASES RESULTING IN CONFINEMENT IN SECURE JUVENILE CORRECTIONAL FACILITIES	4.17	3.31	2.95
CASES TRANSFERRED TO ADULT COURT	Insufficient number of cases for analysis		

More specific data revealed that from 2007 to 2008, African American youth were nearly three times more likely (with an RRI of 2.97) to be referred to juvenile court than White youth; nearly two times more likely (with an RRI of 1.75) to be placed in secure detention than White youth; nearly five times more likely (with an RRI of 4.48) to be confined in a secure correctional facility than White youth;¹² and nearly nine times more likely (with an RRI of 8.55) to be transferred to adult court than White youth¹³ (see Table 1 of the Appendix). Similarly, during this time period, American Indian or Alaska Native youth were nearly one and half times more likely (with an RRI of 1.58) to be referred to juvenile court than White youth; nearly two times more likely (with an RRI of 1.85) to be placed in secure detention than White youth; and three times more likely (with an RRI of 3.07) to be confined in a secure correctional facility than White youth.¹⁴ Data also indicated that Hispanic or Latino youth were over one a half times more likely (with an RRI of 1.55) to be confined in a secure correctional facility than White youth.¹⁵

¹¹ Email from Brandy Dolby, North Carolina Department of Crime Control & Public Safety, to Brandi Clemmons, Assistant Juvenile Defender, Office of the Juvenile Defender, May 10, 2011, (on file with the Office of the Juvenile Defender).

¹² *Id.*

¹³ Email from Megan Howell, North Carolina Department of Juvenile Justice & Delinquency Prevention, to Brandi Clemmons, Assistant Juvenile Defender, Office of the Juvenile Defender, May 10, 2011, (on file with the Office of the Juvenile Defender).

¹⁴ Email from Brandy Dolby, *supra* note 11.

¹⁵ *Id.*

Between 2008 and 2009, the DMC trend continued (see Table 2 of the Appendix).¹⁶ African American youth, specifically, were nearly three times more likely (with an RRI of 2.88) to be referred to juvenile court than White youth; nearly two times more likely (with an RRI of 1.70) to be placed in secure detention than White youth; nearly four times more likely (with an RRI of 3.70) to be confined in a secure juvenile correctional facility than White youth;¹⁷ and nearly three times more likely (with an RRI of 2.94) to be transferred to adult court than White youth.¹⁸ By the same token, American Indian or Alaska Native youth were slightly over two times more likely (with an RRI of 2.09) to be referred to juvenile court than White youth; a little more likely (with an RRI of 1.28) to be placed in secure custody than White youth; and nearly two times more likely (with an RRI of 1.84) to be confined in a juvenile correctional facility than White youth.¹⁹ It should also be noted that Hispanic or Latino youth were over one and a half times more likely (with an RRI of 1.60) to be confined in a secure juvenile correctional facility than White youth²⁰ and five times more likely (with an RRI of 5.06) to be transferred to adult court than White youth.²¹ The data also indicated that Asian youth were slightly more likely (with an RRI of 1.29) to be placed in secure detention than White youth.²²

In the same manner, the DMC trend continued between 2009 and 2010 (see Table 3 of the Appendix).²³ African American youth were nearly three times more likely (with an RRI of 2.84) to be referred to juvenile court than White youth; nearly two times more likely (with an RRI of 1.76) to be placed in secure detention than White youth; over three times more likely (with an RRI of 3.26) to be confined in a secure juvenile correctional facility than White youth;²⁴ and over three times more likely (with a RRI of 3.26) to be transferred to adult court than White youth.²⁵ Moreover, American Indian or Alaska Native youth were nearly two times more likely (with an RRI of 1.77) to be referred to juvenile court than White youth; slightly more likely (with an RRI of 1.37) to be placed in secure custody than White youth; and nearly two times more likely (with an RRI of 1.82) to be confined in a juvenile correctional facility than White youth.²⁶ Hispanic or Latino youth also experienced DMC during this time period as Hispanic or Latino youth were nearly one and a half times more likely (with an RRI of 1.40) to be referred to juvenile court than White youth; over one and a half times more likely (with an RRI of 1.54) to be confined in a secure juvenile correctional facility than White youth;²⁷ and nearly 15 times more likely (with an RRI of 14.77) to be transferred to adult court than White youth.²⁸

Given the disparate treatment that continues to impact youth of color, it is essential that defense counsel work to address DMC when possible. Understanding the possible causes of DMC, and the consequences associated with entering the juvenile justice system is essential to reducing DMC and improving the juvenile justice system.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Email from Megan Howell, *supra* note 13

¹⁹ Email from Brandy Dolby, *supra* note 11.

²⁰ *Id.*

²¹ Email from Megan Howell, *supra* note 13.

²² Email from Brandy Dolby, *supra* note 11.

²³ *Id.*

²⁴ *Id.*

²⁵ Email from Megan Howell, *supra* note 13.

²⁶ Email from Brandy Dolby, *supra* note 11.

²⁷ *Id.*

²⁸ Email from Megan Howell, *supra* note 13.

Youth of Color in Juvenile Court: Potential Causes & Consequences of DMC

In recent years, researchers, policymakers, and juvenile justice stakeholders throughout the United States have researched and speculated over the causes of DMC. Some of the possible explanations include the following.

- ❖ **Differential Offending:** Some researchers assert that youth of color are disproportionately involved in criminal activity, and that this tendency results in DMC.²⁹ Those positing this explanation point toward statistics regarding the number of youth of color involved in gang activity or serious crimes in some studies.³⁰
- ❖ **Differential Opportunities for Prevention and Treatment:** Other research indicates that DMC exists because youth of color have less access to prevention and treatment programs than White youth, and are therefore, more vulnerable to risk factors associated with juvenile delinquency.³¹ Alternatively, those youth with more opportunities for prevention and treatment programs are less likely to offend and enter the juvenile justice system.³²
- ❖ **Differential Handling:** Another explanation for DMC is that youth of color are more likely to enter the juvenile justice system due to differential treatment.³³ For instance, differential arrest rates in specific communities of color may account for DMC in some jurisdictions.³⁴ Some research suggests that differential handling of cases occurs because youth of color are seen as violent, sexual, and undisciplined more frequently than White youth. In essence, “White juvenile offenders may avoid transfer to adult court or confinement because they are viewed by decision makers as ‘troubled youth,’ whereas minority offenders are viewed as ‘troublemakers, gangbangers, or predators.’”³⁵
- ❖ **Indirect Effects:** Research also points out that DMC may be a result of indirect effects between race and crime.³⁶ Indirect effects are defined as “those factors that contribute to presence in the system because of their coexistence with other factors.”³⁷ One example of an indirect effect is family socioeconomic status as those who live in poor areas are more likely to have fewer protective factors, and therefore more risk factors for criminal activity.³⁸ In North Carolina, many judges believe that cultural barriers are detrimental to youth’s representation.³⁹ For instance, at times, there may be a misunderstanding due to language barriers, or cultural norms and mannerisms may be different.⁴⁰ For instance, avoiding direct eye contact is considered respectful in some

²⁹ASHLEY NELLIS, JUVENILE JUSTICE EVALUATION CENTER, SEVEN STEPS TO DEVELOP AND EVALUATE STRATEGIES TO REDUCE DISPROPORTIONATE MINORITY CONTACT (DMC), JUV. JUST. GUIDEBOOK SERIES, 14 (2005), available at <http://www.jrsa.org/pubs/juv-justice/dmc-guidebook.pdf> (last visited June 20, 2011).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Devon J. Green et al., *supra* note 8, at 789.

³⁶ *Id.*

³⁷ *Id.*

³⁸ ASHLEY NELLIS, *supra* note 29, at 15.

³⁹ Devon J. Green et al., *supra* note 8, at 789.

⁴⁰ *Id.*

cultures; however, it can be viewed as a sign of either dishonesty or disrespect by many judges, district attorneys, and other court officers.⁴¹ Therefore, family socioeconomic status, cultural barriers, and similar indirect effects may explain DMC in some cases.

- ❖ **Legislative Changes, Administrative Policies, and Legal Factors:** DMC may also be a result of legislation, policies, and legal factors that inadvertently affect youth of color.⁴² For instance, in some states with “three strikes” legislation and mandatory waiver, youth of color are likely to be disproportionately represented in the juvenile justice system.⁴³ Similarly, administrative policies such as those allowing youth in custody to only be released to guardians who are home may inadvertently discriminate against youth of color given that single parent households with a working parent are more common in communities of color.⁴⁴ Researchers also identify school zero tolerance policies as another factor that may inadvertently cause DMC as these types of policies have been empirically shown to result in disproportionate treatment of youth of color.⁴⁵ Furthermore, the use of legal factors, such as number of prior arrests to determine a youth’s disposition, can disproportionately affect youth of color if they have already experienced differential opportunities or treatment in the juvenile justice system.⁴⁶

Despite which explanation one thinks best articulates the cause for DMC, research indicates that involvement in the juvenile justice system, specifically, detention and incarceration negatively affects youth.⁴⁷ Detention disrupts education, family connections, and services, and subjects youth to potential physical assault and psychological stress.⁴⁸ Research shows that once detention interrupts education, some youth have a difficult time returning to school.⁴⁹ One researcher found that most incarcerated youth in the ninth grade returned to school following incarceration, but within a year of re-enrolling, between two-thirds to three-fourths of them had either withdrawn or dropped out of school.⁵⁰ After four years, less than 15% of those previously incarcerated youth had completed their education.⁵¹ Research also showed that youth who left detention and did not return to school faced consequences such as less financial stability, higher unemployment, and poor health in some cases.⁵²

Furthermore, involvement in the juvenile justice system, specifically, detention exacerbates difficulties for youth with pre-existing mental health problems.⁵³ Detention makes mentally ill youth worse because the setting and the conditions of confinement create an unhealthy

⁴¹ *Id.* at 747-748.

⁴² ASHLEY NELLIS, *supra* note 29, at 16.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Mark Soler, *supra* note 1, at 25.

⁴⁸ *Id.*

⁴⁹ BARRY HOLMAN & JASON ZIEDENBERG, JUVENILE JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES, 9, *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf (last visited June 20, 2011).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Mark Soler, *supra* note 1, at 25.

environment.⁵⁴ For instance, researchers recently found that close to a third of the detention centers in the U.S. were overcrowded, often leading to more violence and chaos.⁵⁵ Therefore, a great deal of youth with behavior or mental health problems simply got worse in detention.⁵⁶ Moreover, research also showed that for a number of incarcerated youth the onset of depression began after they were incarcerated.⁵⁷ Consequently, detention increased the likelihood that those with mental health problems would experience more severe problems, and that those without a previous history of mental health problems would begin to experience such problems.⁵⁸ Detention also put youth at a greater risk of physical harm, including self-harm such as suicidal behavior according to some researchers.⁵⁹

In addition to negatively affecting education and mental and physical health, studies indicate that youth who are incarcerated are more likely to recidivate than youth who are supervised in a community-based program, or youth not detained at all.⁶⁰ Previously detained youth face lasting consequences that impact their future behavior and opportunities.⁶¹ For instance, researchers have shown that incarcerating youth may interrupt and delay the typical pattern of “aging out” of certain behaviors since detention disrupts engagement with families, school, work, and extracurricular activities.⁶² Therefore, incarceration as a youth could lead to a greater likelihood of experiencing involvement in the adult criminal system.⁶³ Moreover, previously detained youth have reduced success in the labor market as some research indicated that young people between the ages of 14 and 24 who spent some time incarcerated in a youth facility experienced three weeks less work a year, with African American youth receiving five weeks less work, compared to youth without a history of incarceration.⁶⁴ Thus, involvement in the juvenile justice system, specifically detention and incarceration, can have lasting consequences for youth, particularly youth of color since those youth are disproportionately represented in the juvenile justice system.

Youth of Color in Juvenile Court: Strategies for Defense Counsel

In order to address DMC, defense counsel should work to become culturally competent and socially sensitive to issues of race and ethnicity.⁶⁵ Given the complexity associated with DMC, the best strategy to begin addressing DMC coupled with cultural competence and racial sensitivity may be zealous advocacy as follows.

⁵⁴ BARRY HOLMAN & JASON ZIEDENBERG, *supra* note 49, at 8.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 9.

⁶⁰ BARRY HOLMAN & JASON ZIEDENBERG, *supra* note 49, at 6.; See KAREN CALHOUN ET AL., NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, JUVENILE RECIDIVISM STUDY: FY 2006-07 JUVENILE SAMPLE, 40 (2011), available at http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/recidivismreportR_2008.pdf (last visited June 20, 2011).

⁶¹ BARRY HOLMAN ET AL., *supra* note 49, at 7.

⁶² *Id.*

⁶³ KAREN CALHOUN ET AL., *supra* note 60, at 40.

⁶⁴ *Id.*

⁶⁵ Philip Penn, Illusion and Reality: The Myth of the Post Racial Society: Disproportionate Minority Representation and Juvenile Injustice: How Do Advocates and Juvenile Defenders Play a Role in Addressing It?, Presented at the North Carolina Bar Association Juvenile Justice & Children Rights Section Annual Meeting (March 26, 2010).

- ❖ **Client Interviews:** Consult with the youth as early as possible and prior to any court appearances out of the presence of his or her parents/guardians.⁶⁶ Be sure to provide materials and information packets for youth who speak foreign languages as their primary language.⁶⁷ When necessary, ensure that an interpreter is provided for the youth.⁶⁸
 - Provide an overview of juvenile court, the purpose of the interview, confidentiality laws, attorney-client privilege, the right to remain silent, and expressed interest advocacy.⁶⁹ Also explain your role to the youth's parents/guardians to prevent any future misunderstandings.⁷⁰
 - Ask the youth about school and any activities he or she participates in that could be affected by the filing of a petition.⁷¹ Also, ensure that the youth is aware that the school may be notified of the alleged offense.⁷² If you learn during the interview that the youth has been suspended or expelled from school because of the alleged offense, ask the youth whether arrangements have been made for him or her to continue his or her education such as attendance at an alternative school.⁷³ If there are no arrangements in place and you are knowledgeable of education law, consider assisting the youth with this matter. At the least, inform the youth of organizations that can assist with school discipline matters such as Advocates for Children's Services of Legal Aid of North Carolina, Inc.
 - If the youth was detained, communicate with the youth to determine if he or she was harassed or mistreated while in detention.⁷⁴
 - Ask the youth whether he or she feels safe at home, and if not, begin considering alternative placements as directed by the youth.⁷⁵ Also, research alternative placements when the youth's parents/guardians do not wish for him or her to return home.⁷⁶
 - Provide contact information and explain how the youth can contact you if any questions arise after the interview.⁷⁷

⁶⁶ NATIONAL JUVENILE DEFENDER CENTER, TEN PRINCIPLES FOR PROVIDING EFFECTIVE DEFENSE ADVOCACY AT JUVENILE DETENTION HEARINGS, 2, available at http://www.njdc.info/pdf/njdc_tools/NJDC_Detention_Tools.pdf (last visited June 20, 2011).

⁶⁷ Philip Penn, *supra* note 65.

⁶⁸ *Id.*

⁶⁹ NATIONAL JUVENILE DEFENDER CENTER, *supra* note 66, at 2. For further explanation of "expressed interest advocacy," see N.C. COMMISSION ON INDIGENT DEFENSE SERVICES PERFORMANCE GUIDELINES FOR APPOINTED COUNSEL IN JUV. DELINQ. PROCEEDINGS AT THE TRIAL LEVEL (Adopted Dec. 14, 2007), available at http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Juv_Del_perf_guides_1-08.pdf (last visited June 20, 2011). The guidelines define expressed interests as "the stated desires of the juvenile client about the direction and objectives of the case."

⁷⁰ NATIONAL JUVENILE DEFENDER CENTER, ACHIEVING EXCELLENCE IN DETENTION ADVOCACY: A CHECKLIST TO EVALUATE DEFENSE REPRESENTATION AT DETENTION HEARINGS, 3, available at http://www.njdc.info/pdf/njdc_tools/Checklist.pdf (last visited June 20, 2011).

⁷¹ See Philip Penn, *supra* note 65.

⁷² See *id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ NATIONAL JUVENILE DEFENDER CENTER, *supra* note 70, at 7.

⁷⁶ *Id.* at 8.

⁷⁷ *Id.* at 4.

- ❖ **Referrals and Charging Decisions:** When it comes to referrals and charging decisions, defense counsel should be aware of the disparate treatment of youth of color, and therefore, when appropriate, collaborate with prosecutors and court counselors to divert, dismiss, and mediate cases.⁷⁸
 - Upon being appointed, speak with the youth immediately to determine if the case is a good candidate for diversion, dismissal, or mediation. If so, speak with the court counselor and prosecutor prior to court.⁷⁹
 - Facilitate communication between the youth and parents/guardians and the court counselor to ensure that the court counselor is aware of difficulties the family may be facing such as lack of transportation or language barriers.
 - Ask the youth about any Individualized Education Plans (IEPs) at school, community involvement, and mental health treatment and gather information in an effort to research alternatives to court involvement (e.g., educational programs, substance abuse treatment, and mental health treatment as well as community programs or youth treatment courts) and provide those for consideration.⁸⁰ If the youth is involved in such programs, reach out to those professionals for assistance, as the prosecutor and court counselor may be willing to consider such alternatives.
 - Educate the parents on the alternatives to court and why they may be more desirable. Also, communicate with the youth's parents/guardians the importance of attending court proceedings.⁸¹ If appropriate, inform the parents/guardians that reluctance to attend hearings or provide information could result in formal charges where a diversion would have been appropriate.
 - When appropriate, make other juvenile justice stakeholders, including the court when appropriate, aware of research that indicates indirect effects such as family socioeconomic status could lead youth, specifically youth of color, into the juvenile justice system.⁸²
- ❖ **Detention Hearings:** As youth of color are disproportionately detained, it is critical that defense counsel communicate to youth that his or her jeopardy of detention can be reduced by appearing in court as scheduled.⁸³ Defense counsel should also consider communicating with the youth's parents/guardians the importance of attending court proceedings.⁸⁴ If the parents/guardians do not attend, consider calling them to ascertain why they are not attending such proceedings.⁸⁵
 - Prior to the hearing, conduct a thorough investigation of the youth's social history by obtaining school records, mental health records, records of delinquent and

⁷⁸ Philip Penn, *supra* note 65.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ NATIONAL JUVENILE DEFENDER CENTER, *supra* note 70, at 8.

⁸² ASHLEY NELLIS, *supra* note 29, at 15.

⁸³ MARK SOLER & LISA GARRY, DMC TECHNICAL ASSISTANCE MANUAL, CHAPTER 3: PREPARATION AT THE LOCAL LEVEL (4TH ED.), 3-23-3-24, available at http://www.ncjrs.gov/html/ojjdp/dmc_ta_manual/dmcch3.pdf (last visited June 20, 2011).

⁸⁴ NATIONAL JUVENILE DEFENDER CENTER, *supra* note 70, at 8.

⁸⁵ *Id.*

undisciplined behavior, including police reports, and screening tools such as risk and needs assessments.⁸⁶

- Communicate with the youth's parents/guardians, teachers, and other relevant adults who may also be able to provide essential information about the youth.⁸⁷ Inform the parents/guardians that the court may ask their input at the hearing.⁸⁸
- Communicate with the youth prior to the hearing to determine his or her expressed interest regarding alternatives to detention.⁸⁹ Once aware of the youth's expressed interest, collaborate with prosecutors and court counselors toward that outcome.⁹⁰ If the youth has expressed an interest in alternatives to detention:
 - Research and recommend community-based programs to the court;⁹¹
 - Argue the harmful effects of detention, and any deficiencies you may be aware of at local facilities;⁹²
 - Provide information to the court that could mitigate against detention such as age, special needs, health concerns, or mental health issues;⁹³
 - Challenge any decision to detain based upon a lack of community resources, and argue that detention should always be a last resort; and⁹⁴
 - Inform the court of the advantages of staying on release, such as involvement with family, school, and other positive factors in the youth's life.⁹⁵
- If possible, advocate for the hearings to be recorded or transcribed.⁹⁶ Additionally, ensure that detention orders are in writing with any special needs of the youth provided.⁹⁷ Review orders to ensure that information is accurate.⁹⁸
- Explain the outcome of the proceeding to the youth and his or her parents/guardians.⁹⁹ If the youth is released, ensure that he or she understands the conditions of release and receives the services as specified by the court.¹⁰⁰ If the youth is detained, seek opportunities for release by filing motions for review when appropriate.¹⁰¹

⁸⁶ *Id.* at 3

⁸⁷ *Id.* at 2.

⁸⁸ *Id.* at 8.

⁸⁹ *Id.*

⁹⁰ *Id.* at 3.

⁹¹ *Id.*

⁹² *Id.* at 4.

⁹³ *Id.*

⁹⁴ *Id.* at 4-5.

⁹⁵ *Id.* at 5.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

- ❖ **Transfer:** Defense counsel should ensure that the youth understands the pros and cons of transfer to adult court and advocate against transfer where appropriate.¹⁰²
 - Explain the collateral consequences of an adult criminal record to the youth, and compare those with a juvenile adjudication.¹⁰³
- ❖ **Disposition and Commitment to a Youth Development Center (YDC):** To create the most appropriate recommendations, defense counsel should communicate with the youth, ensure that the youth understands what is occurring at the proceeding, and advocate against any probation or placements that will be harmful.¹⁰⁴
 - When appropriate, request evaluations or expert witnesses to prepare for the disposition hearing and to provide testimony against any harmful recommendations.¹⁰⁵ Utilize experts, and if necessary interpreters, who are culturally competent and who are able to communicate with youth in their language.¹⁰⁶ Be aware of cultural biases and language barriers that may affect the youth's case or his or her ability to understand the proceeding.¹⁰⁷ When appropriate, in an effort to address cultural biases and to educate the court system actors, defense counsel should consider using a community leader as a culture expert.¹⁰⁸
 - File motions to dismiss and suppress evidence when necessary.¹⁰⁹ Given recent research challenging the reliability of eyewitness identifications, use this as a vehicle to educate court system actors about DMC-related issues.¹¹⁰
 - Ensure that the youth understands all possible disposition options and determine which services he or she feels would be most beneficial.¹¹¹
 - Argue for the least restrictive placement possible, specifically when commitment to a YDC is authorized. Be knowledgeable of community-based programs, and recommend them to the court.¹¹²
 - Explain the collateral consequences of an adjudication, as well as commitment to a YDC, to the youth.¹¹³
- ❖ **Post-Disposition:** Similar to many other jurisdictions, in North Carolina, defense counsel's appointment ends at disposition, and as a result, youth are not afforded a right to counsel post-disposition. Given that there is no post-disposition representation at this time, it is even more critical that defense counsel appointed to represent a youth on a probation violation work thoroughly to investigate and defend against the allegations.
 - At the motion for review hearing defense counsel should prepare to the same degree they would prepare for an adjudicatory hearing, including investigating the

¹⁰² Philip Penn, *supra* note 65.

¹⁰³ *Id.*

¹⁰⁴ Philip Penn, *supra* note 65.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Robin Walker Sterling, *Raising Race*, THE CHAMPION, 29 (2011).

¹⁰⁹ Philip Penn, *supra* note 65.

¹¹⁰ Robin Walker Sterling, *supra* note 108, at 28.

¹¹¹ Philip Penn, *supra* note 65.

¹¹² *Id.*

¹¹³ *Id.*

allegations, determining if the violation was willful or if a lawful excuse exists, and preparing alternatives for disposition sensitive to the youth's needs if he or she is found to be in violation.

- o Defense counsel can also make the youth aware of community-based programs that help youth re-enter society following incarceration in an effort to reduce the chance for recidivism.¹¹⁴

Youth of Color in Juvenile Court: Conclusion

Youth of color are disproportionately represented in the juvenile justice system. Although DMC represents a complex issue, cultural competency and racial sensitivity coupled with the use of zealous advocacy that provides more comprehensive client interviews, more appropriate charging and detention decisions, as well as more effective dispositions and services may be beneficial in reducing DMC at key points of the juvenile justice system.

¹¹⁴ *Id.*

APPENDIX

TABLE 1: RELATIVE RATE INDEX (2007-2008)

DATA ITEMS	RELATIVE RATE INDEX (2007-2008)			
	African American	American Indian or Alaska Native	Asian	Hispanic or Latino
CASES REFERRED TO JUVENILE COURT	2.97	1.58	0.41	1.09
CASES DIVERTED	0.87	0.76	0.76	1.04
CASES INVOLVING SECURE DETENTION	1.75	1.85	0.92	0.94
CASES PETITIONED (CHARGE FILED)	1.09	1.17	1.17	0.97
CASES RESULTING IN DELINQUENT FINDINGS	0.94	1.05	0.67	0.94
CASES RESULTING IN PROBATION PLACEMENT	1.01	1.01	0.94	1.02
CASES RESULTING IN CONFINEMENT IN SECURE JUVENILE CORRECTIONAL FACILITIES	4.48	3.07	Insufficient number of cases for analysis	1.55
CASES TRANSFERRED TO ADULT COURT	8.55 ¹¹⁵	Insufficient number of cases for analysis		

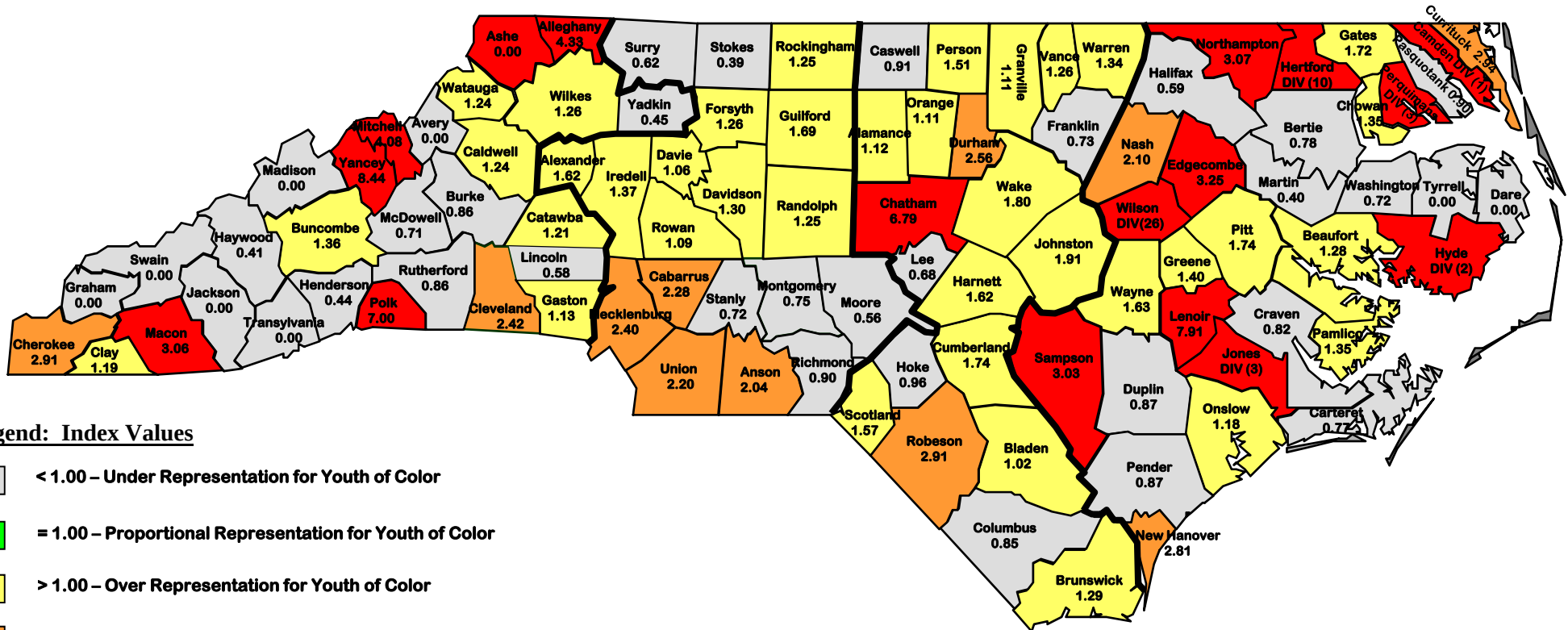
TABLE 2: RELATIVE RATE INDEX (2008-2009)

DATA ITEMS	RELATIVE RATE INDEX (2008-2009)			
	African American	American Indian or Alaska Native	Asian	Hispanic or Latino
CASES REFERRED TO JUVENILE COURT	2.88	2.09	0.32	1.18
CASES DIVERTED	0.92	0.80	0.93	0.89
CASES INVOLVING SECURE DETENTION	1.70	1.28	1.29	1.17
CASES PETITIONED (CHARGE FILED)	1.06	1.13	1.05	1.06
CASES RESULTING IN DELINQUENT FINDINGS	0.94	1.07	0.75	0.92
CASES RESULTING IN PROBATION PLACEMENT	1.02	1.01	0.98	1.00
CASES RESULTING IN CONFINEMENT IN SECURE JUVENILE CORRECTIONAL FACILITIES	3.70	1.84	Insufficient number of cases for analysis	1.60
CASES TRANSFERRED TO ADULT COURT	2.94	Insufficient number of cases for analysis		5.06

TABLE 3 RELATIVE RATE INDEX (2009-2010)

DATA ITEMS	RELATIVE RATE INDEX (2009-2010)			
	African American	American Indian or Alaska Native	Asian	Hispanic or Latino
CASES REFERRED TO JUVENILE COURT	2.84	1.77	0.31	1.40
CASES DIVERTED	0.89	0.73	1.04	0.85
CASES INVOLVING SECURE DETENTION	1.76	1.37	1.05	1.06
CASES PETITIONED (CHARGE FILED)	1.08	1.21	0.97	1.10
CASES RESULTING IN DELINQUENT FINDINGS	0.94	1.20	0.82	0.75
CASES RESULTING IN PROBATION PLACEMENT	0.97	0.86	0.81	1.04
CASES RESULTING IN CONFINEMENT IN SECURE JUVENILE CORRECTIONAL FACILITIES	3.26	1.82	Insufficient number of cases for analysis	1.54
CASES TRANSFERRED TO ADULT COURT	3.26	Insufficient number of cases for analysis		14.77

Relative Rate Index Detention Admissions FY 2009-10

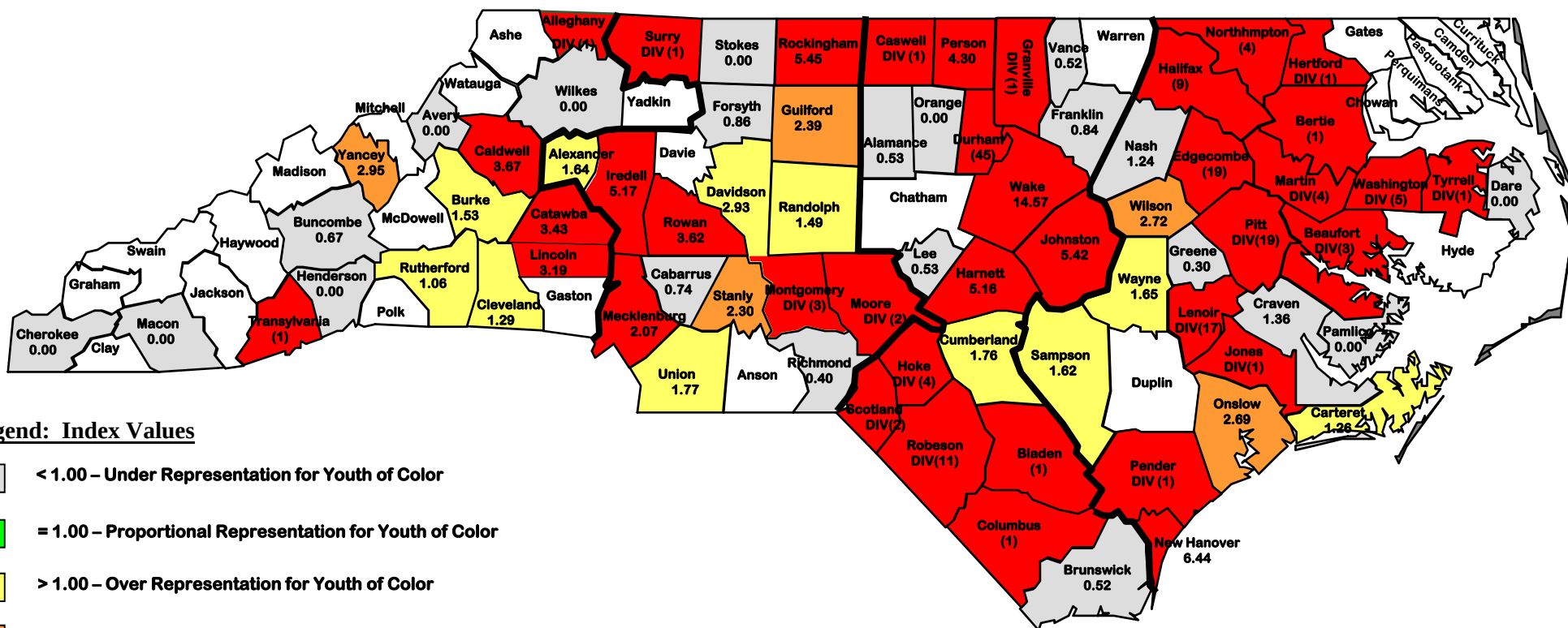


Legend: Index Values

- < 1.00 – Under Representation for Youth of Color
- = 1.00 – Proportional Representation for Youth of Color
- > 1.00 – Over Representation for Youth of Color
- > 2.00 – 2x Over Representation for Youth of Color
- > 3.00 – 3x Over Representation for Youth of Color

Relative Rate Index

Youth Development Center Commitments

FY 2009-10

Legend: Index Values

	< 1.00 – Under Representation for Youth of Color
	= 1.00 – Proportional Representation for Youth of Color
	> 1.00 – Over Representation for Youth of Color
	> 2.00 – 2x Over Representation for Youth of Color
	> 3.00 – 3x Over Representation for Youth of Color



Achieving Equity and Fairness in Foster Care

RIGHT FROM THE START:
**The CCC Preliminary Protective Hearing
Benchcard Study Report**

TESTING A TOOL FOR JUDICIAL DECISION-MAKING

National Council of Juvenile and Family Court Judges
Permanency Planning for Children Department

The National Council of Juvenile and Family Court Judges®, headquartered on the University of Nevada campus in Reno since 1969, provides cutting-edge training, wide-ranging technical assistance, and research to help the nation's juvenile and family courts, judges, and staff in their important work. Since its founding in 1937 by a group of judges dedicated to improving the effectiveness of the nation's juvenile courts, the National Council of Juvenile and Family Court Judges has pursued a mission to improve courts and system practice and to raise awareness of the core issues that touch the lives of many of our nation's children and families.

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COURTS CATALYZING CHANGE PRELIMINARY PROTECTIVE HEARING BENCHCARD STUDY: EXECUTIVE SUMMARY

This report presents findings from the Courts Catalyzing Change: Achieving Equity and Fairness in Foster Care (CCC) Preliminary Protective Hearing (PPH) Benchcard Study. The CCC initiative, supported by Casey Family Programs and the Office of Juvenile Justice and Delinquency Prevention, was created and launched through the National Council of Juvenile and Family Court Judges (NCJFCJ) Model Courts project.

In the fall of 2009, the Permanency Planning for Children Department (PPCD) of NCJFCJ began a study to examine the effects associated with judges' use of the PPH Benchcard, which had been developed as part of the CCC agenda. Three sites agreed to participate in a pilot and assessment of the Benchcard. For the assessment study, data were collected on more than 500 children in Los Angeles, California; Omaha, Nebraska; and Portland, Oregon. Data were gathered from case file information (both court and agency files) and from courtroom observations. Researchers collected data at several junctures, from placement to establishment of jurisdiction and disposition.

To explore Benchcard implementation effects, the study was designed to allow for several different comparisons. Researchers collected information on numerous data points, including demographic details, information about the families involved, hearing participants, dates of case events, and details on allegations, services, and placement. Data from a baseline sample were collected at each of the three sites, and judicial officers at each site were randomly assigned to either a Benchcard implementation group or a control group.

Judicial officers in the Benchcard group were trained on its use, including receipt of a draft Technical Assistance Bulletin explaining the development of the Benchcard (*Right from the Start: A Judicial Tool for Critical Analysis & Decision-Making at the PPH Hearing*). They began implementation of the Benchcard in their preliminary protective hearings. Each randomly assigned judicial officer heard 10 preliminary protective hearings using the Benchcard, while the control group of judicial officers in each of the sites heard 10 preliminary protective hearings without Benchcard implementation. The Benchcard was not shared with stakeholders during the research project in order to isolate the judicial intervention.

Based upon systematic courtroom observation and a standardized count methodology, the data indicate that those judicial officers who used the Benchcard discussed more key topics during the preliminary protective hearings than did the control group. Benchcard implementation appears to be associated with substantially higher quantities and quality of discussion of key dependency topics identified in both the *RESOURCE GUIDELINES* and the CCC initiative when compared to the control group. Benchcard implementation also corresponds to an increased thoroughness of discussion and judicial inquiry, as demonstrated by the number of topics and how thoroughly they were discussed. Tests indicate that these differences are statistically significant. These process findings indicate that Benchcard implementation is associated with substantial increases in the quantity and quality of discussion in PPH hearings.

Benchcard use also was associated with more family placements—placement with a charged parent, with a non-charged parent, or with a relative—at the initial hearing and even more again at adjudication when comparing the same judges before and after Benchcard implementation. (Reciprocally, Benchcard use was also associated with fewer children placed in non-relative foster care at the initial hearing and even fewer again at adjudication.) Statistical tests show these findings to be significant. Similarly, the percentage of children who were reunified with the charged parent at the initial hearing and at the adjudication hearing increased after Benchcard implementation. Differences did exist across the three sites, but the findings remained significant when the three sites were accounted for in the statistical analysis.

The study found race differences in filing trends. White mothers (in comparison to African American and Hispanic mothers) tended to enter court with a higher number of allegations. White mothers also had more allegations of substance abuse, homelessness, and mental health issues (each of these represent statistically significant differences).

Overall, African American mothers came into court with fewer allegations and were more likely to have their case dismissed by the time of the adjudication hearing.

Allegations of substance abuse show a different pattern. White families in the sample were much more likely than other families to face allegations of failure to supervise or parent adequately due to substance abuse (drugs or alcohol) than were families of other racial groups (statistical tests show these differences to be statistically significant). Differences among racial groups are also apparent in allegations involving poor parenting due, in major part, to poor mental health functioning. As with substance abuse allegations, White families were much more likely to be brought to court with allegations relating to mental health. White families were almost three times as likely to face a mental health allegation as families from other racial groups (again statistically significant).

Looking at placement differences by race in the baseline sample, children with White mothers were the most likely to be placed in foster care at the initial hearing, and children with African American mothers were the least likely to be placed in foster care. However, when allegations are taken into account, race does not appear to be related to placements at all. Statistical tests show that there may be differences in placement by racial group, but children with similar case allegations tend to be equally likely to be placed in foster care regardless of race.

While allegation differences could explain apparent differences by race in placement trends, by the permanency hearing these differences were more substantial. At the permanency hearing, African American children were more likely to be currently placed in foster care than children from White or Hispanic families. Also, African American children were less likely to be currently placed with a parent or with relatives at the permanency hearing than children from Hispanic or White families.

These findings represent an initial analysis of the study data. Additional analysis of these and many other topics is forthcoming. Additional reports will be available in the weeks and months to come relating to:

- A further investigation of placements at each case event, with a focus on identifying how placement trends may vary across racial groups;
- An analysis of the effect of Benchcard use on court processes, especially in terms of the timeliness of case events;
- An exploration of how services are offered and ordered for children and families according to case characteristics, family needs, cultural appropriateness, and race;
- A statistical investigation into the baseline (pre-implementation) data to identify which of the variables (among the hundreds collected for this study) are the best predictors of case outcomes.

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INTRODUCTION

This report presents findings from the Courts Catalyzing Change: Achieving Equity and Fairness in Foster Care preliminary Protective Hearing (PPH) Benchcard Study. The National Council of Juvenile and Family Court Judges (NCJFCJ) is providing this report to assist courts in building the necessary support for successful implementation of both the Benchcard and the CCC National Agenda for Reducing Racial Disproportionality and Disparities in the Dependency Court System as a whole. The goal of the agenda is to reduce disproportionality and disparate treatment, ultimately improving outcomes for all children in care. Included in the report are a description of the study, research informing the development of the Benchcard, and highlighted findings with regard to improved court practices and related outcomes.

The CCC National Agenda for Reducing Racial Disproportionality and Disparities in the Dependency Court System

They key components of the agenda are to:

1. Engage national, state, local, and tribal stakeholders, community partners, and children and families
2. Transform judicial practice from the bench
3. Participate in policy and law advocacy
4. Examine and employ research, data, and promising practices
5. Impact service array and delivery

COURTS CATALYZING CHANGE: ACHIEVING EQUITY AND FAIRNESS IN FOSTER CARE

The CCC initiative, supported by Casey Family Programs and the Office of Juvenile Justice and Delinquency Prevention, was created and launched through the NCJFCJ Model Courts project. CCC is a multidisciplinary collaborative effort to develop and implement a national agenda to reduce the disproportionate representation of children of color and to reduce the disparate treatment they and their families can experience in the child welfare system. The national agenda was developed by a Call to Action Work Group in April 2008. In January 2009, a Preliminary Protective Hearing Benchcard was developed with input from the CCC Steering Committee, the NCJFCJ's Permanency Planning for Children Advisory Committee, and the lead judges of the NCJFCJ's Model Courts project. Benchcard development is also aligned with NCJFCJ's current efforts to update and enhance the *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (NCJFCJ, 1995). Intended for use during the hearing, the PPH Benchcard asks judges to both reflect on the decision-making process in order to protect against institutional bias and to consider some key inquiries, analyses, and decisions relating to removal, placement, and services.

Before implementing the PPH Benchcard, each study site was required to develop or enhance an existing multi-system collaborative group to guide local implementation of CCC. The courts were then required to participate in training about institutional and structural racism and unconscious bias in order to better understand the history and complexity of these important issues. The courts also developed strategic plans for CCC implementation. (See Model Courts National Agenda Implementation Guide at www.ncjfcj.org.)

FROM THE BENCHCARD

Reflections on the Decision-Making Process to Protect against Institutional Bias

Ask yourself as a Judge:

- What is my understanding of this family's unique culture and circumstances?
- How has the court's past contact and involvement with this family influenced my decision-making process and findings?
- How have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?

FROM THE BENCHCARD

Examples of Key Inquiries, Analyses, and Decisions

- Reasonable efforts to prevent removal: What actions did the social service agency take to create a safety plan to allow the child to remain at home or in the home of another relative or family friend without court involvement?
- What is preventing the child from returning home TODAY? What type of safety plan could be developed and implemented in order for the child to return home today?
- Appropriateness of placement: How does the placement support the family/child's culture and their involvement in the initial plan?

THE BENCHCARD STUDY

In the fall of 2009, the Permanency Planning for Children Department (PPCD) of NCJFCJ began a study to examine the effects associated with judges' use of the PPH Benchcard. Three sites that had already begun to engage in the initial CCC implementation process described above agreed to participate in the study.

The first phase of the study included data collection on more than 500 children in Los Angeles, California; Omaha, Nebraska; and Portland, Oregon. Data were gathered from case file information (both court and agency files) and from courtroom observations. A longitudinal study was designed to follow these children throughout the course of their involvement in the juvenile dependency system. Researchers collected data at several junctures, from placement to establishment of jurisdiction and disposition, completing the bulk of data entry in March 2010. To explore Benchcard implementation effects, the study was designed to allow for several different comparisons. Researchers collected information on numerous data points, including demographic details (including race), information about the families involved, hearing participants, dates of case events, as well as details on allegations, services, and placement. Data from a baseline sample were collected at each of the three sites, and judicial officers at each site were randomly assigned to either a Benchcard group or a control group.

For data collected by courtroom observation, a standardized court observation instrument was constructed for the study. The instrument included items related to the content and level of discussion in the hearing, the length of the hearing, parties present, and parent engagement. Researchers were trained on the instrument during a 2-day training session (which also included training on the case file review instrument). During the training, all researchers discussed the instrument and considered any potential for coding discrepancies. Researchers visited each of the three study sites during the first week of Benchcard implementation. In Portland and Omaha, researchers attended every Preliminary Protective Hearing that was held during a four-day site visit. Due to differences in caseload volume, in Los Angeles each researcher was assigned to a block of courtrooms for one day. Researchers then coded the first three hearings they observed in pairs. Coding was then compared to check-code and to generate inter-rater reliability scores (which indicated no significant or substantive differences). Afterwards, researchers attended hearings individually for the remainder of the day.

Pilot Jurisdiction Profiles

Los Angeles: The Los Angeles Superior Court, Juvenile Division serves a general population of approximately 10 million across Los Angeles County. The majority of dependency cases are heard at the Edmund D. Edelman Children's Court, the nation's first dependency courthouse designed as a child-sensitive facility. Judge Michael Nash has served as the lead judge of the Los Angeles Model Court since its inception in September 1999, and he is currently the presiding judge of the Los Angeles Juvenile Court. He has presided over a steady decrease in the number of children under the Court's jurisdiction as a result of continued best-practice implementation and successful reform initiatives. Currently, 21 judicial officers serve on the juvenile bench, with approximately 24,700 children under the Court's jurisdiction.

Omaha: The Separate Juvenile Court of Douglas County is the largest of three Separate Juvenile Courts in the state of Nebraska. Under the leadership of Judge Douglas Johnson, Omaha joined the Model Courts project in December 2002. Five juvenile court judges preside over juvenile dependency and delinquency, as well as domestic relations cases. There are approximately 1,800 children in foster care in Douglas County. Former Model Court Lead Judge Wadie Thomas, Jr. has taken a leadership role in implementing CCC in Omaha.

Portland: In October 1998, with the Honorable Stephen Herrell presiding as the lead judge, the Multnomah County Juvenile Court joined the Model Court project. Judge Paula Kurshner is presently the lead judge of the Portland Model Court, and Judge Nan Waller is the chief family court judge on the Multnomah County Circuit Court. Together, they work collaboratively with nine other juvenile court judges and four referees to serve the more than 710,000 residents of Multnomah County. Currently, Portland has 2,758 children under the court's jurisdiction, of whom 1,633 are in out-of-home care. The Portland Model Court continues to develop and implement innovative court practices to reduce safely the number of children in care.

Judicial officers in the Benchcard group were trained on its use, including receipt of a draft Technical Assistance Bulletin explaining the development of the Benchcard (*Right from the Start: A Judicial Tool for Critical Analysis & Decision-Making at the PPH Hearing*). They began implementing the Benchcard in their preliminary protective hearings.¹ Each randomly assigned judicial officer heard 10 preliminary protective hearings using the Benchcard, while the control group of judicial officers in each of the sites heard 10 preliminary protective hearings without Benchcard implementation. The Benchcard was not shared with stakeholders during the research project in order to isolate the judicial intervention. Had the Benchcard been shared with others, it would have been difficult to measure whether judges or others were raising key issues associated with Benchcard use. For more on this issue, see the Study Method on page 10.

Research Background

About 3.3 million referrals for alleged maltreatment, involving approximately 6 million children, were reported to U.S. child protection agencies in 2009. Over 2 million children are investigated for child abuse and neglect each year in the United States, and nearly 600,000 removals (with some children removed more than once) (U.S. Department of Health & Human Services, 2010). Every year in the United States, about 772,000 children are confirmed as victims of child maltreatment.²

Within this context, prior research has demonstrated that racial disparities exist within the juvenile dependency system concerning the reported allegations, specifically against African Americans (Hill, 2004; U.S. Government Accountability Office, 2007). Before a case reaches court, African American children are more likely than other children to be referred to protective services (Gryzlak, Wells, & Johnson, 2005; Magruder & Shaw, 2008; Sabol, Coulton, & Polousky, 2004) and to have allegations of abuse and neglect substantiated (Ards, Myers, Malkis, Sugrue, & Zhou, 2003; Fluke, Yuan, Hedderson, & Curtis, 2003). Further, African American children are more likely to be removed from their homes than children of other racial or ethnic backgrounds (Lu et al., 2004; Magruder & Shaw, 2008; Rivaux et al., 2008).

While children are in the juvenile dependency court system, these disparities continue to occur. Specifically, African American children are more likely to be placed in foster care than other children are (Lu et al., 2004; Needell, Brookhart, & Lee, 2003). African American children also are more likely to stay longer in foster care (Courtney et al, 1996; Denby, Curtis, & Alford, 1998; Garland et al., 2000; Noonan & Burke, 2005); receive fewer services while in care (Courtney et al, 1996; Garland et al., 2000; Rivaux et al., 2008); and are less likely to be reunified with their family than children from other racial and ethnic groups (Barth, 1997; Harris & Courtney, 2003).

Based on interpretation of findings from the National Incidence Studies (NIS) II and III, child welfare advocates and researchers assumed that children's representation at each child welfare decision point should mirror their proportionate composition of the child population. The NIS IV challenged this assumption by concluding that African American children were at greater risk of maltreatment. Due to higher odds of poverty and other related stresses, higher rates of foster care placements for different groups may reflect family and community need. Thus, child welfare and other stakeholders should be concerned about the youth placed who should not have been, as well as youth not served who should have been served (Barth, 2011; Drake & Jonson-Reid, 2011).

In addition, community characteristics matter. Wulczyn (2011) and his colleagues have found that there are substantial ethnic group differences across multiple states, all of which are part of the Chapin Hall Multistate Data Archive. For example, at least one-third of African American children in the Chapin Hall study actually reunified or adopted more quickly than their White counterparts. Data need to be analyzed at the county and state level, not at the level of national aggregation.

1 For this study, the Benchcard implementation intervention included participating in the Benchcard training, receiving the Technical Assistance Bulletin, and using the Benchcard in practice. Both the Benchcard group and the control group participated in the CCC racial equity and implicit bias training, which is a required component of Benchcard implementation.

2 A national estimate of 772,000 child victims in 2008 was calculated by multiplying the victimization rate (10.3) by the national population (74,924,121), dividing by 1,000, and rounding to the nearest 1,000.

Possible Reasons for Racial Disparities³

Empirical evidence suggests that racial differences can exist for at least three reasons:

1. **Greater need for services:** Children of color may have greater service needs due to higher poverty and other risk factors (Drake & Jonson-Reid, 2011; Putnam-Hornstein & Needell, 2011; Wulczyn, Barth, Yuen, Jones Harden, & Landsverk, 1995). Families of color as a whole are more likely to come to the attention of the child welfare system because they are impacted more profoundly by outside factors that can increase the risk of child neglect, such as poverty, joblessness, substance abuse, and mental illness. For example, families of color are more likely to live in communities that are more impacted by poverty, homelessness, crime, and violence, which are less than ideal conditions in which to safely raise a child.
2. **Structural and institutional racism:** There may be racial bias in the child welfare systems or other ecologies (Hill, 2004; Johnson, 2007; McCrory, Ayers-Lopez, & Green, 2006). Some child welfare systems have biased or culturally insensitive practices and policies that can lead to inequitable decision-making processes (Bent-Goodley, 2003; McRoy, 2004; Morton, 1999; Roberts, 2007). These biases and insensitivities may be systemic or individual by worker, and they may be intentional or unintentional.
3. **Community conditions and supports may be inadequate:** Geographic contexts and variability may therefore have a disparate impact on communities and families of color in terms of service availability and access (Roberts, 2007; Wulczyn, 2011). Child welfare systems and processes may disparately involve families of color (Courtney, Barth, Berrick, Brooks, Needell, & Park, 1996; Fluke, Jones-Harden, Jenkins, & Ruehrdanz, 2010; Texas Health and Human Services Commission and Department of Family and Protective Services, 2006).

Foster Care Outcomes

The discussion of disparities in the juvenile dependency system concerns a deeper understanding of the critical issues facing children who are removed from their homes and placed in foster care. Over the past decade, there have consistently been more than 500,000 children in foster care in the United States at any given time (Child Welfare Information Gateway, 2009). Only recently has the number of children in care dropped to 423,773 at the end of the 2009 Federal fiscal year, with 48 percent of these children in non-relative foster care homes (U.S. Department of Health and Human Services, 2010).

Recent research has highlighted a number of troubles facing children in foster care. These include greater incidence of drug and alcohol use (Thompson & Auslander, 2007); significantly higher levels of unemployment (Macomber et al., 2008); higher likelihoods of homelessness (Yen, Hammond & Kushel, 2009; Zlotnick, 2009); higher incidences of teen pregnancy (Dworsky & DeCoursey, 2009); worse educational outcomes (Trout et al., 2008); and more experiences with depression (Blome, Shields, & Verdick, 2009).

Further studies have investigated the experiences of foster care alumni later in life. These findings suggest that youth who were placed in foster care as children are significantly more likely to commit crimes, drop out of school, receive welfare benefits, have substance abuse problems, and be homeless than children who were not placed in foster care (Clausen, Landsverk, Ganger, Chadwick, & Litrownik, 1998; Courtney, Dworsky, Lee, & Raap, 2010; Courtney & Piliavin, Grogan Kaylor & Nesmith, 2001; Pecora et al., 2010; Vinnerljung et al., 2006). In addition, nearly 20 percent of young prison inmates and 28 percent of people who are homeless had spent some time in foster care as a youth (Burt et al., 1999).

Additionally, evidence shows that children in out-of-home care are clearly at greater risk for short- and long-term school failure than are other children (Pecora et al., 2006). Research has shown that disruptions relating to foster care can lead to a lack of continuity in schooling (Courtney, Roderick, Smithgall, Gladden, & Nagaok, 2004; Malmgren &

³ Abstracted with permission from Casey Family Programs (2011).

Meisel, 2002) such as truancy, grade retentions, and multiple placements (Trout et al., 2008). Further, disruptions relating to foster care are related to slow academic achievement (Courtney et al., 2004), negative educational outcomes, and elevated rates of disability (Trout et al., 2008).

Aside from the aforementioned outcomes, children in the juvenile dependency system are also at risk for serious physical injury. Being in the juvenile dependency system does not always offer immediate protection, as children who had been previously reported to a child abuse registry were found to be three times more likely than other children to die in childhood (Sabotta & Davis, 1992).

Finally, research has demonstrated that foster care itself can have negative effects for some children. The evidence suggests that children on the margin of placement—when stakeholders disagree if the child should be placed in out-of-home care—tend to have better outcomes when they remain at home, especially older children (Doyle, 2007). This research concludes that though abusive and neglectful family environments are undoubtedly harmful to children, removing a child from home may be traumatic as well (see also Lawrence, Carlson, and Egeland, 2006).

Given the myriad of potential problems outlined above, coupled with the racial disparities observed throughout the juvenile dependency continuum in many communities, the purpose of this study is to assess the Benchcard as a tool to ameliorating the potential for disparities and negative outcomes at one step in the case. This intervention does not purport to address every potential source of disparity; rather it focuses on the role of judicial decision-making in lessening, heightening, or maintaining any disparities that have occurred earlier in the process. The findings presented below show that the Benchcard appears to have a clear positive effect on overall placement rates, but its effect on disparities is more complex.

Judicial Feedback on the PPH Benchcard

Judge Katherine Tennyson

Multnomah County Family Court, Portland, Oregon

“...[I]t is the strong feeling in our jurisdiction, among judges, lawyers and child welfare workers alike, that consistent use of the Benchcard is raising the standard of practice for everyone. Everyone is now looking at the Benchcard to see how to develop court practice training for their particular disciplines so that lawyers, child welfare workers, service providers and others, can be prepared to answer the court’s questions the moment they walk in for the first appearance, and to know that a second shelter hearing will follow closely if the court needs more. We believe that use of the Benchcard is strongly encouraging serious consideration of all the placement alternatives before the court hears the recommendation.”

Judge Wadie Thomas, Jr.

Separate Juvenile Court of Douglas County, Omaha, Nebraska

Since the start of the Benchcard, I have found that considerable discussion is being had at the initial hearing in regards to services that enable the children to return home. More relatives are being explored, even when the first relative option turns out not to be viable.

The parties seem to have more discussions in regards to the children going home sooner and/or visits being liberalized sooner. It also appears that these concepts work well for all children in our child welfare system, including Caucasian children.

As an aside, I actually enjoy following the Benchcard.

Judge D. Zeke Zeidler

Los Angeles Juvenile Court, Los Angeles, California

The CCC Benchcard served as a concrete reminder to consider and verbalize required findings, such as the services available to leave the child in the home without risk and efforts made to place the child with relatives. It also provided valuable prompts to solicit the input of those family members present in court and to ascertain at the end of the hearing that the parents understood what happened in the hearing. It has the potential to equalize treatment of parties of diverse backgrounds by ensuring that the same considerations are made in every case and by making sure that all participants have an understanding of the court process.

STUDY METHOD

Experimental Design and Comparison Group

The design of the CCC Benchcard research included both a quasi-experimental and an experimental design. The quasi-experimental design consisted of a pre/post test comparing the decisions of Benchcard users prior to and after implementing the CCC Benchcard. In the experimental design, judges from each site were randomly assigned to implement the Benchcard or not (as a control group). Since all participants were aware of the study, any observer effects would have been equal for both groups, thus mitigating any effects on comparative findings.

Study Limitations

The major limitation of this analysis was that there were “spillover” effects. Once judges began asking questions of social workers and attorneys, attorneys and social workers began preparing these answers for court, regardless of the judge. That means that many of the Benchcard question responses were being given to control group judges. Some jurisdictions use teams per courtroom or per judge, which may reduce this effect. To reduce the potential for spillover effects further, the research team used only the first 10 new cases from each judge, thus reducing the amount of spillover due to the decreased time for the spillover to occur. In addition, there was a decrease in sample size for the post-implementation cases, thereby reducing the likelihood of finding statistically significant differences. (See the next section.)

STUDY PARTICIPANTS

Overall, this study relied on a review of over 500 cases (n=555), and the number of observations varied by point of comparison. Of the 555 cases, 336 were from the pre-implementation baseline, and 219 were from post-implementation. Also, of the 555 cases, 277 were from Benchcard users (both pre- and post-implementation) and 278 were from the control group (both pre- and post-implementation). Of the 219 post-implementation cases, 119 were Benchcard users and 100 were in the control group.

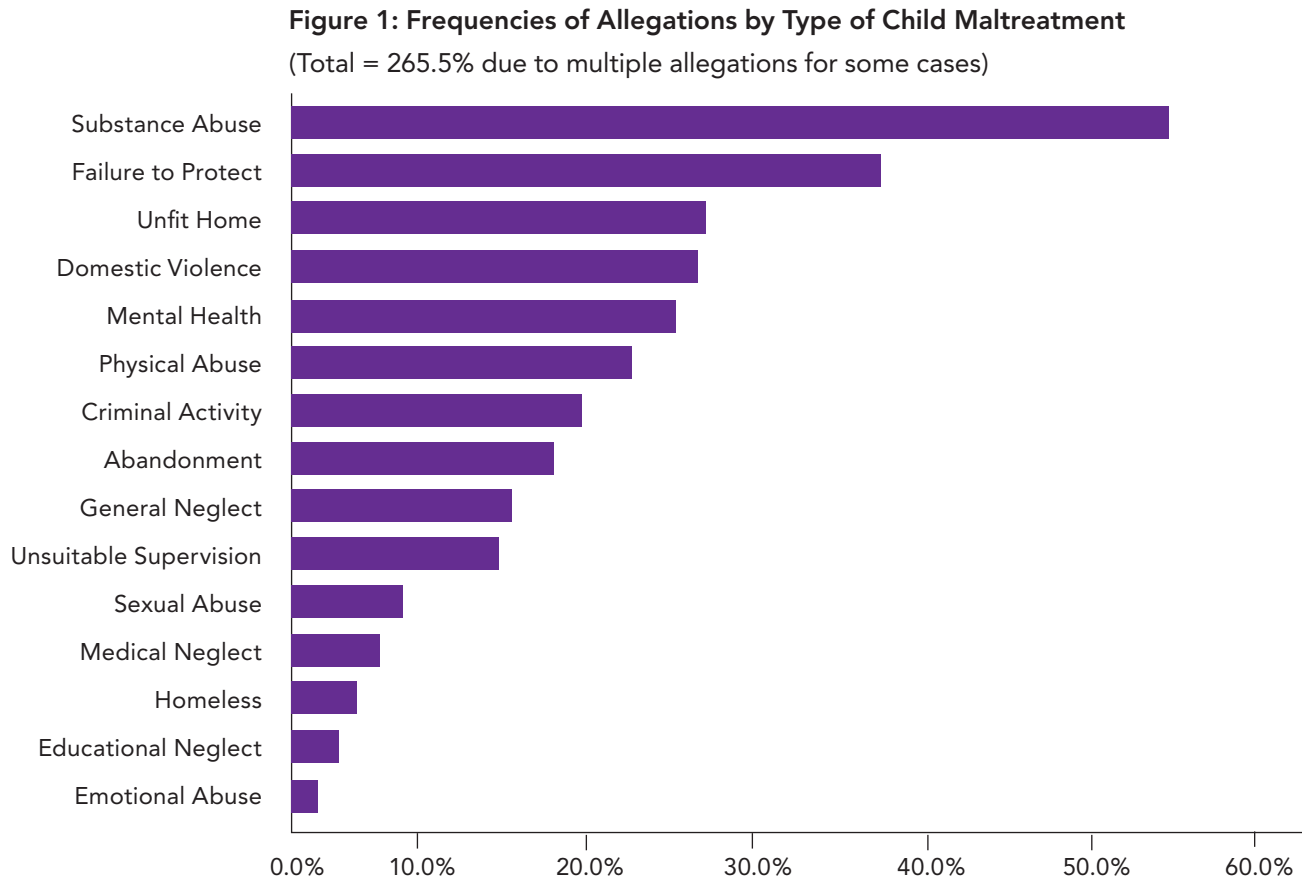
Table 1: Study Participants

Phase	Treatment Group	Control Group	Total
Pre-Implementation	158	178	336
Post-Implementation	119	100	219
Total	277	278	555

Table 2: Characteristics of the Sample (Total number of observations = 555)

	Control Group	Benchcard Group
Primary Race or Ethnicity of Child		
White/Caucasian	35%	35%
Black/African American	22%	24%
Latino/Hispanic	29%	29%
Native American/Indian	0%	2%
Asian/Pacific Islander	3%	1%
Other race or ethnicity	4%	4%
Unable to determine	7%	7%
Jurisdiction		
Omaha	24%	30%
Los Angeles	45%	39%
Portland	30%	31%
Gender		
Male	41%	39%
Female	54%	54%
Unable to Determine	5%	7%
Age		
3 or under	36%	38%
3.1 thru 9	28%	23%
9.1 thru 13	11%	9%
13.1 thru 18	18%	18%
Unable to Determine	8%	12%
Parent Status		
Mother is single	50%	54%
Mother is not single	32%	29%
Father is single	1%	0%
Unable to determine	17%	17%

T-tests were run for differences in each of the above factors between the control group and the Benchcard group. The tests showed these differences to be statistically insignificant at the 0.05 level for each of the above factors with the exception of Asian/Pacific Islander. However, the scale of the difference between the control group and Benchcard group on this factor is too small to be substantive.



Site Differences

Because of the complex nature of child abuse and neglect hearings, differences in practice, policy, and statutes may occur across jurisdictions. The three project sites were selected in part because they do exhibit some diversity in their approaches. While they are similar in many regards, there were some notable differences among the three jurisdictions. Some of these differences are explained below.

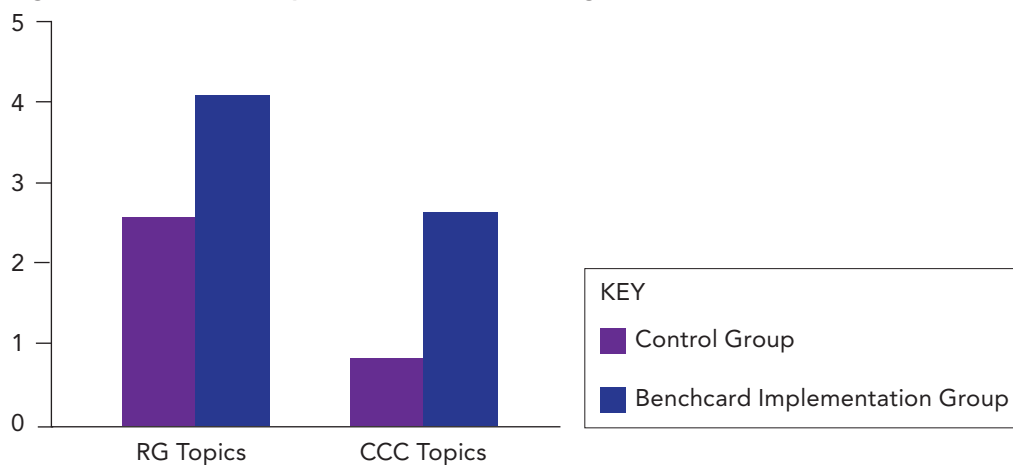
- In Omaha, all new cases come to a pre-hearing conference. The focus is on alternative dispute resolution, during which all parties (except the judge) meet and discuss issues that are pertinent to the preliminary protective hearing. Following this pre-hearing conference, the judge holds a preliminary protective hearing. Further, in Omaha, the permanency planning hearings often occur in conjunction with review hearings.
- In Los Angeles, judges routinely have higher caseloads than judges do in the other two sites. California also routinely appoints counsel for all parties at the first hearing and has an expedited review process for special cases (e.g., children under the age of 3 years).
- In Portland, an initial hearing is held immediately following the petition filing, and a second expanded preliminary hearing is held within 30 days. Also in Portland, counsel is appointed to parents at the first hearing if they are present in court.

Despite these differences, these sites are similar in the way that they handle child abuse and neglect cases. The sites not only follow the federal mandates for child abuse and neglect case processing (e.g., ASFA), but they also are all Victims Act Model Court sites, dedicated to systems change and implementation of best or promising practices. Therefore, we expect that the above differences had a nominal effect on study findings.

FINDINGS: IMPROVED PROCESS

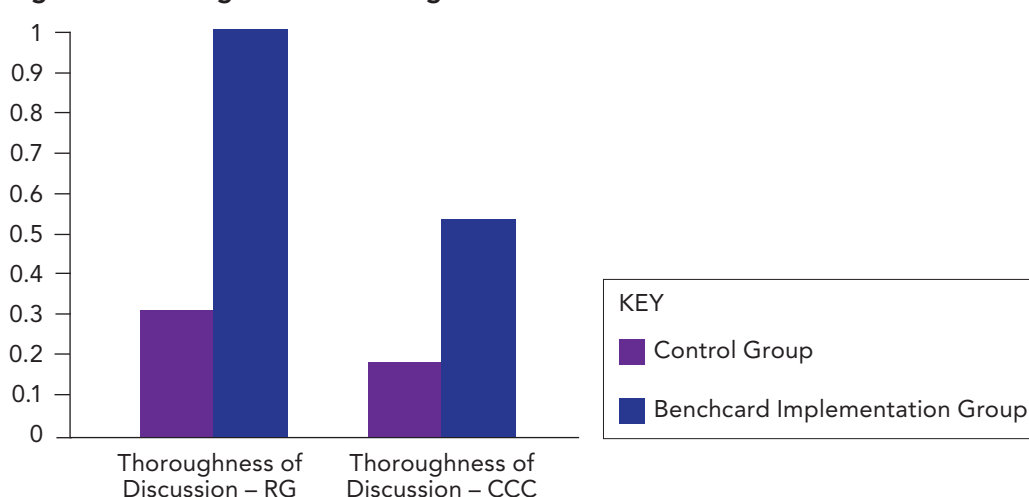
Based upon systematic courtroom observations and a standardized count methodology, the data indicate that those judicial officers who used the Benchcard discussed more key topics during the preliminary protective hearings than did the control group. As depicted in Figures 2 and 3, Benchcard implementation appears to be associated with substantially higher quantities and quality of discussion of key dependency topics identified in both the *RESOURCE GUIDELINES* and the CCC initiative when compared to the control group. In addition, t-tests indicate that these differences are statistically significant at 0.05 (n=29). The following figure illustrates the average number of items discussed or raised by judges for both *RESOURCE GUIDELINES* and CCC topics.

Figure 2: Number of Topics Discussed in Hearings



Benchcard implementation also corresponds to an increased thoroughness of discussion and judicial inquiry. While Figure 2 represents *how many* topics parties discussed, Figure 3 shows how thorough that discussion was. Figure 3 shows discussion thoroughness (based on number of topics covered and thoroughness of discussion into each of those topics) in terms of *RESOURCE GUIDELINES* and CCC topics.⁴ *Thoroughness* was rated on a metric of the amount and breadth of discussion on each topic (ranging from not discussed at all, mentioned but not discussed, discussed briefly, to substantively discussed).

Figure 3: Thoroughness of Hearing Discussion

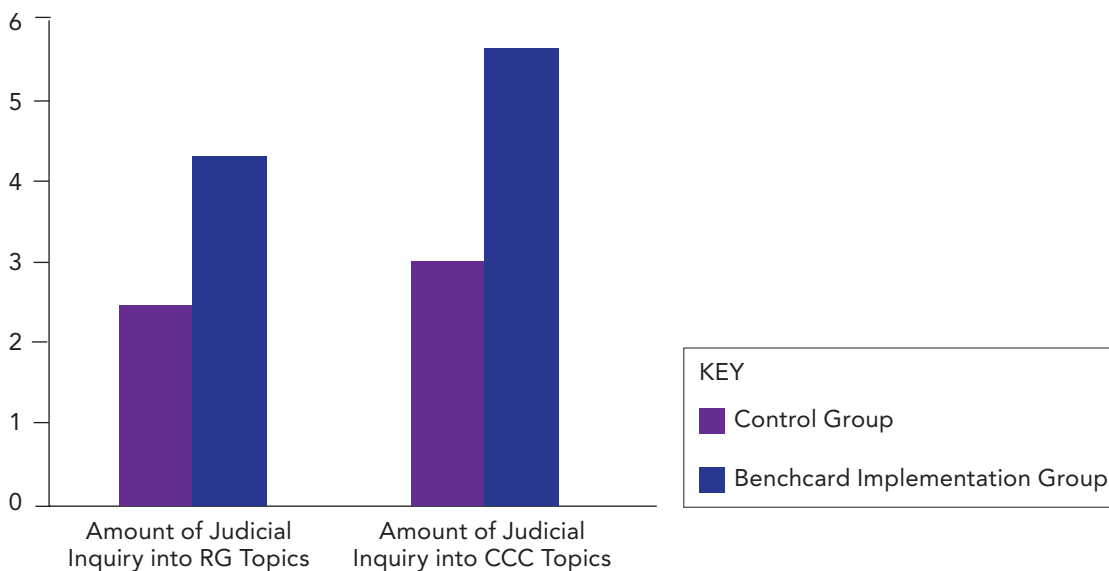


Rating scale: These ratings are presented on a scale of 0 (not discussed) to 1 (substantively discussed).

⁴ The *RESOURCE GUIDELINES* topics include discussion of the petition, parties who should be present, services offered and their appropriateness, placement of the child, whether the child can go home today, and reasonable efforts. The CCC topics include discussion of the allegations and parties, any paternity issues, probable cause for removal, cultural and linguistic issues relating to removal and placement, offering services that might allow the child to go home, safety planning, engaging parents in developing services, and focusing on strengths

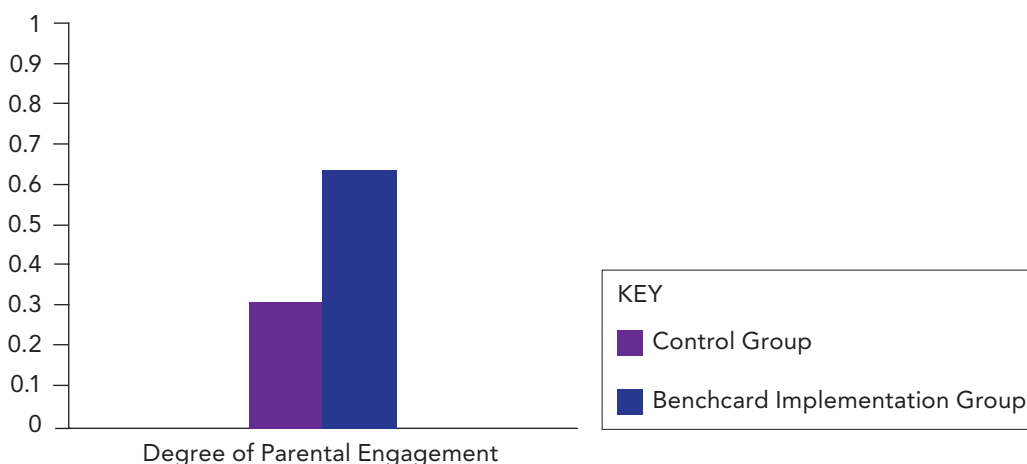
Similarly, Figures 4 and 5 demonstrate how much the judicial officer inquired into the topics and how directly the judicial officer engaged the parents in the discussion. Judicial inquiry was coded on a scale from 0 to 1 (with gradations in between) for each topic. Figure 4 shows the sum of the weighted amounts of each topic that was discussed. Figure 5 shows parental engagement for each group coded on a scale from 0 (representing no engagement) to 1 (equaling substantial engagement), with all gradations in between (based on a direct judicial inquiry, opportunities to speak, to ask questions, or to indicate understanding). Weighted scores were created by multiplying the number of items discussed with the thoroughness of the discussion. Again, t-tests indicated that these differences between the Benchcard implementation group and the control groups were statistically significant at the 0.05 level.

Figure 4: Amount of Judicial Inquiry



Rating scale: These ratings represent the thoroughness ratings (on a scale of 0 to 1) times the number of topics discussed.

Figure 5: Parental Engagement



Rating scale: These ratings are presented on a scale of 0 (no engagement) to 1 (substantively engaged).

These process findings indicate that Benchcard implementation is associated with substantial increases in the quantity and quality of discussion in PPH hearings in comparison to the control group. A t-test indicated that these

differences were statistically significant at the 0.05 level. However, there is room for improvement. As an example, the percentage of *RESOURCE GUIDELINES* topics discussed by Benchcard users in all three sites is 90 percent compared to 32 percent for non-Benchcard users. The percentage of CCC topics discussed by Benchcard users in all was 69 percent, while non-Benchcard users discussed only 37 percent of the CCC topics.

These results were similarly true when looking only at judges in the Benchcard group before and after implementation. Across the three sites, the percentage of *RESOURCE GUIDELINES* topics discussed by Benchcard users pre-implementation was 37 percent compared to 76 percent post-implementation. Also, the percentage of CCC topics discussed by Benchcard users pre-implementation was 32 percent, compared to 56 percent post-implementation. A t-test indicates that these pre/post differences are statistically significant at the 0.05 level.

The process findings vary substantially across the three study sites. As can be seen in Figures 6 through 8, control group levels and Benchcard implementation levels varied greatly across the sites. In terms of the percentage of *RESOURCE GUIDELINES* topics discussed at the initial hearing, Portland was the lowest of the three sites in the control group, but it reached 100 percent of topics discussed in the Benchcard implementation group. Omaha was higher in the control group, and the Benchcard implementation group was not much higher. For the percentage of CCC topics discussed, Portland was at the highest level of the three sites in the control group, and it was also at the highest level of the three sites in the Benchcard implementation group. Los Angeles' control group was at the lowest level of the three, and though it was increased in the Benchcard implementation group, it was at the lowest of the three in terms of CCC topics discussed during the initial hearing. With parental engagement, Portland's control group was at the lowest level of the three, and it was also at the lowest level of the three in the Benchcard implementation group, but the difference there was markedly greater than in the other two sites. Parental engagement in Omaha was at a high level in the control group, and it actually was found to be lower in the Benchcard implementation group (though the difference was minor and may be due to sample differences).

Overall, these figures show that experiences with Benchcard implementation can vary greatly. Baseline levels of *RESOURCE GUIDELINES* and CCC practice can be widely different. Moreover, fidelity to Benchcard implementation can differ notably across sites.

Figure 6: Percentage of Resource Guidelines Topics Discussed

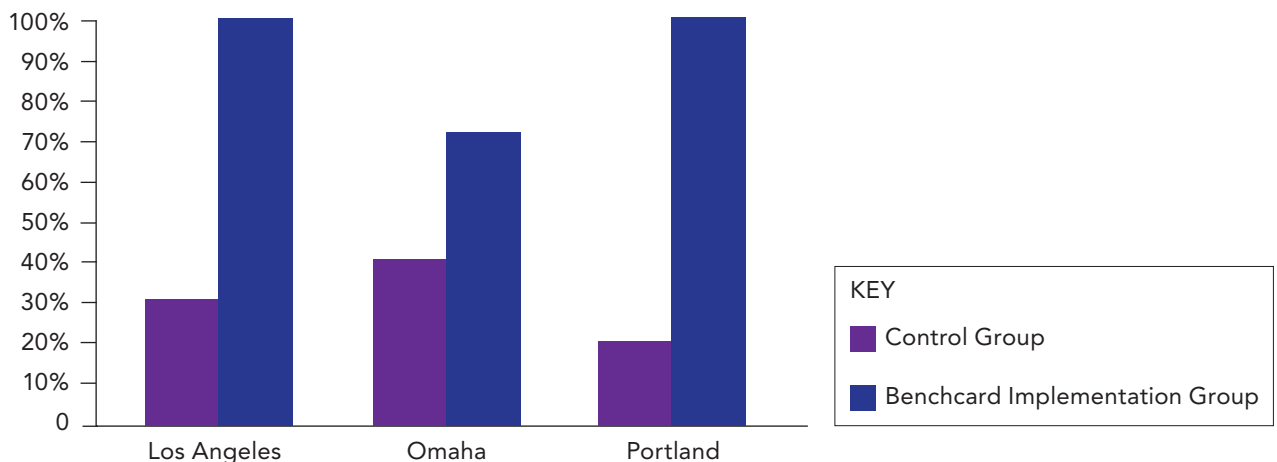


Figure 7: Percentage of CCC Topics Discussed

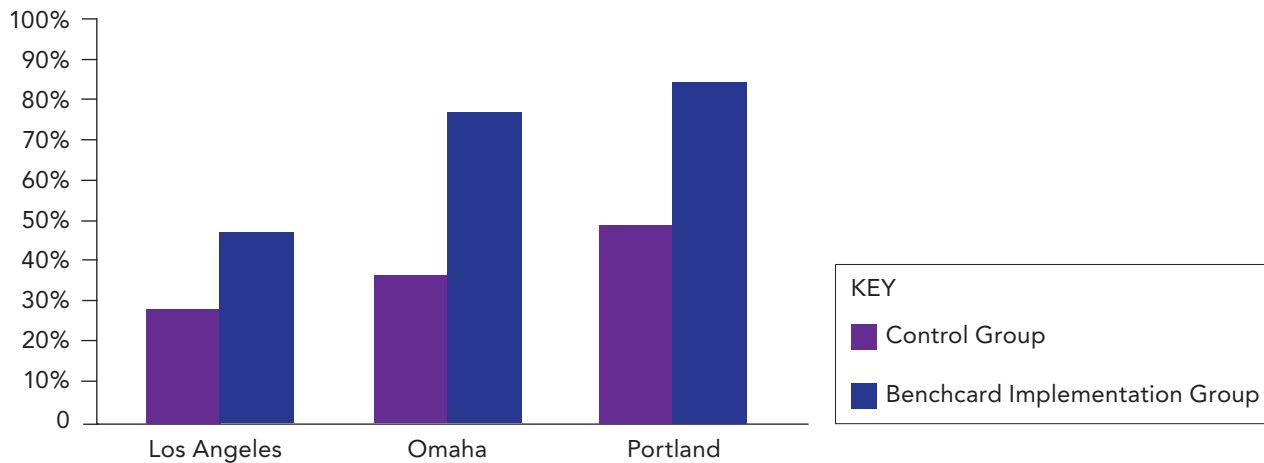
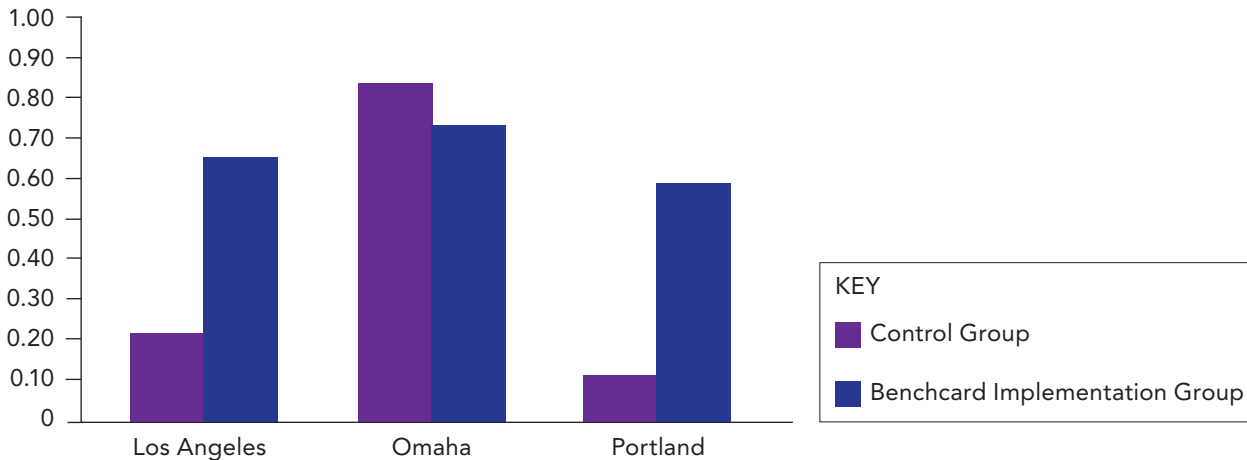


Figure 8: Parental Engagement Ratings



Rating scale: These ratings are presented on a scale of 0 (no engagement) to 1 (substantively engaged).

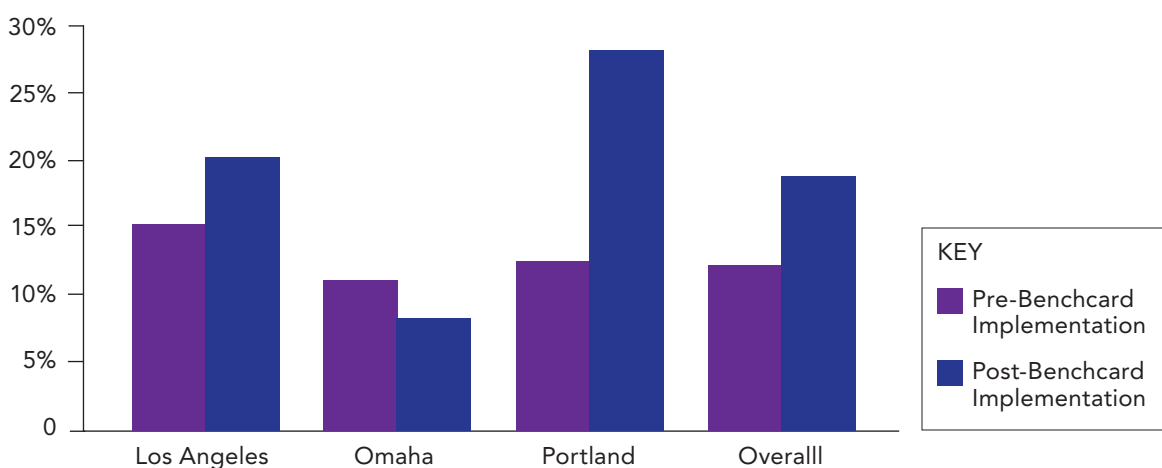
The effects on the length of a hearing are somewhat ambiguous. The study found that for individual judges, hearings did tend to be longer when there was more discussion of *RESOURCE GUIDELINES* topics and CCC topics. Across the three study sites, judges who implemented the Benchcard did tend to have longer hearings. However, there was no statistically significant effect on hearing lengths among the three sites on average: of the three sites, one had shorter hearings on average, one had longer hearings, and one had roughly the same hearing lengths. There may be some shortening effect if the Benchcard helps focus the discussion on key items. This variance across sites may also be due to differences in pre-implementation practice across the sites and differences in the thoroughness of Benchcard implementation.

FINDINGS: CHILD AND FAMILY OUTCOMES

If we compare the same judges before and after their Benchcard implementation, a higher percentage of children were returned home after the initial hearing with Benchcard implementation. As illustrated in Figure 9, prior to Benchcard implementation, Los Angeles hearings were associated with more children returning home after the initial hearing than were hearings in Portland and Omaha. With Benchcard implementation, Portland and Los Angeles increased the number of children returned home after the initial hearing, with Portland increasing more. In Omaha, on the other hand, the number of children returning home decreased. The differences for each site reflect these trends. For Los Angeles and Omaha, the differences between the likelihood of a child returning home before and after Benchcard implementation do not appear to be statistically significant (based on a logistic regression).

For Portland, the effect was much greater and was statistically significant at the 0.05 level (again based on a logistic regression). This relates directly to both the level of baseline *RESOURCE GUIDELINES* discussion and the thoroughness of Benchcard implementation at each site. As can be seen in Figures 6, 7, and 8 above, Portland had the largest increases in hearing thoroughness and had the highest level of thoroughness with Benchcard implementation.⁵

Figure 9: Percentage of Children Returned Home after Initial Hearing



Benchcard use was related to more family placements—placement with a charged parent, a non-charged parent, or with a relative—at the initial hearing and even more placements again at adjudication when comparing the same judges before and after Benchcard implementation. (Reciprocally, Benchcard use was also associated with fewer children placed in non-relative foster care at the initial hearing and even fewer again at adjudication.) This finding is displayed in Figure 10. A logistic regression comparing the likelihood of a family placement versus non-family placement before and after Benchcard implementation shows these findings to be statistically significant at the 0.05 level. Substantial differences did exist across the three sites, but the finding remained significant when the three sites were accounted for in the statistical model.

Similarly, Figure 11 shows that the percentage of children who were reunified with the charged parent at the initial hearing and at the adjudication hearing increased after Benchcard implementation. A logistic regression shows the likelihood of reunification to be different at a statistically significant (0.05) level between before and after Benchcard implementation. Again, substantial differences did exist across the three sites, but the results were significant when sites were accounted for in the statistical model. Many factors could have influenced these findings (such as changes in

⁵ A logistic regression was used to analyze how Benchcard implementation related to the dichotomous outcome of the child returning home after the initial hearing versus the child not returning home after the initial hearing for each case.

agency practice), but the consistency of the findings across the three sites and across issue areas suggests that adequacy of Benchcard implementation is a major factor affecting the findings.

Figure 10: Percentage of Children in Non-Relative Foster Care

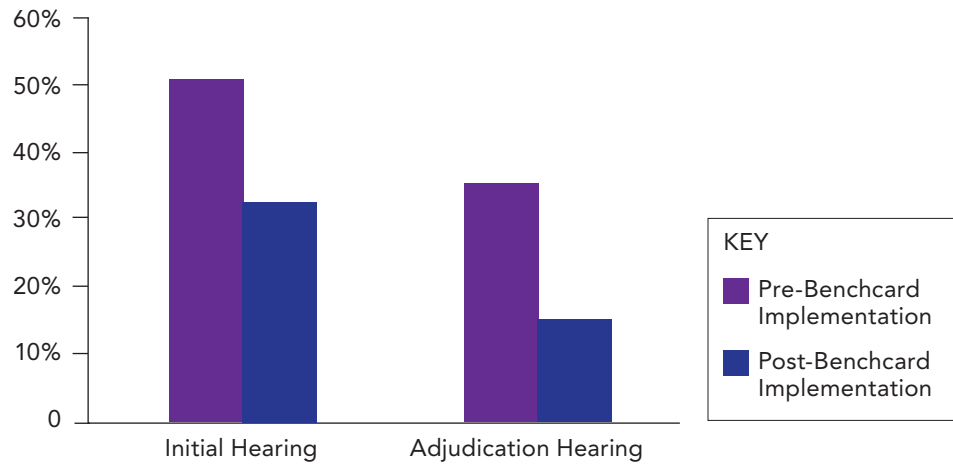
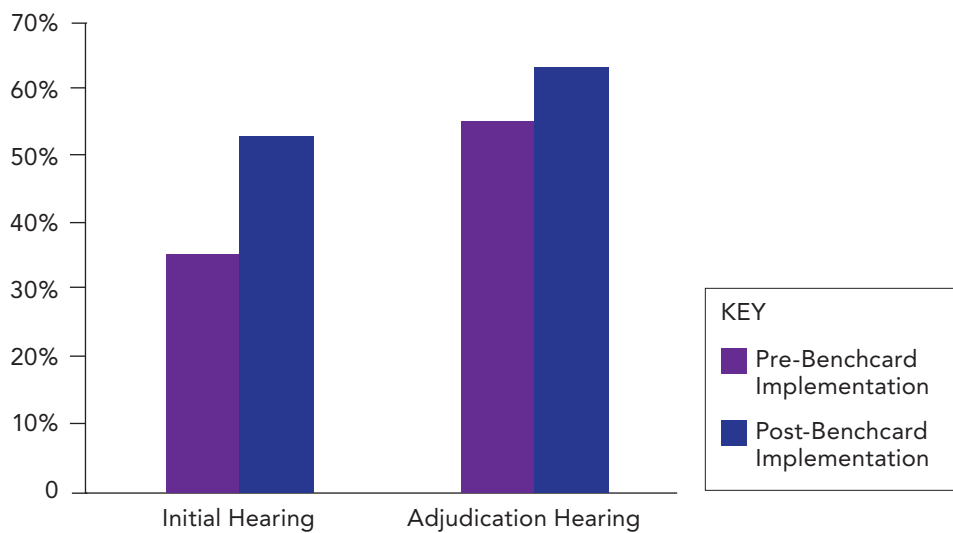


Figure 11: Percentage of Children Reunified with the Charged Parent



FINDINGS: SERVICES

The study also examined how well services related to allegations in terms of adequacy of number of services and the relationship of those services to the allegations before the court. Overall, the study found that approximately 90 percent of services ordered were directly related to an initial petition allegation after the Benchcard was implemented. This matching was slightly decreased when examining only founded allegations: 16 percent of services did not appear to be related to any founded allegation. There were no statistically significant differences in the trends between the Benchcard and control groups, or in the Benchcard group pre- and post-implementation for initial and founded allegations.

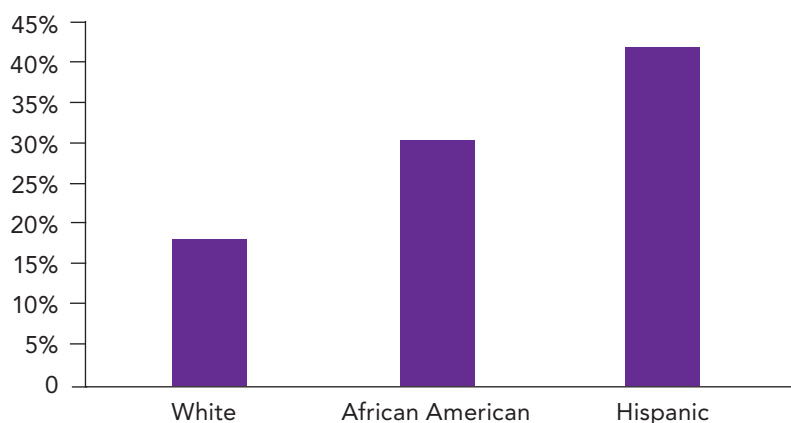
The study explored whether there was a service ordered for each allegation made and for each founded allegation, and 92 percent of all allegations did have at least one corresponding service ordered. Again, there were no statistically significant differences between the Benchcard and control groups, or in the Benchcard group pre- and post-implementation on this measure.

FINDINGS: RACIAL DIFFERENCES IN THE CASES BROUGHT TO COURT

The study found clear race differences in filing trends. White mothers (in comparison to African American and Hispanic mothers) entered court with a higher number of allegations, averaging 3.3 allegations compared to 2.4 for others (ANOVA analysis shows this difference to be statistically significant at the 0.05 level). White mothers also had more allegations of substance abuse, homelessness, and mental health issues (each of these represent statistically significant differences at the 0.05 level). Overall, African American mothers came into court with fewer allegations and were more likely to have their case dismissed. African American mothers tended to be brought to court with less serious allegations. Hispanic mothers were brought to court with the fewest number of allegations on average, and they had the least serious allegations. Judges may be reversing this trend to some degree by dismissing many of these less serious cases for African American and Hispanic mothers. Significant research has been done on differences in reporting rates across racial groups (cf. Drake, Lee, & Johnson-Reid, 2009), and it is not the purpose of this report to explain these difference. Rather, for this report it is important to note that there are substantial differences across racial groups in the types of cases that come into court.

Below, Figure 12 shows differences by racial group in “failure to protect” allegations, which can mean that no maltreatment has yet occurred but the risk of maltreatment was present. This type of allegation is often seen in conjunction with other allegations of neglect or abuse or in domestic violence cases in which the mother is the victim of the violence. As shown in Figure 12, White families were substantially less likely to face this allegation than families of other racial groups. Conversely, Hispanic families were substantially more likely to face an allegation of failure to protect.

Figure 12: Differences by Race: Commonness of Failure to Protect Allegations



Allegations of substance abuse show a different pattern. White families in the sample were much more likely to face allegations of failure to supervise or parent adequately due to substance abuse (drugs or alcohol) than were families of other racial groups (again an ANOVA shows these differences to be statistically significant at the 0.05 level). Allegations of substance abuse for African American and Hispanic families were somewhat less common. This comparison is shown in Figure 13.

Differences among racial groups are also apparent in allegations involving poor parenting due, in major part, to poor mental health functioning. As with substance abuse allegations, White families were much more likely to be brought to court with allegations relating to mental health. White families were almost three times as likely to face a mental health allegation as families from other racial groups (again statistically significant at the 0.05 level). This is shown in Figure 14.

Figure 13: Differences by Race: Percentage of Cases with Allegations of Child Maltreatment with Parental Involvement in Substance Abuse

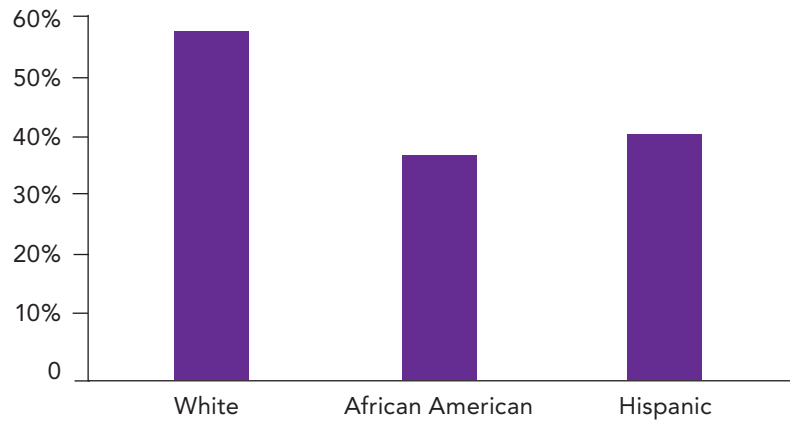
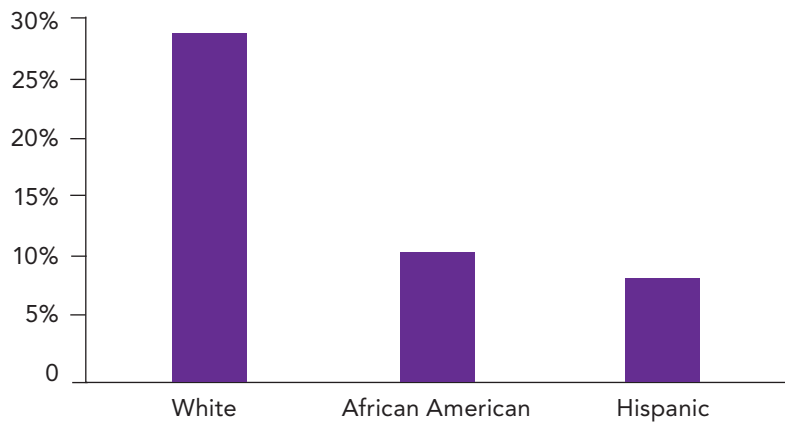


Figure 14: Differences by Race: Percentage of Cases with Allegations of Child Maltreatment with Poor Parental Mental Health Functioning



After entering the court system, more total services were ordered for White mothers than for others (approximately four services ordered for White mothers compared to two or three for other mothers).

These findings represent a first look at an extensive set of study data. Most of what is presented in this report are simple descriptions of a few factors, without exhaustive analysis of causality or consequence. As we begin to address the research questions below, we expect our understanding of the issues surrounding disparities to grow, improve, and gain nuance.

- Can we identify any judicial decision points across the three study sites where outcomes are different across racial groups?
- If so, to what do these differences relate—case factors, family characteristics, judicial processes?
- Are there significant differences among the three study sites in judicial decision making? What would account for these differences?

FINDINGS: RACIAL DISPARITIES IN PLACEMENTS

A primary goal of the CCC implementation in the Model Courts and the development of the Benchcard was to identify implicit and systemic biases that might influence judicial decision making. Some differences did appear in the sample. In the baseline sample, children with White mothers were the most likely to be placed in foster care at the initial hearing, and children with African American mothers were the least likely to be placed in foster care. These trends can be seen below in Figure 15. It may appear that there was disparate treatment toward White families or there may be valid differences in the type or amount of family needs. In fact, when differences in allegations are taken into account, race does not appear to be related to placements at all. When using a set of logistic regressions to estimate the relationships that includes numbers of allegations, race is not found to be a statistically significant predictor of foster care placements at the initial hearing. That is, there may be differences in placement by racial group, but children with similar case allegations tend to be equally likely to be placed in foster care regardless of race. As White mothers face greater allegations on average, their children tended to be in foster care more. This is an important area for further analysis as many other factors may be related to placements at the initial hearing.

While differences by race in placement trends at the preliminary protective hearing could be explained by allegation differences, by the time of the permanency hearing these differences were more substantial. This change can be seen by comparing Figures 15 and 16. As Figure 15 shows, the differences in foster care placement among racial groups at the initial hearing are not large and are not statistically significant (based on logistic regression analysis). Similarly, relative and group home differences are not statistically significant. In the placement with a parent category, it is clear that Hispanic children are placed with a parent more often than White or African American families. But by the time of the permanency hearing, trends have clearly shifted.

As is shown in Figure 16, at the permanency hearing, African American children were more likely to be currently placed in foster care than children from White or Hispanic families. Using a logistic regression to compare foster care placements with other placements, this finding was statistically significant at the 0.05 level. Also, African American children were less likely to be currently placed with a parent at the permanency hearing than children from Hispanic or White families. This is similarly true for relative placements. Note that not all children who had an initial hearing (and are represented in Figure 15) also had a permanency hearing (and are represented in Figure 16). Because some cases do not ever have permanency hearings, the populations of these two figures are not the same.

Overall, the differences in the distributions shown in Figures 15 and 16 may suggest that placement differences may not always be found at the initial hearing but instead may develop over the course of the case. Further analysis in this area will be forthcoming in a more specialized report on how race might relate to long-term outcomes and well-being.

Figure 15: Distribution of Placement Status at Time of Initial Hearing by Race, Pre-Benchcard Implementation

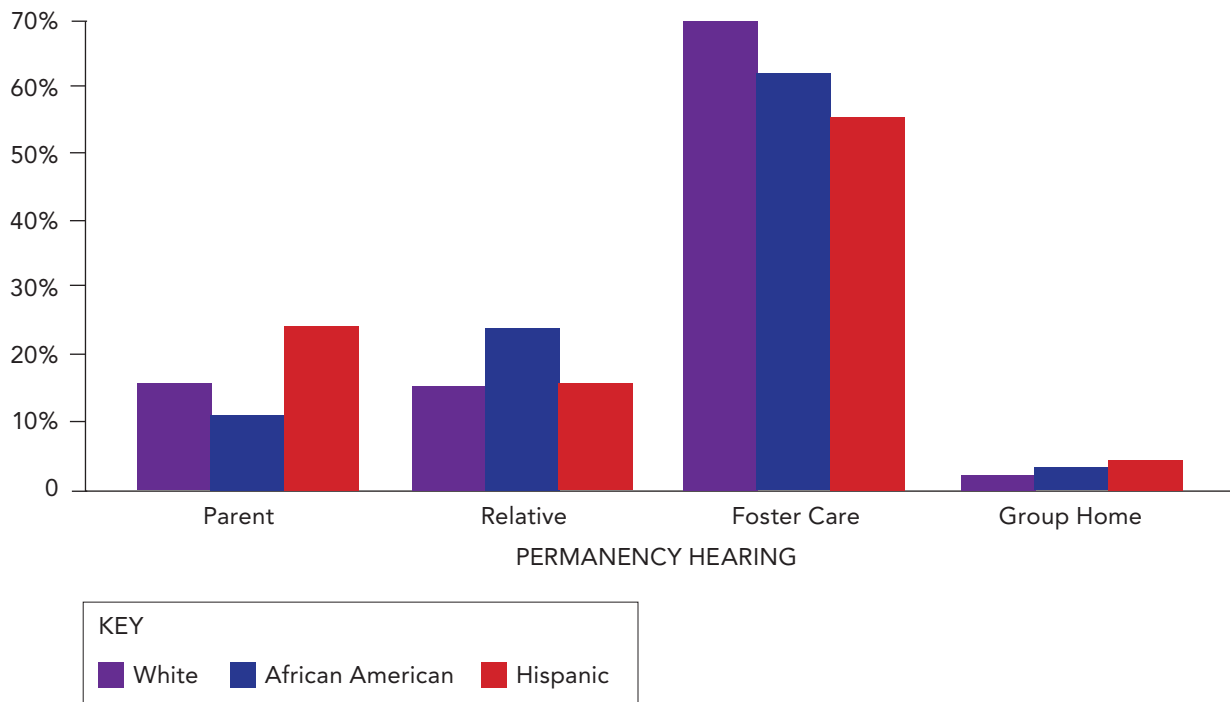
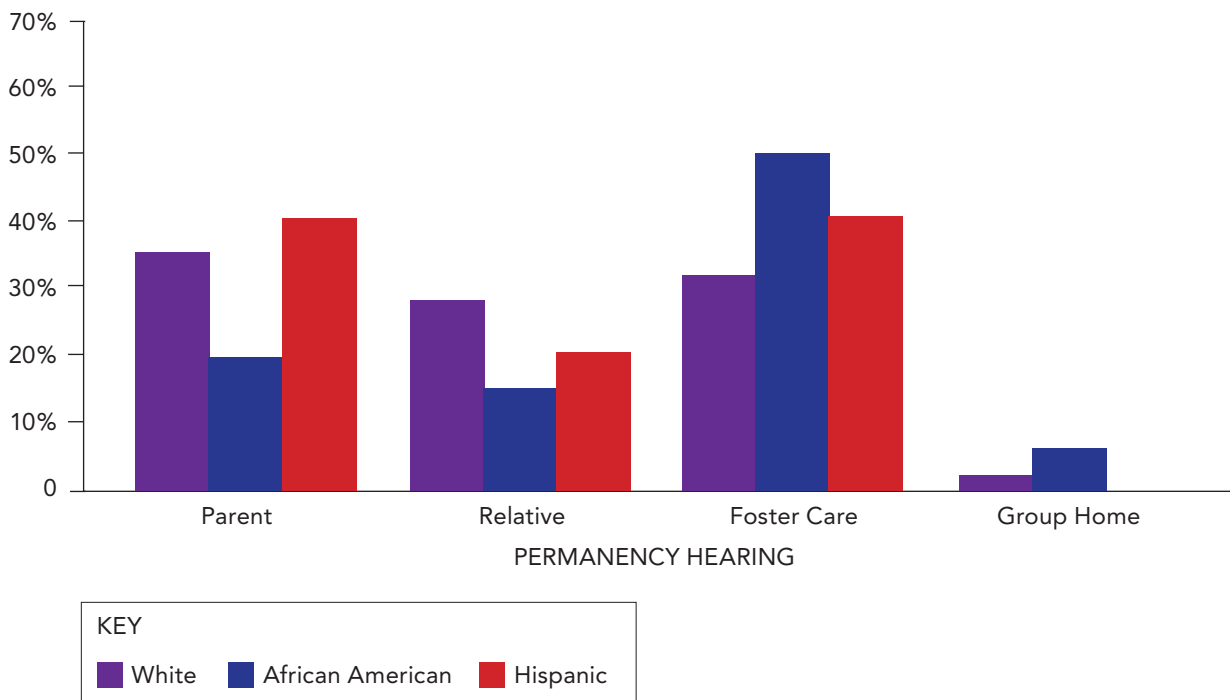


Figure 16: Distribution of Placement Status at Time of Permanency Hearing by Race, Pre-Benchcard Implementation



DISCUSSION

As with all experimental research, the present study is limited. All three study sites were Model Courts as part of NCJFCJ's Model Court Project, and thus it may be inappropriate to generalize beyond that. Further testing of the Benchcard is expected to include other court jurisdictions. Also, given the design of this study, we could assess only what occurred once a case was brought to court, not what occurred prior. For example, the study did not collect information on decisions around which cases were reported to child protective services, were investigated, or were substantiated.

The fact there may have been observational effects should also be considered. The judges were informed when the research began and may have modified their behavior because they were being watched. However, we believe any observational effects have been mitigated. First, all three sites are Model Court sites, which are regularly observed by NCJFCJ staff. Second, though some of the participating judges were observed in court, many were not. Also participating judges were not reminded of the study and, as is often the case with observation, may have quickly returned to "typical" practice.

Some of the empirical findings presented in this report do not have obvious causal explanations. The finding that White mothers face more allegations and more serious allegations than African American mothers, for example, may be because White mothers have a higher threshold to cross in terms of case allegations before being brought to court. This hypothesis, however, is not testable with the data from this study. Similarly, the finding that more services are ordered for White mothers than for other mothers may simply represent a greater tendency to offer services to White mothers but may also be indicative of the differences in the seriousness or number of allegations by the time White mothers' cases are brought to court. Again, further research would be needed to explore these ideas.

Additional analysis of these and many other topics is forthcoming. Additional findings will be available in the weeks and months to come relating to:

- Multivariate statistical analysis to understand how case factors might interact;
- A further investigation of placements at each case event, with a focus on identifying how placement trends may vary across racial groups;
- An analysis of the effect of Benchcard use on court processes, especially in terms of the timeliness of case events
- An exploration of how services are offered and ordered for children and families according to case characteristics, family needs, cultural appropriateness, and race;
- A statistical investigation into the baseline (pre-implementation) data to identify which of the variables (among the hundreds collected for this study) are the best predictors of case outcomes.

REFERENCES

- Ards, S. D., Myers, S. L., Malkis, A., Sugrue, E., & Zhou, L. (2003). Racial disproportionality in reported and substantiated child abuse and neglect: An examination of systematic bias. *Children and Youth Services Review*, 25, 375-392.
- Barth, R. (2011). Risks of serious maltreatment without additional child welfare services. Presentation for the Race and Child Welfare Working Conference at Harvard Law School, January 29, 2011. Retrieved from <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd.conference.papers.html>
- Bent-Goodley, T. (Ed.) (2003). *African-American social workers and social policy*. New York: The Haworth Press.
- Blome, W., Shields, J., & Verdick, M. (2009). The association between foster care and substance abuse risk factors and treatment outcomes: An exploratory secondary analysis. *Journal of Child & Adolescent Substance Abuse*, 18, 257-273.
- Burt, M., Aron, L., Douglas, T., Valente, J., Lee, E., & Iwen, B. (1999). *Homelessness: Programs and the people they serve: Findings of the National Survey of Homeless Assistance Providers and Clients*. Washington, DC: Urban Institute. Child Welfare Information Gateway, available at <http://www.childwelfare.gov/>
- Clausen, J., Landsverk, J., Ganger, W., Chadwick, D., & Litrownik, A. (1998). Mental health problems of children in foster care. *Journal of Child and Family Studies*, 7, 283-296.
- Courtney, M. E., Barth, R. P., Berrick, J. D., Brooks, D., Needell, B., & Park, L. (1996). Race and child welfare services: Past research and future directions. *Child Welfare*, 75(2), 99-137
- Courtney, M., Piliavin, I., Grogan Kaylor, A. & Nesmith, A. (2001). Foster youth transitions to adulthood: A longitudinal view of youth leaving care, *Child Welfare*, 80(6), 685-717.
- Courtney, M., Dworsky, A., Lee, J., & Raap, M. (2009) Midwest evaluation of the adult functioning of former foster youth: Outcomes at age 23 and 24. Chicago: Chapin Hall at the University of Chicago.
- Courtney, M., Roderick, M., Smithgall, C., Gladden, R., & Nagaok, J. (2004). *The educational status of foster children*. Chicago, IL: Chapin Hall Center for Children.
- Denby, R. W., Curtis, C. M., & Alford, K. A. (1998). Family preservation and special populations: The invisible target. *Families in Society*, 79, 3-14.
- Doyle, J. (2007). Child protection and child outcomes: Measuring the effects of foster care. *The American Economic Review*, 97, 1583-1610.
- Drake, B., Lee, S. M., & Johnson-Reid, M. (2009). Race and child maltreatment reporting: Are Blacks overrepresented? *Children and Youth Services Review*, 31, 309-316.
- Drake, B., & Jonson-Reid, M. (2011). *Front-end disproportionality in CA/N: Some things we know for certain*. Presentation for the Race and Child Welfare Working Conference at Harvard Law School. January 28-29, 2011. Retrieved from <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd.conference.papers.html>
- Dworsky, A., & DeCoursey, J. (2009). *Pregnant and parenting foster youth: Their needs, their experiences*. Chicago: Chapin Hall at the University of Chicago.
- Fluke, J., Jones-Harden, B., Jenkins, M., & Ruehrdanz, A. (2010). *Research synthesis on child welfare disproportionality and disparities*. Denver, CO: American Humane Association.
- Fluke, J. D., Yuan, Y-Y. T., Hedderson, J., & Curtis, P. A. (2003). Disproportionate representation of race and ethnicity in child maltreatment: Investigation and victimization. *Children and Youth Services Review*, 25, 359-373.
- Garland, A. F., Hough, R. L., Landsverk, J. A., McCabe, K. M., Yeh, M., Ganger, W. C., & Reynolds, B. J. (2000). Racial and ethnic variations in mental health care utilization among children in foster care. *Children's Services: Social Policy, Research, and Practice*, 3(3), 133-146.
- Gryzlak, B., Wells, S., & Johnson, M. (2005). Ethnicity, culture, and child maltreatment. *Journal of Social Issues*, 62, 787-809.
- Harris, M. S., & Courtney, M. E. (2003). The interaction of race, ethnicity, and family structure with respect to the timing of family reunification. *Children and Youth Services Review*, 25, 409-429.
- Hill, R. B. (2004) *Institutional racism in child welfare. Synthesis of research on disproportionality in child welfare: An update*. Washington, DC: Casey-CSSP Alliance for Racial Equity in the Child Welfare System.
- Johnson, E. P. (2007). Racial disparity in Minnesota's child protection system. *Child Welfare*, 86(4), 5-20.
- Lawrence, C., Carlson, E., & Egeland, B. (2006). The impact of foster care on development. *Development and Psychopathology*, 18, 57-76.

- Lu, Y. E., Landsverk, J., Ellis-MacLeod, E., Newton, R., Ganger, W., & Johnson, I. (2004). Race, ethnicity, and case outcomes in child protective services. *Children and Youth Services Review*, 26, 447-461.
- Macomber, J., Kuehn, D., McDaniel, M., Vericker, T., Pergamit, M., Cuccaro-Alamin, S., ... Barth, R. P. (2008). *Coming of age: Employment outcomes for youth who age out of foster care through their middle twenties*. U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation.
- Magruder, J., & Shaw, T. V. (2008). Children ever in care: An examination of cumulative disproportionality. *Child Welfare*, 87, 169-188
- Malmgren, K., & Meisel, S. (2002). Characteristics and service trajectories of youth with serious emotional disturbance in multiple service systems. *Journal of Child and Family Studies*, 11, 217-229.
- McRoy, R. (2004). The color of child welfare. In K. Davis & T. Bent-Goodley (Eds.) *The color of social policy* (pp. 37-63). Alexandria, VA: Council on Social Work Education.
- McCrory, J., Ayers-Lopez, S., & Green, D. (2006). Disproportionality in child welfare. *Protection Connection*, 12, 1-16.
- Morton, T. (1999). The increasing colorization of America's child welfare system: The overrepresentation of African American children. *Policy and Practice*, 57 (4), 23-30.
- Needell, B., Brookhart, A., & Lee, S. (2003). Black children and foster care placement in California. *Children and Youth Services Review*, 25, 393-408.
- Noonan, K., & Burke, K. (2005). Termination of parental rights: Which foster care children are affected? *The Social Science Journal*, 42, 241-256.
- Pecora, P. J., Kessler, R. C., O'Brien, K., White, C. R., Williams, J., Hiripi, E., ... Herrick, M. A. (2006). Educational and employment outcomes of adults formerly were placed in foster care: Results from the Northwest Foster Care Alumni Study. *Child and Youth Services Review*, 28, 1459-1481.
- Pecora, P. J., Kessler, R. C., Williams, J., Downs, A. C., English, D.J., White, J., & O'Brien, K. (2010). *What works in family foster care? Key components of success from the Northwest foster care alumni study*. New York: Oxford University Press.
- Putnam-Hornstein, E., & Needell, B. (2011). *Predictors of child protective service contact between birth and age five: An examination of California's 2002 Birth Cohort*, *Child and Youth Services Review*, publication pending.
- Roberts, D. E. (2002). Shattered bonds: *The color of child welfare*. New York, NY: Civitas Books
- Roberts, D. E. (2007). Toward a community-based approach to racial disproportionality. *Protecting Children*, 22(1), 4-9.
- Sabol, W., Coulton, C., & Polousky, E. (2004). Measuring child maltreatment risk in communities: A life table approach. *Child Abuse and Neglect*, 28, 967-983.
- Sabotta, E., & Davis, R. (1992). Fatality after report to a child abuse registry in Washington State, 1973-1986. *Child Abuse and Neglect*, 16, 627-635.
- Texas Health and Human Services Commission and Department of Family and Protective Services. (2006). Disproportionality in child protective services statewide reform effort begins with examination of the problem. Austin: Author.
- Thompson, R., & Auslander, W. (2007). Risk factors for alcohol and marijuana use among adolescents in foster care. *Journal of Substance Abuse Treatment*, 32, 61-69.
- Trout, A., Hagaman, J., Casey, K., Reid, R., & Epstein, M. (2008). The academic status of children and youth in out-of-home care: A review of the literature. *Children and Youth Services Review*, 30, 979-994.
- U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. (2010). *The AFCARS Report - Preliminary FY 2009 Estimates as of July 2010 (17)*. Washington DC: Author. Retrieved from http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report17.htm
- U.S. Government Accountability Office. (2007). African American children in foster care: Additional HHS assistance needed to help states reduce the proportion in care. (GAO 07-816). Washington, DC: Author. Retrieved from <http://www.gao.gov/new.items/d081064t.pdf>
- Vinnerljung, B., Sundell, K., Lofholm, C., & Humlesjo, E. (2006). Former Stockholm child protection cases as young adults: Do outcomes differ between those that received services and those that did not? *Children and Youth Services Review*, 28, 59-77.
- Wulczyn, F. (2011). Permanency, disparity and social context. Presentation for the Race and Child Welfare Working Conference at Harvard Law School. January 28-29, 2011. Retrieved from <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd.conference.papers.html>

- Wulczyn, F., Barth, R., Yuan, Y. T. Jones Harden, B., & Landsverk, J. (1995). *Beyond common sense: Child welfare, child well-being, and the evidence of policy reform*. Piscataway, NJ: Transaction Publishers.
- Yen, I., Hammond, W., & Kushel, M. (2009). From homeless to hopeless and healthless? The health impacts of housing challenges among former foster care youth transitioning to adulthood in California. *Issues in Comprehensive Pediatric Nursing*, 32, 77-93.
- Zlotnick, C. (2009). What research tells us about the intersecting streams of homelessness and foster care. *American Journal of Orthopsychiatry*, 79, 319-325.

Additional Resources

- Adelman, L. (2003). *Race: the Power of Illusion*., DVD.
- Gatowski, S. I., Maze, C. L., & Miller, N. B. (2008). Courts catalyzing change: Achieving equity and fairness in foster care: Transforming examination into action. *Juvenile and Family Justice Today*, Summer 2009, 16-20.
- Marsh, S. C. (2009). The lens of implicit bias. *Juvenile and Family Justice Today*, 18, 16-19.
- Miller, N., & Maze, C., (2010). *Right from the start: A judicial tool for critical analysis & decision-making at the PPH hearing*. Reno, NV: National Council of Juvenile and Family Court Judges.
- National Council of Juvenile and Family Court Judges. (2007). *Disproportionate Representation of Children of Color National Working Group Progress Report*. Reno, NV: National Council of Juvenile and Family Court Judges.
- National Council of Juvenile and Family Court Judges. (2008). *Courts catalyzing change: Achieving equity and fairness in foster care: National agenda for reducing racial disproportionality and disparities in the dependency court system*. Reno, NV: National Council of Juvenile and Family Court Judges.
- National Council of Juvenile and Family Court Judges. (2009). *Courts catalyzing change: Achieving equity and fairness in foster care: July 2007 to Date*. Reno, NV: National Council of Juvenile and Family Court Judges.
- National Council of Juvenile and Family Court Judges. (1995). *Resource Guidelines*. Reno, NV: National Council of Juvenile and Family Court Judges.
- Summers, A., Dobbin, S. A., & Gatowski, S. I. (2008). *The state of juvenile dependency court research: Implications for practice and policy*. Reno, NV: National Council of Juvenile and Family Court Judges.

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PERSONS WHO SHOULD BE PRESENT AT THE PPH²

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Relatives – relatives with legal standing or other custodial adults, including adult half-siblings
 - Paternal and maternal relatives
- Non-related extended family, fictive kin (someone who is known and trusted by the families; godparents)
- Assigned caseworker
- Agency attorney
- Attorney for each parent (if conflict exists)
- Legal advocate for the child
- Guardian ad Litem (GAL)
- Court Appointed Special Advocate (CASA)
- ICWA expert (if ICWA applies)
- Tribal representative/tribal liaison
- Treatment and/or service providers
- All age-appropriate children
- Foster parents
- Cultural leaders, cultural liaisons, religious leaders
- Court-certified interpreters or court-certified language services
- Education liaison/school representative
- Court reporter
- Court security

COURTS CAN MAKE SURE THAT PARTIES AND KEY WITNESSES ARE PRESENT BY:³

- Ensuring that the judge, not the bailiff or court staff, makes the determination about who is allowed to be in the courtroom.
- Asking the youth/family if there is someone else who should be present.
- Requiring quick and diligent notification efforts by the agency.
- Requiring both oral and written notification in a language understandable to each party and witness.
- Requiring service/tribal notice to include the reason for removal, purpose of the hearing, availability of legal assistance in a language and form that is understandable to each party and witness.
- Requiring caseworkers and/or protective service investigators to facilitate attendance of children, parents, relatives (paternal and maternal), fictive kin and other parties.
- Facilitating telephonic or video conferencing appearance at hearings.

CONTINUE TO BACK

¹ The preliminary protective hearing is the first court hearing in juvenile abuse and neglect cases. In some jurisdictions this may be called a “shelter care,” “detention,” “emergency removal,” or “temporary custody” hearing.

² State and federal law determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the initial hearing.

³ State and federal law determine who must be present for any hearing to proceed.

REVIEWING THE PETITION

- A sworn petition or complaint should be filed prior to the preliminary protective hearing and served/provided to the parents.
- The petition should be specific about the facts that bring the child before the court.
- The petition should not be conclusory without relevant facts to explain and support the conclusions.
- Petitions need to include allegations specific to each legal parent or legal guardian if appropriate.
- If the petition does not contain allegations against a legal parent or legal guardian, the child should be placed with or returned to that parent or legal guardian unless it is determined that there is a safety threat to the child.
- Petitions/removal affidavits need to include specific language clearly articulating the current threat to the child's safety.

REFLECTIONS ON THE DECISION-MAKING PROCESS THAT PROTECT AGAINST INSTITUTIONAL BIAS:

ASK YOURSELF, AS A JUDGE:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or how might it influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?

KEY INQUIRIES, ANALYSES AND DECISIONS THE COURT SHOULD MAKE AT THE PRELIMINARY PROTECTIVE HEARING

INDIAN CHILD WELFARE ACT (ICWA) DETERMINATION

The court should require that the applicability of the ICWA be determined before proceeding with the preliminary protective hearing. If the court has reason to believe ICWA applies, the court should proceed accordingly.

- If Yes – different standards apply, refer to the ICWA Checklist.
- If Yes – determine whether there was clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e).

ENGAGE PARENTS

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about?
- What family members and/or other important people should be involved in this process with us?
- Do you understand the petition? (review petition with parties)

DUE PROCESS

- Who are the child's parents and/or guardians?
- How was paternity determined?
- What were the diligent search efforts for all parents?
- Have efforts to identify and locate fathers been sufficient? What has been done?
- How were the parents notified for this hearing?
 - Was the notice in a language and form understandable to parents and/or guardians?
- Do the parents understand the allegations?
- Are the parents entitled to representation? Are there language issues to consider when appointing attorneys?
- Are there issues in the case that are covered by the Americans with Disabilities Act?

LEGAL THRESHOLD FOR REMOVAL

- Has the agency made a prima facie case or probable cause showing that supports the removal of the child?
- Have the family's cultural background, customs and traditions been taken into account in evaluating the event and circumstances that led to the removal? Have the parent(s) cultural or tribal liaison/relevant other(s) been asked if there is a culturally-based explanation for the allegations in the petition?

REASONABLE EFFORTS (TO PREVENT REMOVAL)

- Were there any pre-hearing conferences or meetings that included the family?
 - Who was present?
 - What was the outcome?
- What services were considered and offered to allow the child to remain at home? Were these services culturally appropriate? How are these services rationally related to the safety threat?
- What was done to create a safety plan to allow the child to remain at home or in the home of another without court involvement?
 - Have non-custodial parents, paternal and maternal relatives been identified and explored? What is the plan to do so?
- How has the agency intervened with this family in the past? Has the agency's previous contact with the family influenced its response to this family now?

[CONTINUE TO BACK](#)

KEY INQUIRIES, ANALYSES AND DECISIONS THE COURT SHOULD MAKE AT THE PRELIMINARY PROTECTIVE HEARING

WHAT IS PREVENTING THE CHILD FROM RETURNING HOME TODAY?

- What is the current and immediate safety threat? Has the threat diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
- What is preventing the child from returning home today? What type of safety plan could be developed and implemented in order for the child to return home today?
 - What specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
 - Will the removal or addition of any person from or in the home allow the child to be safe and be placed back in the home?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family and child, and are you satisfied that they understand these conditions?

APPROPRIATENESS OF PLACEMENT

- If child is placed in foster care/shelter, have kinship care options been fully explored? If not, what is being done to explore relatives? If so, why were the relatives deemed inappropriate?
- If child is placed in kinship care, what steps have been taken to ensure the relative is linked with all available training, services, and financial support?
- How is the placement culturally and linguistically appropriate?
 - From the family and child's perspective, is the current placement culturally and linguistically appropriate?
- How does the placement support the child's cultural identity? In what way does the placement support the child's connection to the family and community?
- How does the placement support the family/child's involvement in the initial plan?
- What are the terms of meaningful family time with parents, siblings and extended family members?
 - Do the terms of family time match the safety concerns? Is it supervised? Specifically, why must it be supervised?
 - Is the time and location of family time logistically possible for the family, and supportive of the child's needs?

REASONABLE EFFORTS TO ALLOW THE CHILD TO SAFELY RETURN HOME

- What services can be arranged to allow the child to safely return home today?
- How are these services rationally related to the specific safety threat?
- How are the parents, extended family and children being engaged in the development and implementation of a plan for services, interventions, and supports?
- How will the agency assist the family to access the services?
 - Does the family believe that these services, interventions and supports will meet their current needs and build upon strengths?
 - Has the family been given the opportunity to ask for additional or alternate services?
- How are the services, interventions and supports specifically tailored to the culture and needs of this child and family?
 - How do they build on family strengths?
 - How is the agency determining that the services, interventions and supports are culturally appropriate?
- What evidence has been provided by the agency to demonstrate that the services/interventions for this family have effectively met the needs and produced positive outcomes for families with similar presenting issues and demographic characteristics?

CLOSING QUESTIONS TO ASK PARENTS, CHILDREN AND FAMILY MEMBERS

- **Do you understand what happened here today?**
- **Do you understand what are the next steps?**
- **Do you have any questions for the court?**



COURTS
CATALYZING
CHANGE

Achieving Equity and Fairness in Foster Care

RIGHT FROM THE START:

The CCC Preliminary Protective Hearing Benchcard

A TOOL FOR JUDICIAL DECISION-MAKING



NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES

est. 1937



RIGHT FROM THE START:
**The CCC Preliminary Protective
Hearing Benchcard**
A TOOL FOR JUDICIAL DECISION-MAKING

BRIEF AUTHORED BY:

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INTRODUCTION

Disproportionality & Disparate Treatment in the Child Welfare System

American children of all races, ethnicities and socioeconomic backgrounds experience abuse, abandonment and neglect. More often than not, these children live in families who are under enormous stress due to substance abuse, domestic violence, poor living and educational conditions and parental history of trauma. The first three National Incidence Studies of Child Abuse and Neglect (referred to as NIS-1, NIS-2 and NIS-3) found that, regardless of the standard of maltreatment used and adjusting for poverty, there are “no statistically significant differences in the overall occurrence rate for maltreatment between black and white families.”¹ The NIS-4, reporting 2006 data, found that African American children experienced higher rates of maltreatment than white children in several categories; however, this is due in part to the “growing gap between white and black children’s economic well-being.”²

Research has demonstrated that children and families of color are disproportionately represented in the child welfare system.³ “In states where there is a large population of Native Americans, this group can constitute between 15% and 65% of the children in foster care.”⁴ Hispanic or Latino children may be significantly over-represented based on the locality (e.g., in Santa Clara County, California, Latino children represent 30% of the child population, but 52% of all child welfare cases).⁵

Children of color experience disparate decision-making in investigation, substantiation, removal, placement in foster care and final permanency determinations. “African Americans are investigated for child abuse and neglect twice as often as Caucasians,”⁶ and African American children who are determined to be victims of child abuse are 36% more likely than Caucasian children to be removed from their parent(s) and placed in foster care.⁷ Federal Child and Family Services Review⁸ data also show that Caucasian children achieve permanency outcomes at a higher rate than children of color.⁹ In addition to being more likely to be placed in foster care, African American children are less likely to be reunified with their parents¹⁰ and receive fewer services than Caucasian children.¹¹

Disproportionality – the difference in the percentage of children of a racial or ethnic group in a population as compared to the percentage of children of the same racial or ethnic group in the child welfare system.

Disparity – unfair or unequal treatment of one racial or ethnic group as compared to another racial or ethnic group.

¹ Hill, R.B. (2006). Synthesis of research on disproportionality in child welfare: An update. Casey Family Programs. See also G.A.O. (2007). *African American children in foster care: Additional HHS assistance needed to help states reduce the proportion in care*. GAO-07-816.

² Sedlak, A. J., McPherson, K., & Das, B. (2010). *Fourth national incidence study of child abuse and neglect (NIS-4): Supplementary analyses of race differences in child maltreatment rates in the NIS-4*. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families.

³ Anderson, G. R. (1997). Introduction: Achieving permanency for all children in the child welfare system. In G. R. Anderson, A. Ryan, & B. Leashore (Eds.), *The challenge of permanency planning in a multicultural society* (pp. 1-8). New York: Haworth Press, Inc. See also U.S. Department of Health and Human Services (2005). *Data Report*.

⁴ Miller, O. (2009). Breakthrough Series Collaborative on Reducing Disproportionality and Disparate Outcomes for Children and Families of Color in the Child Welfare System. Casey Family Programs. Seattle: WA. Retrieved at http://www.casey.org/Resources/Publications/pdf/BreakthroughSeries_ReducingDisproportionality_process.pdf on June 10, 2010.

⁵ Congressional Research Service. *Race, Ethnicity and Child Welfare* (August, 2005).

⁶ Yaun, J., Hedderson, J., and Curtis, P. (2003). Disproportionate representation of race and ethnicity in child maltreatment investigation and victimization. *Children and Youth Services Review*, 26, 359-373.

⁷ U.S. Department of Health and Human Services (2005). *Data Report*

⁸ The Child & Family Service Review (CFSR) are a statewide assessment and on-site review by the Department of Health & Human Services, Administration for Children & Families Children’s Bureau. The state must address a large array of systemic factors that are reviewed by the federal team of reviewers. The process includes case file reviews, consumer interviews, stakeholder interviews and state data analysis and review. The states are measured in the area of safety, permanency and child and family well-being. For more information on the CFSR process, visit www.acf.dhhs.gov/programs/cb.

⁹ National Child Welfare Resource Center (2006). *Data Report*

¹⁰ Lu, Y. E., Landsverk, J., Ellis-MacLeod, E., Newton, R., Ganger, W., & Johnson, I. (2004). Race, ethnicity and case outcomes in child protective services. *Children and Youth Services Review*, 26, 447-461.

¹¹ Courtney, M., Barth, R., Berrick, J., Brooks, D., Needell, B., & Park, L. (1996). Race and child welfare services: Past research and future directions. *Child*

Disproportionality and disparity are distinct, complex, and related concepts. Disproportionality is created and perpetuated by disparities.¹² Thus, “[p]olicies and practices to reduce disproportionality must target the underlying disparities that lead to it.”¹³ There are a number of factors that contribute to disparities. Agency practices, court culture, access to and effectiveness of services, child and family resources, community resources, law and public policy, social problems, institutional/structural racism and individual bias may all be contributing factors. A “one size fits all” service array, found in far too many communities, belies the fact that the same services do not work for every family. Services that are targeted, culturally appropriate and specific must be developed in communities across the country. Every person and part of the child welfare system must engage in targeted strategic action to reduce these inequities to improve outcomes for all children and families.

The National Council of Juvenile and Family Court Judges’ (NCJFCJ) Courts Catalyzing Change Initiative¹⁴

The *Courts Catalyzing Change: Achieving Equity and Fairness in Foster Care* (CCC) initiative was developed by the NCJFCJ’s Permanency Planning for Children Department in pursuit of a Model Court national goal to reduce disproportionality and disparate treatment. Funded by Casey Family Programs and the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP), the CCC Initiative builds on the successful work of the Casey Breakthrough Series Collaborative. CCC was developed with input from the following NCJFCJ committees and workgroups:

- Committee on the Disproportionate Representation of Children of Color
- Tribal Courts Committee
- Diversity Committee
- Permanency Planning for Children Department (PPCD) Advisory Committee
- NCJFCJ’s Model Court Lead Judges
- CCC Call to Action Workgroup

The CCC mission is to create and disseminate judicial tools, policy and practice guidelines, and associated action plans that court systems can implement to reduce disproportionality and disparities. The CCC Initiative, informed by existing and newly developed research, will evaluate decision points in the dependency court system, re-evaluate federal, state, and local policy, make recommendations for changes or improvements, and recommend strategies for court and child welfare systemic change.

Development of the CCC Initiative & PPH Benchcard

In September 2007, Casey Family Programs partnered with NCJFCJ to bring together judicial officers and other child welfare system stakeholders in a series of leadership and work group meetings to create a National Agenda to reduce disproportionality and disparate treatment in the foster care system. Once developed, the National Agenda was to be implemented in the NCJFCJ’s Model Court jurisdictions.

“Courts Catalyzing Change is the most significant initiative our Juvenile Court has embarked upon in the last decade. The journey to understanding how deeply embedded bias, in all its forms, is within each of us individually and within our entire child welfare system is extraordinarily difficult. Reducing the disparities that result from this bias is an even more arduous task. However, both are incredibly worthwhile and, as our efforts through Courts Catalyzing Change are demonstrating, both can be done. I am a better judge for my involvement with this initiative. Likewise, our juvenile court system is becoming more just for all children and families.”

— HONORABLE LOU TROSC
DISTRICT COURT JUDGE
26TH JUDICIAL DISTRICT
OF NORTH CAROLINA

Welfare, 75, 99-137.

¹² Gatowski, S., Maze, C., & Miller, N. (Summer 2008). Courts Catalyzing Change: Achieving Equity and Fairness in Foster Care — Transforming Examination into Action. *Juvenile and Family Justice TODAY*, 16-20

¹³ *Ibid.*

¹⁴ Excerpted in part from Gatowski, S., Maze, C., & Miller, N. (Summer 2008). Courts Catalyzing Change: Achieving Equity and Fairness in Foster Care — Transforming Examination into Action. *Juvenile and Family Justice TODAY*, 16-20.

Funded by the OJJDP, Model Courts in 35 jurisdictions across the country are committed to improving courts' handling of child abuse and neglect cases and engaging in overall system improvement efforts. Guided by a local Lead Judge, a Model Court team comprised of all child welfare system stakeholders works collaboratively to improve court and child welfare systems.

On October 3, 2007, at the OJJDP-funded Model Court All-Sites Conference in New Orleans, Louisiana, the Model Court Lead Judges began initial conversations about the development of the National Agenda. A Judicial Steering Committee was soon appointed and the Courts Catalyzing Change initiative was born. A broad-based Call to Action Workgroup, brought together by the NCJFCJ, developed the CCC National Agenda and continues to advise the project as it moves forward. The NCJFCJ Board of Trustees adopted a resolution supporting the CCC initiative, clearly articulating support from the highest levels of the organization.

The Courts Catalyzing Change initiative was launched in the National Council's OJJDP supported Model Court jurisdictions. These courts have strong, collaborative, problem-solving, system improvement teams already in place. Model Courts are in a constant state of readiness for change. They have worked together over time to create an environment that embraces system improvement.

The CCC National Agenda is comprised of five core components: engaging stakeholders, transforming judicial practice, utilizing data and research, evaluating policy and law, and impacting the service array for children and families in the child welfare system. Each of five core components of the CCC National Agenda include comprehensive strategies to implement both on the local and national levels. Components of the National Agenda are implemented locally in the sequence that best fits each jurisdiction.

The CCC initiative is guided by core principles:

- Children and families of color must be an integral part of the planning and problem-solving process at all levels and at all stages.
- Judges – as the final arbiters of justice - must be leaders in their communities on the issue of reducing disproportionality and disparity in the child welfare system.
- Broad-based, multidisciplinary alliances and honest collaboration must be formed to effectively and comprehensively reduce disproportionality and disparate treatment.
- Reducing racial disproportionality and disparities in the child welfare system must be linked with a broader effort to eliminate institutional and structural racism in the child welfare system.

Nationally and locally, lead judges, Model Courts and their community partners and stakeholder teams, have been engaged in a multi-layered process to move these principles to action. Model Court teams have worked to bring the community

CORE COMPONENTS OF THE NCJFCJ COURTS CATALYZING CHANGE NATIONAL AGENDA

- I. Engage national, state, local and tribal stakeholders, including children and families
- II. Transform judicial practice
- III. Participate in policy and law advocacy
- IV. Examine and employ research, data and promising practices
- V. Impact service array and delivery

"The Courts Catalyzing Change initiative is the NCJFCJ taking an historical leadership role to administer justice for all. We are looking at institutional racism and bias for the first time and saying it is nobody's fault but it is everyone's responsibility. By working together with all of our stakeholders with intentionality towards reducing the overrepresentation and disparities of children of color in our systems, this initiative provides real hope of change in how we work with our nation's most vulnerable children and families to provide fairness of process and eliminate barriers that may have once seemed insurmountable."

— HONORABLE KATHERINE LUCERO
SUPERVISING JUDGE OF DEPENDENCY COURT,
SANTA CLARA COUNTY SUPERIOR COURT

into the juvenile court system – not through the courtroom doors – but rather to meetings, planning sessions and problem-solving efforts. Model Court collaboratives have engaged in training, team/trust-building and awareness-raising to better understand structural and institutional racism. Judges have begun to explore how their own beliefs and biases can perpetuate inequitable treatment of the children and families who appear before them and contribute to disproportionality and disparate treatment.

The CCC Steering Committee discussed the importance of understanding the many factors that impact judicial decision-making. To that end, training was developed for all Model Courts focused on:

- Understanding and examining implicit bias;
- Understanding race as a social and legal construct; and
- Understanding and identifying institutional and structural racism.

Although it is the most difficult issue to explore, NCJFCJ member judges chose to begin their work to reduce disproportionality and disparities by holding courageous conversations about race and implicit bias. Clearly, the disproportionate number of children of color in care signals a system imbalance. While many debate whether and why disproportionality exists, NCJFCJ member judges are focused instead on remedying the disparate treatment experienced by children and families of color once they enter the foster care system.

NCJFCJ member judges affirmatively decided to begin their CCC work to reduce disproportionality and disparate treatment at the point the child and family first appear in court. Conducting a thorough hearing, allowing sufficient time to fully explore the need for foster care placement, helps to ensure that foster care is utilized only when it is the only appropriate

option to protect the safety of a child.

The CCC Preliminary Protective Hearing (PPH) Benchcard, a practical and concrete judicial tool for use at the first hearing, was developed by the Call to Action Workgroup and vetted by the CCC Steering Committee and PPCD Advisory Committee. Building on the *RESOURCE GUIDELINES: Improving Court Practice in Child Abuse & Neglect Cases*,¹⁵ the PPH Benchcard reflects aspirational 'best practices' for the Preliminary Protective Hearing, one of the most critical stages in a child abuse and neglect case.

"How do we reduce implicit bias in our decision making when it is automatic and pervasive? ...Developing and employing checklists at various key decision points (e.g., detention intake) can encourage less biased decisions by providing an objective framework to assess your thinking and subsequent decisions. The methodical approach encouraged by checklists also can serve to reduce cognitive load by introducing more time into the decision making process."

Marsh, S. (2009). The Lens of Implicit Bias. Juvenile & Family Justice TODAY, Summer, 16-19.

¹⁵ *RESOURCE GUIDELINES: Improving Court Practice in Child Abuse & Neglect Cases* (1995). National Council of Juvenile and Family Court Judges, Reno, Nevada.

IMPLEMENTING THE CCC NATIONAL AGENDA: GETTING STARTED

Develop a Collaborative Leadership Group

Reducing and eliminating disproportionality and disparities is a collective effort that requires the collaboration of all system partners and stakeholders including the judiciary, child welfare and juvenile justice agencies, court administration, community service providers, advocates (lay, legal and community), researchers/universities, funders, biological and foster parents and youth who have experienced the foster care system.

Host an Informational and Information-Sharing Meeting

This meeting is an opportunity for the judicial leader to discuss the CCC National Agenda components and overall goals and strategies. This meeting allows those already working to reduce disproportionality and disparities in their own sphere of influence to describe their work as well. It also offers an opportunity to present data that demonstrates the jurisdiction's key child welfare system and court measures for each racial/ethnic group as a way to frame the work. It is critically important to ensure all system stakeholders are gathered at this initial meeting. Involving parents and children who have experienced the system brings an important voice to the conversation. Consider the contributions that can be made by non-traditional partners and ensure they are invited.

Initiate a Courageous Conversation about Institutional & Structural Racism

Those who engage in the difficult and long-term work of reducing disproportionality and disparities in the child welfare system should first gain an understanding of the scope and causes of the issue. By examining the history of institutional and structural racism, each individual involved in the collaborative will be asked to examine his/her own biases and beliefs. This is a difficult, but necessary part of the process.

Develop a Strategic Plan

Due to the scope and goals of the National Agenda, it is unlikely that a jurisdiction can tackle all of the components and strategies at once. Developing a plan of action is essential and will allow each jurisdiction to identify its own strengths and opportunities for implementation and to prioritize the process.

Follow Up and Follow Through

Those jurisdictions that have successfully begun to implement the National Agenda have ensured that their collaborative group meets regularly to review progress on action items and to continue to engage in a conversation about improving outcomes. Agreeing on objective measures of progress promote follow up meetings that go beyond sharing experiences to actually evaluating the effect of the group's efforts.

For comprehensive guidance on implementing the CCC National Agenda please see *Model Courts CCC National Agenda Implementation Guide* (2009), National Council of Juvenile and Family Court Judges.

The Benchcard is built around two types of inquiry: internal and external. The internal inquiry is set forth in a self-reflection section containing questions designed to help judges examine potential biases at play that may affect their decisions. The external inquiry is laid out in both the due process related questions and considerations as well as the actual judicial inquiry of the hearing participants related to specific salient issues that should be determined at the PPH.



SETTING THE STAGE FOR A PRODUCTIVE, THOROUGH AND FAIR HEARING

REFLECTION QUESTIONS

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or how might it influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- How have I integrated the parents, children and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the Agency and/or the Court?

"The men and women who serve as attorneys, judges and social workers in abuse and neglect cases bring their total life experiences and the assumptions that those experiences create to each case. It is a lofty goal to expect that attorneys, judges and social workers can set aside assumptions that are based on our perceptions of race, ethnic background, religion, poverty, substance abuse, literacy, language differences, gender, age and sexual orientation."

Source: Ventrell, M. and Duquette, D. (Eds.). (2005) *Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases*. Bradford Publishing Co., (8,1).

Reflection questions encourage the judge to pause and think about his or her own decision-making process. The reflection questions in the PPH Benchcard acknowledge that all people, often subconsciously and without malice, ascribe a set of stereotypes to people around them. These stereotypes naturally help us categorize and organize our world. Many are not harmful, and many are, especially if they seep into the 'neutral' realm of judicial decision-making.¹⁶ It is important not only for judges, but for all decision-makers in the child welfare system, to acknowledge this 'implicit bias' and to become more conscious about potential influences on their decision-making process.

The reflection questions also support judges in making individually-tailored decisions that consciously consider the unique cultural and familial context in which each child and family exist, while applying the same legal standard to all families involved in the dependency court process. The goal is to understand the cultural contexts of the children and families involved in the child welfare system. The strengths of a particular family, coupled with those of their cultural community can be used as supports upon which to build a rehabilitative and supportive plan that promotes stability and permanence for the child.

The reflection questions can be used in the manner that is most helpful to each individual judge. Some judges may choose to take a moment prior to each PPH and look through the reflection questions before they begin the hearing. Others may use the reflection questions to trigger additional questions they may have of the parties or participants.

"Martha Minow, Harvard Law School [Dean and Jeremiah Smith, Jr. Professor of Law] states that modern American society - and thus the application of the rule of law - must begin with new assumptions based upon an understanding that there are no cultural norms and everyone should be treated as though everyone is different. Minow's position calls for a new set of assumptions in abuse & neglect practice:

- *Each family is unique*
- *Each family is different in key aspects of their lives*
- *The solutions needed to repair the family or determine whether to break the parent-child relationship forever must be based upon a clear and careful understanding of family differences and family uniqueness."*

Source: Howze, K.A. (1996). *Making Differences Work: Cultural Context in Abuse and Neglect Practice for Judges and Attorneys*. American Bar Association, 5-6.

¹⁶ Banaji, M. R., Bazerman, M. H., & Chugh, D. (2003). How (un)ethical are you? *Harvard Business Review*, 81(12), 56-64, and Carpenter, S. (2008). Buried prejudice. *Scientific American Mind*, 19, 32-39.

Who Should Be Present?

Following the format of the *RESOURCE GUIDELINES*, the first page of the PPH Benchcard identifies those who should be present and be represented at the preliminary protective hearing. The discussion below is meant to provide insight into the value of having each party present at the initial removal hearing, as well as additional recommendations for how best to ensure that they are aware of the hearing and able to participate. While state and federal laws define which parties are required to receive notice, the list of persons provided in the following pages will provide the court with the most thorough information on which to base its decisions.

Removing a child from her home is a monumental decision and one that should not be made lightly or quickly. Too often, these important hearings are conducted in a matter of minutes with few if any participants other than the caseworker and perhaps, the parents. The PPH Benchcard changes the paradigm of the removal hearing and the important decisions made at that hearing. It encourages thorough exploration of alternatives to foster care, maintenance of cultural connections for children and their families, and involvement of key individuals in the family and child's life in this important early decision-making process. To have a fair, productive, and thorough hearing, judges require accurate, up-to-date information. While many of the questions at the initial hearing are often answered by an investigator of the initial allegation of child maltreatment, it is critically important for the court to hear the perspective of the family and those attending the hearing as support for them.

Parents, parents' partners, relatives, and any available extended family

are critical to the proceeding. Parents who are incarcerated should be transported to the PPH or permitted to attend by phone or videoconference. The child welfare agency should be expected to locate and assess relatives on both the maternal and paternal side of each family. Those connected to the child by relationships "of the heart" can also be strong supporters and should be encouraged to participate. Relatives and the extended networks of the parents/children are often able to provide support that may prevent removal of the child. When removal is necessary, these biological and social networks often offer a safe placement option that also keeps the child within his community or connected to his family, as opposed to placement with strangers.

RESEARCH REGARDING NON-RESIDENT FATHERS OF CHILDREN IN THE CHILD WELFARE SYSTEM INDICATES:

- Involvement by non-resident fathers is associated with more reunifications and fewer adoptions.
- Higher levels of non-resident father involvement are associated with substantially lower likelihood of later maltreatment allegations.
- Highly involved non-resident fathers' children exited foster care more quickly.
- Children who had had contact with a non-custodial parent in the last year were 46% less likely to enter foster care.

Source: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Human Services Policy and Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. (2008). More about the dads: Exploring associations between nonresident father involvement and child welfare case outcomes. Available at <http://www.fatherhoodqc.org>.

Diligent searches for all relatives should be standard. The Fostering Connections Act (PL 110-351) requires due diligence to identify and provide notice to all adult relatives within 30 days of removal.¹⁷ A standard court-wide protocol for ensuring effective and thorough diligent searches should be cooperatively implemented. Child protection investigators and caseworkers should be trained on the protocol. Some courts have created ‘diligent search’ checklists or other family finding techniques that conform to state statute.¹⁸

Tribal representatives or liaisons, cultural or community leaders or liaisons, and/or religious leaders should always be at the PPH when required and whenever possible if not required. They should be engaged as partners in the effort to find community alternatives to foster care. Families should be asked prior to the PPH which of these leaders should be invited to attend. If the Indian Child Welfare Act (ICWA) applies, an ICWA expert or Tribal liaison should be involved at the PPH to testify and to advise the court and parties. Waiting until the jurisdictional hearing for the ICWA expert to testify could result in a child spending months in care without consideration of the higher standard for placement that the ICWA requires.

Children should participate in the PPH. Judges should expect that children are brought to court when safe and appropriate – and if they are not, the court should require that the child welfare agency provide an explanation that connects to that child’s safety and well-being. There is evidence to suggest that children who are more knowledgeable about the legal system - through preparation by attorneys, social workers or caregivers as well as personal experience with the system - are less distressed about attending court and value the opportunity to be heard by the judge.¹⁹ If not already instituted, courts will need to develop policies and protocols for ensuring that children will have the opportunity to attend the PPH and subsequent hearings. Judges should expect that substitute caregivers and child welfare agencies will work collaboratively to ensure that children are able to appear in court.²⁰ Courts should seek and participate in specific training to learn how best to engage children during the hearing process. The court should carefully weigh whether the child should be present throughout the whole hearing or just portions, as well as the extent to which the child should be asked to testify immediately after the removal.

All attorneys and advocates should be present at the PPH. Even though many jurisdictions only appoint counsel at the PPH, developing a process in which each parent’s attorney is appointed prior and present at the PPH allows for the parent to have advice and counsel at the start of the process – promoting speedier resolution of key issues that need to be determined at this stage. Although some jurisdictions routinely provide separate counsel for each parent, in those that do not, judges should determine from the onset whether there is a conflict or potential conflict for an attorney to represent both parents. In cases involving domestic violence, it is critical that separate attorneys be appointed.

Of equal importance is the legal and/or lay advocate for the child. Ideally, the child’s advocate(s) should be involved in the process from the first day and should be able to speak with the child prior to the PPH and present that child’s perspective or position and a recommendation as to their best interest on removal, placement, visitation, and service/treatment decisions. Representation for the child welfare agency, whether by a district attorney representing the agency’s position, or,

¹⁷ 42 U.S.C Section 671(29)

¹⁸ ChildFocus. (2007). *Making relative search happen: A guide to finding and involving relatives at every stage of the process*. <http://www.childfocuspartners.com/toolkits%26guides.htm>.

¹⁹ Quas, J.A., Wallin, A.R., Horwitz, B., Davis, E. & Lyon, T. (2009). Maltreated Children’s Understanding of and Emotional Reactions to Dependency Court Involvement. *Behavioral Sciences & the Law* 27: 97–117

²⁰ See the American Bar Association Center on Children and the Law, Bar-Youth Empowerment Project, National Child Welfare Resource Center on Legal and Judicial Issues. (2008). *Judicial Benchcard for Engaging Children & Youth in Court*. Available at www.abanet.org.



when a conflict exists, by an agency attorney or state attorney is also essential.

Because the PPH is often very upsetting and difficult for parents, supportive individuals who can help the parents navigate the process such as parent mentors, cultural liaisons, substance abuse coaches, domestic violence advocates, etc., can help a parent remain engaged during and after the PPH. Treatment or service providers that have been working with the family prior to the court's involvement should be invited to attend the PPH to support the parents and discuss their progress. Judges need to inquire about the whereabouts of each of these representatives if they are not present.

Promoting Attendance at the PPH

Involving many of the aforementioned individuals in the PPH can be a challenge. Inherent mistrust of the system may keep individuals away from the court. Court schedules are not particularly conducive to gathering large numbers of people together for an emergency hearing. Schedules are most often more convenient for the court than they are for the individuals who must appear. However, making the court accessible and welcoming is an important part of building public trust and confidence and allowing families the best possible opportunity for involvement in the proceedings. Building relationships among the court, the child welfare agency, community leaders and cultural liaisons can assist with promoting attendance at the PPH. Implementing time certain calendaring can support broader hearing attendance by avoiding scheduling that may require participants to wait for long periods of time for their hearing to commence. Consideration of alternative scheduling (i.e. night court) may further assist families and their support systems with attendance.

In open courts, all persons present for the hearing should be allowed to enter the courtroom. In courts where the proceedings are closed, judges should make a point of requiring their bailiffs to invite anyone waiting for a case into the courtroom unless there is a compelling safety reason to the contrary. It is critically important that the judge, and not the bailiff, make decisions about who is allowed to enter the courtroom and participate in the hearing. Judges should routinely

inquire of the family and child/youth whether there is anyone waiting outside the courtroom.

Documentation and/or testimony should be provided by the child welfare agency affirming that parties and witnesses received both oral and written notice in a language that is understandable to them. Certified court interpreters should be used where available if a family is non-English speaking. Under no circumstances should a family member, party to the case, or other hearing participant interpret the proceedings for another person in attendance.

Appropriate motions and orders should be entered to ensure that incarcerated parents are transported for PPHs whenever possible. For parties and key witnesses who are unable to attend in person, telephonic attendance or videoconferencing should be made available.

Reviewing the Petition

While state and federal law dictate the essential elements of the initial petition, judges can work with the agency to

WHAT JUDGES CAN DO AT THE PRELIMINARY PROTECTIVE HEARING TO ENSURE THAT THE AGENCY IS WORKING TO IDENTIFY AND LOCATE FATHERS FROM THE START:

The Fostering Connections Act (PL 110-351) requires due diligence to identify and provide notice to all adult relatives within 30 days of removal (42 U.S.C. Section 671(29)). This includes non-resident fathers and paternal relatives. The court should ask what actions the social worker has taken to identify and locate the father. Has the social worker:

1. Asked the mother about the identity and location of the father?
2. Used any search technology such as the child support locator to locate the father?
3. Asked the mother's relatives about the father and his relatives?
4. Asked the mother about the identity and location of any of the father's relatives?
5. Used family finding technology to identify the father's relatives?
6. Contacted any of the father's relatives concerning his location?
7. Checked with local jail or state prison representatives to determine whether the father is incarcerated?
8. Checked with probation or parole authorities to determine if the father is on probation or parole?
9. Talked with the child or the child's siblings about contact with the father or father's relatives?

These and other questions will inform the case manager about the thoroughness of the inquiry the court expects concerning the father's identity and location.

"[..The issues discussed.....regarding identifying, locating, notifying, and engaging fathers are relevant to incarcerated fathers. The mother may finally reveal the father's identity, but she may not know if he is incarcerated. With a name, birth date, and possibly other information, the social worker should be able to locate an incarcerated father quickly. The court should insist that the caseworker contact the alleged father, inform him of the legal proceedings, and determine his desires about the child protection proceedings. The fact that he is in jail should not stop the inquiry."

If a case involves domestic violence, the way in which the court makes these inquiries is important so as not to compel the victim to provide information that may place her in danger.

Source: Edwards, L. (2009). Engaging fathers in the child protection process. *Juvenile and Family Court Journal*, 60(2), 1-29.]

require that petitions contain sufficient factual and contextual information upon which to base a more thoroughly considered decision. Judges must also determine whether the petition meets the requirements of state law and whether due process requirements are met.

Generally, initial petitions must be sworn and the affiant should be present in court or available to the court to answer questions about the facts contained therein. Clearly stated facts should support any conclusions reached in the petition. Many petitions are vague (“the child is in need of the services of the court”) or conclusory (“the father reportedly has a substance abuse problem”). In domestic violence cases, the court should pay particular attention to the language of the petition – does it hold the batterer accountable for his violence?²¹

Judges should insist that proof be offered at the level the court requires to determine probable cause for any and all allegations in the petition. The petition should include specific language that articulates the current threat to the child’s safety that necessitates removal. Additionally, the petition should be accompanied by an affidavit stating the specific reasonable or active efforts that have been made to prevent removal. It is important that the initial petition is filed prior to the time of the PPH to allow adequate time for the parents’ review and consideration.

Petitions often list allegations only as to the primary caretaker parent. Often, caseworkers or investigators are concerned that they do not know enough about the other non-custodial, non-charged parent or guardian at the time the petition is filed. If that parent or guardian then appears at the hearing, they are sometimes ordered to participate in a series of evaluations to “convince” the child welfare agency and court that he/she is a fit parent. Judges must ensure that the rights of non-custodial parents or guardians are adequately protected and should carefully consider whether there is a legal basis to deprive a non-custodial parent of placement of their child if no allegations have been filed.

Throughout the PPH Benchcard development process, judges expressed concern regarding how best to handle cases with uninvolved parents who may or may not be appropriate placement resources. The court and/or agency needs additional information in order to make that determination. The majority of judges involved in the creation of the PPH Benchcard believe that a parent has a right to custody of their child if no allegations are filed. Others strongly believe that the court has the authority to order services even if allegations are not filed. This is an important consideration individual judges must make, often based on state law.

Conducting the Hearing

Once the judge has confirmed that the aforementioned individuals and representatives were given the opportunity to attend the PPH and is satisfied that due process requirements regarding notice and the elements of the petition have been met, he/she should proceed through the questions of the PPH Benchcard. The questions are grouped by topic area to allow for flexibility based on each judge’s style and the natural flow of the hearing.

²¹ Goodmark, L. (2008). *Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence*. Reno, NV: National Council of Juvenile and Family Court Judges Family Violence Department

Key Inquiries, Analyses and Decisions the Court Should Make at the Preliminary Protective Hearing



DETERMINE WHETHER THE INDIAN CHILD WELFARE ACT (ICWA) APPLIES

The court should require that the applicability of the ICWA be determined before proceeding with the preliminary protective hearing. If the court has reason to believe ICWA applies, the court should proceed accordingly.

- If Yes – different standards apply, refer to the ICWA Checklist.
- If Yes – determine whether there was clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e).



Judges must determine whether the ICWA applies to the case as a threshold inquiry. Meant to safeguard and protect Indian children, the ICWA was intended to remedy abusive child welfare practices that separated Indian children from their families in the interest of assimilating them in to the white culture. Because tribal children were removed at outrageously disproportionate rates (in one state at 20 times the rate of non-Indian children), the ICWA set forth the requirement and standard that the state engage in active focused efforts to prevent the removal of Indian children from their homes and/or termination of parental rights. The ICWA also recognized that a child's extended family as well as other tribal families should be considered first as substitute caregivers for Indian children. The ICWA also provides for the right of tribes to actively participate in any state court proceeding involving tribal children.²²

The ICWA applies when the proceedings are 'child custody proceedings' as defined by ICWA²³ and the child is an 'Indian child' as the ICWA defines that term.²⁴ Under the ICWA, a child custody proceeding includes:²⁵

- Any action where the Indian child is removed from his or her parent or Indian custodian for temporary placement in a home or institution, including guardianship and conservatorship and where parent or custodian cannot have child returned upon demand but where parental rights have not been terminated;
- Termination of parental rights;
- Pre-adoptive placements; and
- Adoptive placements.

The child is considered an 'Indian child'²⁶ pursuant to the ICWA if:

- He/she is an unmarried person under the age of 18, and
- The child is a member of a federally recognized Indian tribe; or
- The child is the biological child of a member of a federally recognized Indian tribe and the child is eligible for membership in any federally recognized Indian tribe.

²² The five aspects of the ICWA are based on a summary of Thorne, W.A. An overview of the Indian Child Welfare Act (ICWA). The *Judge's Page Newsletter*. National CASA in partnership with the National Council of Juvenile and Family Court Judges. http://www.casaforchildren.org/atf/cf/%9928CF18-EDE9-4AEB-9B1B-3FAA416A6C7B}/0404_indian_child_welfare_act_issue_0011.pdf

²³ 25 U.S.C. §1903(1)

²⁴ 25 U.S.C. §1903(4)

²⁵ 25 U.S.C. §1903(1)(i-iv)

²⁶ 25 U.S.C. §1903(4)

EXCERPT FROM PPH CHECKLIST FOR ICWA CASES

Key inquiries the court should make:

- Is the child under 18, unmarried and:
 - a member of a federally recognized tribe or
 - eligible for membership in a federally recognized Indian tribe and the biological child of a member of a federally recognized tribe?
- Was the child in the custody of an Indian custodian prior to the hearing?
- If child is an Indian child, does the child either reside or is the child domiciled on a reservation or is the child already a ward of a tribal court, depriving the court of jurisdiction? If the child resides or is domiciled on reservation but is temporarily off reservation, the court may order an emergency removal from the parent or Indian custodian to prevent imminent physical damage or harm to the child.
- Has the agency mailed proper notice the child's putative father, including father who has acknowledged paternity, even if he has not legally established paternity?
- Was proper notice and inquiry mailed to all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination?
- If the child's tribe is not known at this time, was written notice sent to the U.S. Secretary of the Interior?
- What efforts, if any have been made by the agency to identify extended family or other tribal members or Indian families, for placement of the child? Has the agency attempted to create a family chart or genogram soliciting assistance from neighbors, family or members of the Indian community who may be able to offer information?
- Is the parent able to read and/or understand English? If not, what efforts have been made to ensure that the parent understands the proceedings and any action the court will order?

Key decisions the court must make:

- Has the agency made *active efforts* [emphasis added] to identify responsible extended family or other tribal members or Indian families to serve as a placement for the child?
- Is it in the best interest of the child to appoint counsel for the child?
- If the state law makes no provision for the appointment of counsel, has the court notified the Secretary upon appointment of counsel so that reasonable fees and expenses may be appropriated?
- In assessing whether an individual who meets the placement preferences is an appropriate placement for the child, has the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family reside, or with which the parent or extended family maintain social and cultural ties?
- What additional efforts need to be made to ensure that the child is placed with extended family or within his/her tribal community?
- What culturally relevant services will allow the child to remain at home?
- Will parties voluntarily agree to participate in services?
- Are restraining orders or orders expelling an allegedly abusive parent from the home appropriate or necessary?
- Are orders needed for examinations, evaluations, or other immediate services?

"Leadership by the court is essential to ensure ICWA compliance....Much has been written in recent years about the impact to affected children if the requirements of the ICWA are not met, most notably the significant delay in achieving permanency for these children as well as the widespread non-compliance with the requirement that a qualified expert testify at hearings including the initial removal hearing."

— HONORABLE DALE R. KOCH,
MULTNOMAH COUNTY CIRCUIT COURT,
PORTLAND, OR

The court should make a determination about the applicability of the ICWA for every child that appears before the court, and review ICWA applicability at every hearing. Once the ICWA is determined to apply to the child, the court should refer to the PPH checklist for ICWA cases that appears in the Indian Child Welfare Act Checklists for Juvenile and Family Court Judges developed and published in 2003 by the NCJFCJ-PPCD. Most importantly, the court must apply the actual wording of the ICWA to decide if removal is appropriate. Key written findings that the court must make include:

- Whether, at the time of removal, the child was already a ward of a tribal court (if known) thereby depriving the state court of jurisdiction.²⁷
- Whether, at the time of removal, the child was in the custody of an Indian custodian.
- Whether active efforts were made prior to removal of the child to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, and whether the efforts were successful.²⁸
- Whether there was clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.²⁹
- Whether the parent, Indian custodian, or child's tribe requested an additional 20 days to prepare for the hearing.³⁰

²⁷ 25 U.S.C. §1903(6)

²⁸ 25 U.S.C. §1912(e)

²⁹ 25 U.S.C. §1912(e)

³⁰ 25 U.S.C. §1912(a)



ENGAGE IN AN OPENING DISCUSSION WITH PARENTS, CHILDREN AND FAMILY MEMBERS AT THE BEGINNING OF THE HEARING

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about?
- What family members and/or other important people should be involved in this process with us?
- Do you understand the petition? (review petition with parties)

One of the key principles of the CCC Initiative is to engage families in every court hearing. Judges have a significant opportunity to connect with and engage families appearing before them. Often referred to as therapeutic jurisprudence, the judge's demeanor, behavior, and interactions with each party, relative, and community member are crucial to the perception of fairness in the process.³¹ In this case, the cliché is true – the perception of justice is of equal importance as justice itself.

The “Opening Discussion” questions listed on page three of the PPH Benchcard guide the judge through the initial family engagement process. These questions will help the judge determine whether the family truly understands the proceedings and the process, and demonstrate openness on the judge's part to including the family's familial, social, community, and cultural support network in the court process. The opening discussion between the judge and the family can set the stage for the rest of the proceedings by modeling and promoting cooperation, communication, engagement and a strength-based family-centered approach. Not only does this signal to the family that they will be treated fairly and openly, it clearly sends the message that those working directly with the family will be expected to be open and fair as well.

CONSIDERATIONS WHEN ENGAGING FATHERS IN CASES INVOLVING DOMESTIC VIOLENCE

When domestic violence is involved in a child maltreatment case, efforts to engage the father and extended family through Family Group Decision-Making or other collaborative, family-centered approaches must consider the safety and protection of the adult victim (mostly mothers) and the children. Safeguards from further emotional and physical abuse should be identified and implemented and separate parental engagement strategies should be employed. The judge should consult with the mother and her domestic violence advocate regarding safety concerns and priorities as well as her present and future needs. The judge should encourage differentiated engagement by the caseworker that takes into consideration the expressed concerns and needs of the children, mother and father individually.

Judges should be aware of how the abused parent and the perpetrator will present to social workers, court staff, and to judges themselves. On first glance, the perpetrator may appear to be the better parent—charming, cooperative, and in control of the children. The abused parent, on the other hand, may seem stressed, depleted, and an inadequate parent. Judges should understand, and help others in the dependency system to understand, the techniques used by the perpetrator to undermine the adult victim's parenting.³²

³¹ Senjo, S. and Leip, L. (2001). Testing therapeutic jurisprudence theory: An empirical assessment of drug court process. *Western Criminology Review* 3(1) [Online]. Available: <http://wcr.sonoma.edu/v3n1/senjo.html>.

³² Goodmark, L. (2008). *Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence*. Reno, NV: National Council of Juvenile and Family Court Judges Family Violence Department



DETERMINE WHETHER ESSENTIAL DUE PROCESS REQUIREMENTS WERE MET

- Who are the child's parents and/or guardians?
- How was paternity determined?
- What were the diligent search efforts for all parents?
- Have efforts to identify and locate fathers been sufficient? What has been done?
- How were the parents notified for this hearing?
 - Was the notice in a language and form understandable to parents and/or guardians?
- Do the parents understand the allegations?
- Are the parents entitled to representation? Are there language issues to consider when appointing attorneys?
- Are there issues in the case that are covered by the Americans with Disabilities Act (ADA)?

Although state law varies, the specific questions related to due process requirements addressed in this section meet the minimum standards of most, if not all, jurisdictions, as well as the requirements under the Fostering Connections Act regarding notice to relatives and youth engagement.³³ The questions can be addressed to the parents, relatives, caseworker/investigator and others who may be present. To the best of its ability, the court must determine whether the child protection agency has sufficiently attempted to identify, locate, and confirm paternity in every case. If the judge determines this has not taken place, additional steps and a timeframe for completing these steps should be clearly ordered. The judge should conduct a paternity inquiry of any and all parties in the courtroom. The judge must also assess whether the parents were notified pursuant to the requirements of state statute, including the right to receive notice in a language and form that is understandable to them.

The court should require that critical documents such as the initial petition, notices of hearing, the case plan, etc., are professionally translated into the language that the parent is most capable of reading. If a parent is unable to read in any language, the court should instruct the parents' counsel to be sure to read all documents to the parent and to ensure that the parent understands their meaning. The parents should be asked whether they have any physical or developmental disabilities that prevent them from fully participating in the proceedings. If they do, the Americans with Disabilities Act (ADA) may require certain accommodations be made by the court and the child protection agency.

³³ P.L. 110-351



IF THE CHILD HAS BEEN REMOVED, DETERMINE WHETHER THE AGENCY MET THE LEGAL THRESHOLD FOR REMOVAL OF THE CHILD

- Has the agency made a prima facie case or probable cause showing that supports the removal of the child?
- Have the family's cultural background, customs and traditions been taken into account in evaluating the event and circumstances that led to the removal? Have the parent(s) cultural or tribal liaison/relevant other(s) been asked if there is a culturally-based explanation for the allegations in the petition?

Removing a child from home, even when there is an imminent safety threat, is a life-altering experience for all involved. Despite the very intrusive and high-impact nature of the initial removal decision by child protective services, much about this decision is left to the subjective judgment of the child protective investigator. Judges charged with reviewing the decision to remove a child are in a powerful and challenging position. Removing a child from his parents will likely result in removing the child from his siblings, extended family, friends, activities, belongings and community. Once removed, a child

may be placed with an adult and other children whom they do not know, who may not look like them, speak their language, or follow their family's customs. They may be separated from school or community activities, and adults that they trust. Parents are often confused, scared, concerned and desperate.

Timeframes for the PPH differ by state.³⁴ Whatever the timeframe, the state child protection agency is required to make a prima facie case or probable cause showing that supports removal of the child. The question at this point is not whether the allegations are true but, assuming the allegations are true, whether an imminent safety threat to the child necessitating removal exists? Some state statutes specifically state that the judge may make either a probable cause finding, or rule that the court requires additional time to obtain and review documents in order to determine the risk of harm to the child.³⁵

It is the duty of the court to ensure that its findings are based on conclusions that are supported by facts. Often, statements are made in court that are, in fact, conclusions drawn by witnesses without evidence to support the claims. For example, a neighbor may have reported to the agency that a parent has a substance abuse problem. Because the agency has not had adequate time to gather additional information, the court may simply be informed that the parent has a substance abuse problem that places the child at risk. The court should challenge every conclusion made to ensure that those conclusions are supported by facts. Statements in petitions such as, "The parent was out of control," should be further explored by the judge. A parent may have behaved this way due to the trauma of having their children removed. This behavior may be completely uncharacteristic of the parent and does not necessarily pose a threat to the child's safety.

When evaluating the facts contained in the petition, judges should consider whether the family's cultural background, customs, and traditions have been taken into account regarding the events and circumstances that led to the removal, as well as the types, tailoring, and appropriateness of services provided and the method by which the family was engaged. Cultural norms shape the way that individuals evaluate and determine whether a particular behavior is considered abusive or places a child at risk. Sometimes they cause people to find abuse where none in fact exists. Conversely, sometimes beliefs about what is 'normal' for a culture or community cause those responsible for determining safety and risk to dismiss signs of threat or harm. Thus, a decision-maker's cultural norms must be balanced by knowledge and information about cultures and communities coupled with objective and effective safety and risk assessments by professionals in the field. There are a number of key informants on this issue in addition to the agency: the parents, the extended

Cultural norms shape the way that individuals evaluate and determine whether a particular behavior is considered abusive or places a child at risk. Sometimes they cause people to find abuse where none in fact exists. Conversely, sometimes beliefs about what is 'normal' for a culture or community cause those responsible for determining safety and risk to dismiss signs of threat or harm. Thus, a decision-maker's cultural norms must be balanced by knowledge and information about cultures and communities coupled with objective and effective safety and risk assessments by professionals in the field.

³⁴ In Florida, for example, the statute requires a hearing within 24 hours after the removal of the child (Fla. Stat. §39.401(3)(b)). Arizona law requires the court to hold a preliminary protective hearing to review the removal not fewer than five days nor more than seven days after the child is taken into custody (ARS §8-824).

³⁵ For example, Florida Statute 39.402(8)(h) in discussing what written findings must be made states, "That based upon the allegations of the petition for placement in shelter care, there is probable cause to believe that the child is dependent or that the court needs additional time, which may not exceed 72 hours, in which to obtain and review documents pertaining to the family in order to appropriately determine the risk to the child."

family, religious, cultural or tribal representatives or experts, or community leaders. Judges should inquire whether the incident(s) causing the harm or safety concerns were related to the parent engaging in a cultural or religious practice or belief.

The court must carefully consider whether these customs rise to the level of child abuse or neglect. If the judge finds that cultural or community practices and beliefs contributed to the allegations, there should be an exploration of the risk of harm to the child if the practice was to continue in the home. If the judge does believe there is a safety threat to the child,

THE COURTS' ROLE IN ENSURING CULTURAL COMPETENCE

Falicov (1995) recommends that an inquisitive and open-minded strategy is adopted, rather than relying on stereotypical information about members of a particular group. She also cautions us to view people in all their many contexts and facets including “rural, urban, or suburban setting; language, age, gender cohort, family configuration, race, ethnicity, nationality, socioeconomic status, employment, education, occupation, sexual orientation, political ideology, migration and state of acculturation” (p. 375). In other words, knowing one particular fact about a family’s identity, such as its race or ethnic background, tells us little about who the family really is.

Saba and Rodgers (1990, p. 205) offer the following guidelines:

- Clarify your assumptions (about members of the group.)
- Realize that your perceptions may vary considerably from the family’s.
- Accept that a climate of mistrust exists.
- Understand that mutual stereotypes enter the interview room first.
- Be conscious of the power relationships between you and the family.
- When uncommon events occur, consider alternate explanations in addition to the obvious ones.
- Accept and admit your fallibility.
- When you discover your discriminatory behaviors, do not give up. Make changes and continue to work.
- Explore your setting for structures that foster prejudice.
- Cultivate safe collegial relationships that will permit discussion of clinical discrimination.
- Most importantly, be open to learning from the families you treat.

Source: Fontes, L.A. (2005). *Child Abuse and Culture: Working with Diverse Families*. Guilford Press: NY.

For more resources on cultural competence in child abuse and neglect cases, including how child abuse and neglect is viewed in different cultures, please consult the Child Welfare Information Gateway, a technical assistance service of the U.S. Department of Health and Human Services- Administration of Children and Families’ Children’s Bureau. www.childwelfare.gov/systemwide/cultural/can.cfm

*"Every child who should be in
care must be in care, and not
one child more."*

— HONORABLE R. MICHAEL KEY
JUVENILE COURT OF TROUP COUNTY
LAGRANGE, GEORGIA

the parents' willingness to explore different ways to respect cultural tradition without causing harm to the child must be evaluated.

If the judge determines that a prima facie case was made or probable cause was shown, there are additional inquiries and findings that need to be made. The judge must next determine: 1) whether reasonable efforts were made to prevent removal and 2) whether the immediate threat has diminished and/or whether adequate safeguards could be put in place to sufficiently protect the child should he/she return home today? Foster care placement should only be used as a last resort.



DETERMINE WHETHER REASONABLE EFFORTS WERE MADE TO PREVENT REMOVAL

- Were there any pre-hearing conferences or meetings that included the family?
 - Who was present?
 - What was the outcome?
- What services were considered and offered to allow the child to remain at home? Were these services culturally appropriate? How are these services rationally related to the safety threat?
- What was done to create a safety plan to allow the child to remain at home or in the home of another without court involvement?
 - Have non-custodial parents, paternal and maternal relatives been identified and explored? What is the plan to do so?
- How has the agency intervened with this family in the past? Has the agency's previous contact with the family influenced its response to this family now?

The federally required ‘reasonable efforts to prevent removal’ determination is one of the most critical elements of the PPH. Federal law requires the judge to determine whether “reasonable efforts have been made to prevent or eliminate the need for removal.”³⁶ This finding must be made by the court within 60 days from the time of removal.³⁷

REASONABLE EFFORTS IN DEPENDENCY CASES INVOLVING DOMESTIC VIOLENCE

In cases involving domestic violence, the court must first understand the agency’s rationale for removal or for seeking removal of the child. Was the child being physically or emotionally abused by the perpetrator of abuse against the adult victim? Was the child being physically or emotionally abused or neglected by the adult victim of domestic violence? Was removal sought because the child was ‘exposed’ to domestic violence in the home (which some states define as per se neglect). In order to determine whether the agency’s efforts to prevent removal were reasonable, the judge should consider the following:

1. How did the family come to the agency’s attention? How did the investigator/case manager determine that domestic violence was an issue for the family? What injury to the child is the agency alleging?
2. How did the agency seek to address the domestic violence in the family prior to seeking removal? (Alternatively: Why was immediate removal warranted?)
 - Did the adult victim have strategies to keep the child safe? If so, why were those strategies not effective?
 - Did the investigator/case manager consult with a domestic violence expert or advocate? If applicable, did he/she consult with the perpetrator’s probation or parole officer or treatment providers?
 - Was there an assessment of the likelihood of future violence?
3. What assistance and services, if any, were provided to the adult victim to keep herself and her children safe and together? (e. g., developing a meaningful safety plan; providing emergency funds; legal assistance for the adult victim; helping the victim enter shelter or obtain a protective order if she deems these necessary; connecting the adult victim with in-patient services that will allow her child to remain with her; etc.)
4. How did the agency deal with the batterer? Does the petition hold the batterer accountable for his violence? Did the agency try to have the batterer removed from the home?
5. If the child has already been moved, what actions would be necessary to allow the child to return home immediately and safely and what services would be required to support the child’s return?

Source: Goodmark, L. (2008). *Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence*. Reno, NV: National Council of Juvenile and Family Court Judges Family Violence Department.

³⁶ 42 U.S.C. §§672(a)(1), 672(a)(1); 45 C.F.R. Section 1356.21(b)(1)

³⁷ 45 C.F.R. §1356.21(b)(1)



The ‘reasonable efforts’ evaluation is the judge’s opportunity to fully assess the efforts that have been made to engage the family in services and supports that would have either eliminated the safety threat prior to placement or allow the child to return home today. These findings powerfully communicate whether the court is satisfied that the agency is using foster care only as a last resort and not simply as the most expeditious intervention and provide guidance to the agency about the court’s expectations for immediate service delivery whenever possible.

It is reasonable to make no efforts in an emergency situation. Courts must carefully evaluate which situations are actually emergencies. Court and agency culture over the years sometimes leads to a less than thorough exploration of alternatives to placement even when a situation appears grave on its face. A judicial finding that it was reasonable to make no efforts to prevent the placement should only be made if there are no other reasonable means to protect the child from an imminent safety threat.

If the court determines that an emergency situation did not exist, the judge should inquire about the specific services provided and the specific safety concerns they were meant to ameliorate. A judicial inquiry should also be made about the cultural relevance and appropriateness of the services, including the languages in which they were offered. Proof of provision of these services, beyond a simple one-page referral sheet, is also important to consider.

The family’s past interactions with the court and the child protection agency should be considered by the judge, but care should be taken to ensure that the judge or the child protection agency is not unduly influenced by that history. The agency as well as the judge must use history as a context, but also view the current situation in light of the presenting set of facts and circumstances and the efforts made now to prevent removal. Past efforts that were unsuccessful do not relieve the agency from making reasonable efforts to prevent removal should a new allegation arise.

Most importantly, judges should explore with the agency whether an in-home safety plan was considered prior to the removal and whether such a plan would allow the child to safely return home – with or without the involvement of the agency and /or court. “If an in-home safety plan would be sufficient, and the agency fails to consider or implement one, then the agency has failed to provide reasonable efforts to prevent removal.”³⁸ The elements of assessing safety and the appropriateness of an in-home safety plan are discussed more thoroughly in the next section.

³⁸ Lund, T., & Renne, J. (2009). *Child safety: A guide for judges and attorneys*. Washington, DC: American Bar Association, p. 25.



IF THE CHILD HAS BEEN REMOVED ON AN EMERGENCY BASIS AND REASONABLE EFFORTS TO PREVENT REMOVAL WERE NOT REQUIRED, DETERMINE WHETHER THERE IS ANYTHING THAT PREVENTS THE CHILD FROM RETURNING HOME TODAY

- What is the current and immediate safety threat? Has the threat diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
- What is preventing the child from returning home today? What type of safety plan could be developed and implemented in order for the child to return home today?
 - What specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
 - Will the removal or addition of any person from or in the home allow the child to be safe and be placed back in the home?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family and child, and are you satisfied that they understand these conditions?

Determining safety threats and the need for continued out-of-home placement is one of the most challenging aspects of serving as a judge in child protection proceedings. Accurate, up-to-date information from credible sources about the threats to the child's safety must be available to the judge. At the first hearing, emphasis is frequently focused on the child's stay in substitute care rather than thoroughly assessing whether the child can safely return home immediately. Implicit bias and historical systemic practice can easily cloud the decision-making process regarding the need for the child's removal, thus necessitating a more structured approach based on discernable criteria upon which to base this key decision.

Confusion of the terms 'risk' and 'safety' is a core issue when evaluating an emergency removal decision.³⁹ In state statute, as well as in common child welfare parlance, risk and safety are often referred to as one and the same, when, in fact, they are not.

The *Child Safety Guide* disseminated in 2009 by the ABA Center on Children and the Law's National Resource Center on Legal and Judicial Issues⁴⁰ and the National Resource Center for Child Protective Services advocates the use of six background questions to assess the threat of danger, vulnerability of the child and protective capacities of the parent(s):

1. What is the nature and extent of the maltreatment?
2. What circumstances accompany the maltreatment?
3. How does the child function day-to-day?
4. How does the parent discipline the child?
5. What are overall parenting practices?
6. How does the parent manage his own life?

There is a significant chance of missing information and/or bias influencing the answers to these questions. For example, many women experiencing domestic violence never disclose the battering to their closest friends and family, let alone to their attorneys or a government agency empowered to remove their children. And although professional organizations such as the National Association of Public Child Welfare Administrators have stressed the importance of screening and assessing families for domestic violence, some caseworkers may not make such inquiries.⁴¹ If this critical information is not disclosed, it is possible that negative assumptions may be made about the behavior of a battered woman, when in fact, that very behavior may be necessary to save her life or that of her children.

"Whether or not a child is safe depends on a threat of danger, the child's vulnerability and a family's protective capacity....Vulnerable children are safe when there are no threats of danger within the family or when the parents possess sufficient protective capacity to manage any threats....Children are unsafe when threats of danger exist within a family and children are vulnerable to such threats and parents have insufficient protective capacities to manage or control threats."

Source: Lund, T., & Renne, J. (2009). *Child safety: A guide for judges and attorneys*. Washington, DC: American Bar Association, (p.2).

³⁹ *Child Safety: A Guide for Judges and Attorneys* jointly developed by the American Bar Association Center on Children and the Law and the National Resource Center for Child Protective Services. This is an excellent and thorough guide through the questions and decision-making process in which judges must engage to determine safety throughout the life of the case. The Guide also provides comprehensive case studies that demonstrate the decision-making process recommended by the authors.

⁴⁰ The National Council of Juvenile and Family Court Judges and the National Center for State Courts are partners with the ABA in the National Resource Center on Legal and Judicial Issues.

⁴¹ Goodmark, L. (2008). *Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence*. Reno, NV: National Council of Juvenile and Family Court Judges Family Violence Department.



In another example, children may function very differently day-to-day depending on their culture. They may spend more time with grandparents than they do with their biological parents, they may share sleeping quarters with multiple siblings, they may live in homes with dirt floors and minimal food. Failure to explore the cultural relevancy of certain behaviors or conditions may lead to assumptions about those behaviors or conditions having a negative influence on a child.

Each case must be carefully evaluated within the family's cultural context. In making the safety decision, judges are strongly encouraged to refer directly to the self-reflection questions to help them ensure that bias is not influencing the safety inquiry at this critical juncture. Making a safety determination at the PPH stage is especially challenging because it takes time for caseworkers, attorneys, and CASAs to gather the needed contextual and background information.

The decision to remove a child on an emergency basis must be factually supported even though the agency may have only limited information. The extent of maltreatment and the surrounding circumstances must be clearly explained.⁴² If the judge determines a safety threat did, in fact, exist, the judge should then inquire whether an in-home safety plan was considered and, if found to be appropriate, implemented. The following factors must be evaluated to determine whether an in-home safety plan is feasible:⁴³

⁴²Lund & Renne (2009), p. 7

⁴³Lund & Renne (2009), p. 25

- If the family's current capacity to protect the child is limited, what other measures can be put in place to ensure safety? Considering when and how threats develop and emerge is important in making this decision. For example, in a domestic violence case, if the alleged abuser is removed from the home, can the child and the alleged victim parent remain safe?
- Based on the above analysis, is an in-home safety plan going to control the safety threats?
- What services and action steps are necessary for the in-home plan to control the threats to the child?

The judge should use answers to these questions to assess whether an in-home safety plan will be "sufficient, feasible and sustainable."⁴⁴ The safety plan is not a case plan, although some of the services and supports necessary for implementing the safety plan will also be part of the parents' case plan. Only when the court determines that an in-home safety plan is not feasible or sustainable, should the court turn its attention the child's out-of-home placement and ongoing contact with his or her family.

⁴⁴ Lund & Renne (2009), p. 25-26



DETERMINE WHETHER THE CURRENT OUT-OF-HOME PLACEMENT MEETS THE CHILD'S AND FAMILY'S NEEDS

CONSIDERING KIN AS A FIRST RESORT

- If child is placed in foster care/shelter, have kinship care options been fully explored? If not, what is being done to explore relatives? If so, why were the relatives deemed inappropriate?
- If child is placed in kinship care, what steps have been taken to ensure the relative is linked with all available training, services, and financial support?
- How is the placement culturally and linguistically appropriate?
 - From the family and child's perspective, is the current placement culturally and linguistically appropriate?
- How does the placement support the child's cultural identity? In what way does the placement support the child's connection to the family and community?
- How does the placement support the family/child's involvement in the initial plan?
- What are the terms of meaningful family time with parents, siblings and extended family members?
 - Do the terms of family time match the safety concerns? Is it supervised? Specifically, why must it be supervised?
 - Is the time and location of family time logistically possible for the family, and supportive of the child's needs?



The stability and quality of placement and parenting time (visitation) are essential to successful reunification between children and their parents. Agencies are required to provide an out-of-home placement that is the ‘least restrictive’ and ‘most family-like’ for the child. Judges must consider the cultural, linguistic, environmental, and geographical aspects of the placement, as well as the substitute caregiver’s ability to maintain the child’s connection to his or her family, school, traditions and community. Kinship care (or relative placement) can be the best possible opportunity for maintaining these ties and reducing the overall trauma of removal and placement. Furthermore, kinship care placements generally allow for a more natural parenting time routine, a familiar ‘supervisor’ if parenting time is required to be supervised, and potentially fewer logistical challenges associated with timing and transportation.

Research has shown that children placed with kin experience fewer placement disruptions than do children placed with non-related foster parents and, if disruption occurs, the children are more likely to be transferred to the care of another relative rather than a non-relative caregiver.⁴⁵

Because research has shown that kinship caregivers are more likely to be older, single, less educated, unemployed, and poorer than most agency foster parents,⁴⁶ they are sometimes eliminated as unable or unfit to care for the children. They typically require assistance from caseworkers in order to obtain financial, health and social support to be able to provide for the children placed in their care. Judges should specifically inquire about the level of support that has been offered to assist the kin caregiver. Many jurisdictions offer relative caregiver funds. Supplemental Security Income and Social Security Disability benefits are often available. The caseworker should be expected to assist the relative with school enrollment, Medicaid enrollment, and access to other entitlement programs, etc. Institutionalized attitudes and practices that create unbalanced benefits for relatives must be eliminated, but while they still exist, judges may have influence to change them. For example, some states will pay a foster care maintenance payment to an agency foster home but not to a relative. This sort of institutional bias prevents children from being placed with kin. Parents are often required to place severely

⁴⁵ Gleeson, J.P. (2007). *Kinship Care Research and Literature: Lessons Learned and Directions for Future Research*. *Kinship Report*. Child Welfare League of America, 1(2), 1, 8-11.

⁴⁶ Cuddleback, G. S. (2004). Kinship family foster care: A methodological and substantive synthesis of research. *Children and Youth Services Review*, 26, 623-639.

KINSHIP CARE RESEARCH OVERVIEW

In 2007, the Child Welfare League of America (CWLA) published a report of a review of 15 years worth of research on kinship care. Following are highlights of this literature review.

Placement Stability: Children in the child welfare system who are in relative placements experience fewer placement disruptions than children placed in non-related foster care. If the placement is disrupted, children in relative care are more likely to move to the home of another relative versus placement in a foster home. Financial and social support influence relative placement stability.

Reunification: Children placed with kin are reunified at slower rates with their biological parents than those children in non-related foster care. However, those in kinship care are less likely to reenter the child welfare system. The slower rate of reunification may be connected to the decreased focus on permanency once a child is placed with a relative.

Adoption: Recent research, as compared from early research about relative adoption, shows a greater willingness on the part of relatives to consider adopting their kin. Key to relative adoptions are the approach of the case manager in discussing all permanency options, information provided and assistance and support in weighing the pros and cons of a particular option.

Guardianship: Subsidized guardianship as an alternative to adoption is thought to be more consistent with cultural practices of ‘informal adoption.’ This is particularly true for African American families who are typically comfortable with taking care of their kin permanently; however, are not supportive of termination of their son or daughter’s parental rights.

Child Safety: The National Survey of Child and Adolescent Well-Being (NSCAW) found no difference between the child’s physical environment and community violence exposure in kinship care versus foster care. Similarly, there are no detected differences between the number of children with kin and the number of children in non-relative foster care who are exposed to harsh disciplinary practices.

Child Well-Being: Children and youth living with relatives have been found to have lower rates of mental health and behavioral problems than do children in foster care and group care, although they have higher rates of these problems than the general population does and of those in non-child welfare related (informal) kinship placements.

Children’s Views: Of the six studies on this topic published as of 2007, children generally reported feeling always loved at a higher rate than children in foster care. They are less likely to run away and more likely to like their caregivers, have contact with biological family and talk with the adults in their life about school and dating. Also, children reported that being in a relative’s care required very little transition for them as they had close relationships with their extended family and experiences of living together all or some of the time.

Impact on Kin: Although they report high levels of satisfaction and meaning from taking care of their grandchildren, those who suffer the most physically and emotionally from kinship care are the actual caregivers. Conflicting loyalties, complex legal situations, lack of financial and material resources, stress/physical health deterioration and community violence all impact a relative’s ability to care for their kin.

Source: Gleeson, J.P. (2007). *Kinship Care Research and Literature: Lessons Learned and Directions for Future Research*. *Kinship Report*. Child Welfare League of America, 1(2), 1, 8-11.



disabled children in care because benefits are only available if the child is in foster care. Judges must weigh these institutional practices in determining their reasonable efforts findings. Many advocates argue just because it is policy does not make it reasonable.

Kinship caregivers may also find themselves facing undue bias or confront preconceived judgments about their ability to care for their kin based on the poor behavior of the parent. Of course, criminal history, involvement with the child protection system, and ability to provide for the children should be evaluated and may rule out kinship caregivers as an option. Even a criminal history or prior contact with child welfare, however, should not summarily rule out a relative. The court should make active inquiry as to the current circumstances of the family to determine whether prior history warrants eliminating the family from consideration.

Kinship caregivers should be approached from a strengths-based perspective – addressing their current situation, and evaluating current and known safety risks along the same lines that child safety is evaluated with respect to returning the child to his or her biological parents. Non-relative foster care placement should be a last resort and, even if a child is placed in foster care, maintaining a connection with relatives who are important to the children and supportive of the parents is essential.

Non-Relative Foster Care

When children must be placed in foster homes, the judge must consider a variety of factors at the PPH to determine whether the placement is appropriate. Whether and how the placement supports the child's cultural identity is a key consideration. The judge should ask the parents, relatives, and community representatives how the child identifies culturally and in what ways the court and the placement can best support his or her identity. The child's opinion should also be solicited in these important considerations. The most basic elements involve language, food and meal times, religious beliefs and practices, and grooming. After the trauma of removal, placing a 10 year old in a home where he is the only Spanish speaker, expected to eat food that is unfamiliar, attend an unfamiliar church, or even, cut or style his hair in a way that is not acceptable in his family of origin, can strip a child of his identity. It is essential to ensure the placement supports the child's cultural identity which, in turn, can promote active communication, less difficulty with acclimating to the new

environment, and can build productive relationships among the foster family, child and birth parents. Supporting the family's culture and traditions may also contribute to the parents' engagement with permanency planning efforts and related interventions and services. Whether in foster care or kinship care, the ability of the substitute caregiver to maintain the child's connection to his or her parents and extended family is essential.

Visitation/Parenting Time

Note: The term "visitation" is only used in this Technical Assistance Bulletin given that it is most often used in the child welfare system. Juvenile courts are encouraged to change the term to 'parenting time' in order to communicate the importance of the parent/child relationship.

At the PPH, supervision of parent-child contact should not be imposed unless there is objective evidence suggesting that the child will not be safe in an unsupervised setting. In many jurisdictions, sadly, supervised visitation is the norm. It is critical that the court make a vigorous inquiry and a well-reasoned and supportable determination as to why visits need to be supervised. In order to truly preserve the child's attachment to the parent, visitation should be as unrestricted as possible while ensuring the child's safety. There are jurisdictions in which visits are assumed to be unsupervised unless the agency can rebut the presumption that unsupervised visits are in the child's best interest. Again, it is important for the court to actively inquire about the facts to support any conclusion drawn. For example, reports often state that "the child acts out after visits, therefore the visits need to continue to be supervised." The court must explore the fact that the child, in fact, may be acting out because they miss the parent and need more time with them.

Visitation has been called the 'heart of permanency planning'⁴⁷ and frequent visitation can promote healthy attachment and reduce the negative impact of separation for both the child and the family.⁴⁸ Research shows that regular, frequent visitation increases the likelihood of an expeditious reunification.⁴⁹ Visitation should be specifically tailored to meet the

VISITATION & REUNIFICATION

Research has noted the importance of parent-child visitation as a predictor of family reunification. One reunification study involving 922 children age 12 or younger determined that children were 10 times more likely to be reunited with mothers with whom they had visitation. In fact, the birth mother's visits are a stronger predictor of reunification than are her presenting problems (i.e., substance abuse). The location and frequency of visits is important as well and are linked to positive reunification and parental engagement outcomes.

Visits in a home setting – birth parents or foster parents – were associated with more frequent maternal visitation than visits at fast food restaurants, an office building, or other location. Frequent visitation is associated with a birth mother's level of involvement in case reviews and other case-related activities. Finally, and critically, foster children who saw their birth parents at least once every two weeks showed fewer behavior problems, less anxiety and less depression.

Sources:

Davis, I. P., Landsverk, J., Newton, R., & Ganger, W. (1996). Parental visiting and foster care reunification. *Children and Youth Services Review*, 18(4/5), 363–382.
Cantos, A. L., Gries, L. T., & Slis, V. (1997). Behavioral correlates of parental visiting during family foster care. *Child Welfare*, 76, 309-330.
Gardner, H. (1996). The concept of family: Perceptions of children in family foster care. *Child Welfare*, 75, 161-183.
Child Welfare Information Gateway. (2006). Family reunification: What the research shows. Retrieved at http://www.childwelfare.gov/pubs/issue_briefs/family_reunification/family_reunification.pdf on August 31, 2010.

⁴⁷ Hess, P. & Proch, K. (1988). *Family Visiting in Out-of-Home Care: A Guide to Practice*. Washington, DC: Child Welfare League of America.

⁴⁸ Smiarga, M. (2007). *Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know*. ABA Center on Children & the Law and Zero to Three Policy Center

⁴⁹Id.

individual needs of the child and family before the court. “One-size-fits-all” approaches place unnecessary restrictions on the child and family and may delay permanency.

Many visitation schedules are more focused on the needs of the child welfare workers or foster parents than they are designed to meet the needs of the child and family. Visits should be scheduled at a time that best allows the parent to participate and disrupts the child’s schedule as minimally as possible.

Visitation should include all levels of ‘family time’ with frequent face-to-face interactions. Parent-child visits should include all siblings unless there are reasons to do otherwise. If so, arrangements should be made for specific visitation time between/among siblings. Visits should take place in a natural environment – a home, family church or the park – rather than an office. Other contacts such as phone calls, emails and letter writing should be scheduled and parents should be expected and encouraged to participate in all school, medical and therapeutic appointments. Parents should be allowed to participate in cultural and community events with their children.

It is important for caseworkers to personally observe visits. While workers may consider feedback from others who may be supervising the visitation, the personal experience and evaluation of the caseworker for the family can help guard against potential bias in describing the visits. Judges should expect that caseworkers will have the requisite education, training, and tools (i.e., a visitation assessment form) to make a complete and informative report to the court about visitation that includes qualitative information about the parent’s ability to protect and keep his child safe, as well as parent-child attachment. Reports on these issues should be framed in a strengths-based manner, emphasizing challenges and issues in terms of additional supports and needs of the parent and/or child. It is very important for the court to carefully inquire about conclusions drawn in reports of visits especially if the visit is observed outside the room (e.g., behind a one-way mirror); a person supervising the visit may draw conclusions based on incomplete facts or assumptions about the behavior of the parents.



DETERMINE WHAT REASONABLE SERVICES, INTERVENTIONS AND SUPPORTS WOULD ALLOW THE CHILD TO SAFELY RETURN HOME

- What services can be arranged to allow the child to safely return home today?
- How are these services rationally related to the specific safety threat?
- How are the parents, extended family and children being engaged in the development and implementation of a plan for services, interventions, and supports?
- How will the agency assist the family to access the services?
 - Does the family believe that these services, interventions and supports will meet their current needs and build upon strengths?
 - Has the family been given the opportunity to ask for additional or alternate services?
- How are the services, interventions and supports specifically tailored to the culture and needs of this child and family?
 - How do they build on family strengths?
 - How is the agency determining that the services, interventions and supports are culturally appropriate?
- What evidence has been provided by the agency to demonstrate that the services/interventions for this family have effectively met the needs and produced positive outcomes for families with similar presenting issues and demographic characteristics?



Research shows that the longer children remain in out-of-home care, the less likely it is that they will be reunified with one or both parents.⁵⁰ Thus, early and intensive permanency and service planning and implementation are keys to promoting expeditious reunification. At the PPH, the court should inquire directly of the agency and the family regarding the services and supports necessary for the child to be safely returned home. Like visitation planning, the services should be specific to the needs and safety threats in the individual family. Not all parents require parenting skills courses and anger management and not all children require play therapy. Rather than overwhelming parents with multiple services, agencies and families should work together to create a plan that is rationally related to the jurisdictional findings of the court. Should further allegations arise later in the case, and these allegations are proven, additional services to address these concerns can be added to the case plan.

Emphasis should also be placed on increasing the involvement of natural supports to a family – neighbors, relatives, respite families, afterschool care, etc. – that can reduce the safety threat, increase the parent’s protective abilities and reduce the child’s vulnerability. Immediate in-home services have been found to be successful in that they initiate very close in

⁵⁰Wulczyn, F., Chen, L. & Hislop, K.B. (2007). *Foster care dynamics 2000-2005: A report from the Multistate Foster Care Data Archive*. Chicago: Chapin Hall Center for Children at the University of Chicago.

time to the event necessitating a referral, teach practical skills to use in the home, and emphasize skill building and the delivery of concrete services.⁵¹

The family should be actively engaged in developing and participating in the service plan. Family-focused approaches addressing the needs of the entire family unit, not just the child, are more likely to yield long-term results. Even therapeutic interventions for the child should involve the parent(s).⁵²

Families must be provided with programs that are known to be (1) effective and (2) incorporate family's unique strengths, cultural connections and community resources. Since the mid-1990s, there has been a growing body of social and behavioral science research that supports the use of approaches and strategies that have demonstrated their effectiveness with children, youth and families.⁵³ To determine effectiveness, such programs have been evaluated rigorously in experimental or quasi-experimental studies.

EVIDENCE-BASED PRACTICES AND PROGRAMS

A program or practice is evidence-based if (a) evaluation research shows that the program produces positive results; (b) the results can be attributed to the program itself, rather than to other extraneous factors or events; (c) the evaluation is peer-reviewed by experts in the field; and (d) the program is “endorsed” by a federal agency or respected research organization and included in their list of evidence-based programs.

Although the availability of evidence-based programs may be limited in some geographic areas, ensuring that parents and children are enrolled in programs that have been rigorously tested increases the odds that the program will work as expected and the intended outcome will result.

Source: Cooney, S. M., Huser, M., Small, S. A., & O'Connor, C. (2007). Evidence-based programs: An overview. *What Works: Wisconsin Research to Practice Series*, 6. Madison: University of Wisconsin-Extension. Retrieved August 1, 2008, from http://www.uwex.edu/ces/flp/families/whatworks_06.pdf
See also: Lederman, C., Gomez-Kaifer, M., Katz, L., Thomlison, B. and Maze, C. (Fall 2009). An Imperative: Evidence-Based Practice in the Child Welfare System. *Juvenile & Family Justice TODAY*.

Judges should ask caseworkers if the services and interventions in the plan are evidence-based and considered effective with families involved in child welfare proceedings and families from the particular socioeconomic and racial/ethnic background as the family before the court. One of the many advantages of using an evidence-based program is the increased likelihood of participant retention, which is essential with families involved with the child welfare system. Although this concept is new for many child welfare systems and there simply may not be evidence-based programs in a particular community, “evidence-based” should be used as the benchmark for programs and interventions.

⁵¹ Dawson, K. & Berry, M. (2002). Engaging families in child welfare services: An evidence-based approach to best practice. *Child Welfare*, 81, 293-317.

⁵² Dawson & Berry (2002)

⁵³ Cooney, S. M., Huser, M., Small, S. A., & O'Connor, C. (2007). Evidence-based programs: An overview. *What Works: Wisconsin Research to Practice Series*, 6. Madison: University of Wisconsin-Extension. Retrieved August 1, 2008, from http://www.uwex.edu/ces/flp/families/whatworks_06.pdf

Pilot Studies of the Preliminary Protective Hearing Benchcard's Usability & Effectiveness

The Preliminary Protective Hearing (PPH) Benchcard has been piloted in three Model Court sites: Los Angeles, California; Omaha, Nebraska; and Portland, Oregon. This pilot was conducted along with a rigorous research study to test the effects of the PPH Benchcard. The first phase of the study included data collection on approximately 500 children in the three study sites. Data were gathered from case file information (both court and agency files) and from courtroom observation. This longitudinal study was designed to follow these children throughout the course of their involvement in the juvenile dependency system. Researchers collected data at several junctures from placement to establishment of jurisdiction and disposition. They collected information on numerous data points, including demographic details (including race), information about the families involved, hearing participants, dates of case events, details on allegations, services, and placement outcomes.

To explore PPH Benchcard implementation effects, the study was designed to allow for several different comparisons. Data from a baseline sample were collected at each of the three sites, and judicial officers at each site were randomly assigned to either a PPH Benchcard group or a control group. Judicial officers in the PPH Benchcard group were trained on its use, including receipt of a draft of this Technical Assistance Bulletin explaining the development of the PPH Benchcard. They then began implementation of the PPH Benchcard in their preliminary protective hearings. After each judicial officer heard 10 preliminary protective hearings with the PPH Benchcard, all judicial officers in each of the sites (both the PPH Benchcard group and control group) began using the PPH Benchcard in their preliminary protective hearings. The PPH



Benchcard was not shared with stakeholders during the research project in order to isolate the judicial intervention. Had the PPH Benchcard been shared with others, it would have been difficult to measure whether judges or others were raising key issues associated with its use.

This methodology will allow researchers to examine any changes in the status of children and later, the actual effects of using the PPH Benchcard. Future analysis will also assess any potential reductions (or increases) in decision-making disparities, changes in judicial and child welfare practice, and child welfare outcomes like safety and permanency.

Pilot Survey Results

As part of the pilot assessment, judges who had been assigned to the Benchcard implementation group were asked about their opinions on ease of implementation, challenges to implementation, and strategies for more efficient use. Of the judges who were surveyed, 62 percent said that the PPH Benchcard was easy to integrate into the Preliminary Protective Hearing. Most believed that it was easy to integrate because they already had experience using the *RESOURCE GUIDELINES*. Approximately 25 percent of judges surveyed indicated that it was difficult to integrate, and the remaining 13 percent fell somewhere in the middle. Some of the challenges noted were:

- **Flow.** Several judges indicated that the flow of the PPH Benchcard was not in line with their typical hearing process, making it difficult to integrate the PPH Benchcard. Revisions were made to the flow of the PPH Benchcard based on this feedback.
- **Length.** A concern of some was length of the PPH Benchcard since the piloted PPH Benchcard had questions across four pages. The PPH Benchcard was reorganized by topic area for ease of use.
- **Stakeholder Responses.** A final concern that was expressed was that stakeholders, such as agency representatives or attorneys, were not prepared to respond to PPH Benchcard questions. For the study, only judicial officers implemented the PPH Benchcard, but going forward, all stakeholders will be included.

Court Observation Findings

Researchers observed Preliminary Protective Hearings in the three pilot sites to assess the impact of the PPH Benchcard on hearing practice. This observation found that judicial officers who implemented the PPH Benchcard discussed more key topics (based on the CCC initiative and topics outlined in the *RESOURCE GUIDELINES*) during the preliminary protective hearings. PPH Benchcard implementation also corresponded to a greater thoroughness of discussion across topics. PPH Benchcard implementation was also found to be associated with greater direct judicial inquiry and with more engagement of parents.

More discussion of the pilot study in general, as well as these findings in particular, is available in the CCC Benchcard Study Technical Report. This Technical Report will also include preliminary findings and analysis on PPH Benchcard implementation effects on outcomes for families and children.

JUDICIAL FEEDBACK FROM PPH Benchcard PILOT SITES

"...[I]t is the strong feeling in our jurisdiction, among judges, lawyers and child welfare workers alike, that consistent use of the Benchcard is raising the standard of practice for everyone. Everyone is now looking at the Benchcard to see how to develop court practice training for their particular disciplines so that lawyers, child welfare workers, service providers and others, can be prepared to answer the court's questions the moment they walk in for the first appearance, and to know that a second shelter hearing will follow closely if the court needs more. We believe that use of the Benchcard is strongly encouraging serious consideration of all the placement alternatives before the court hears the recommendation."

— JUDGE KATHERINE TENNYSON
MULTNOMAH COUNTY FAMILY COURT
PORTLAND, OREGON

"Since the start of the Benchcard, I have found that considerable discussion is being had at the initial hearing in regards to services that enable the children to return home. It seems that more children are returning home at the first hearing than in the past. In addition, for those children that remain outside of the home, more are definitely being placed with relatives. More relatives are being explored, even when the first relative option turns out not to be viable....Visits when children are remaining outside of the home are less restrictive when they safely can be, and the parties seem to have more discussions in regards to the children going home sooner and/or visits being liberalized sooner. It also appears that these concepts work well for all children in our Child Welfare System, including Caucasian children...As an aside, I actually enjoy following the Benchcard."

— JUDGE WADIE THOMAS, JR.
SEPARATE JUVENILE COURT OF DOUGLAS COUNTY
OMAHA, NEBRASKA

"The CCC Benchcard served as a concrete reminder to consider and verbalize required findings, such as the services available to leave the child in the home without risk, and efforts made to place the child with relatives. It also provided valuable prompts to solicit the input of those family members present in court and to ascertain at the end of the hearing that the parents understood what happened in the hearing. It has the potential to equalize treatment of parties of diverse backgrounds by ensuring that the same considerations are made in every case and by making sure that all participants have an understanding of the court process...."

— JUDGE D. ZEKE ZEIDLER
LOS ANGELES JUVENILE COURT, CALIFORNIA

Implementing the Preliminary Protective Hearing Benchcard Based on Feedback from the Field

The pilot test data were used to inform the final version of the PPH Benchcard, to guide recommendations regarding use and implementation and to inform related training tools. The primary lessons learned indicate that the most effective way to integrate the PPH Benchcard into the preliminary protective hearing is for judges to become very familiar with the questions. This includes understanding the rationale behind the inclusion of each question included in the PPH Benchcard as described in this publication. The pilot test revealed that reading directly from the PPH Benchcard may make the hearing seem awkward and may prohibit the natural interaction between the judge and the parties. Thus, thoroughly learning and integrating the PPH Benchcard questions will help the judge obtain key information linked with improving outcomes while maintaining the flow of the hearing.

IMPLEMENTING THE PRELIMINARY PROTECTIVE HEARING BENCHCARD

Lay the Foundation

- Participate in training that examines foundational issues related to implicit bias, structural and institutional racism.
- Determine availability of data, gather and report on local problem scope.

Build Consensus Through Collaboration

- Hold collaborative meetings to discuss the PPH Benchcard and its potential impact in order to build consensus for its use.

Develop a Strategic Plan

- Discuss the jurisdiction's strengths and opportunities. Discuss strategies and priorities. The PPH Benchcard is just one tool. It is important to consider how it will fit into the jurisdiction's overall strategic plan for reducing disproportionality and disparity.
- Include all members of the collaborative.
- Set attainable goals and specific timelines and activities.

Train all Stakeholders on PPH Benchcard Use

- Train all stakeholders so that everyone is familiar with the questions and can actively participate in discussions during the hearing process.

Participate in Ongoing Dialogue

- Use the PPH Benchcard implementation process, challenges and successes as a means of continuing ongoing dialogue regarding disproportionality and disparities.
- Assess whether disproportionality and disparities have changed as a result of use of the PPH Benchcard. Discuss reasons why it has or has not been as effective a tool.
- Discuss ways to better utilize the PPH Benchcard so that it fits the individual needs of the jurisdiction and all agencies involved.

The second major lesson learned is that training prior to implementing the PPH Benchcard is essential and must include all major stakeholders involved in the court process. To reduce spillover effects and maintain statistical control during the pilot test, only judges were trained on using the PPH Benchcard. However, this method prevented the parties from being fully prepared to address the new issues related to safety, reasonable efforts and race and culture that are raised by the PPH Benchcard. Training all professionals involved with the preliminary protective hearing about the PPH Benchcard, including the underlying reasons for the specific questions, will allow social workers, attorneys and others to gather the necessary information prior to the hearing. Such

training will also foster greater awareness of cultural considerations and implicit bias and the professionals' role in reducing disparities for children and families of color. Ultimately, professionals who are motivated to be responsive to the judge, may start using the PPH Benchcard questions outside of court, potentially improving their practice and reducing the impact of unintended bias in their own decision-making.

PRIMARY LESSONS ABOUT THE PRELIMINARY PROTECTIVE HEARING BENCHCARD

- Become very familiar with each specific question on the PPH Benchcard in order to implement effectively.
- Training should include all stakeholders so there is awareness about the issues that will be addressed by the judge.
- Using the PPH Benchcard increases discussion of major hearing issues.
- Using the PPH Benchcard increases parental engagement in the process.

UNC School of Government
Juvenile Defender Conference
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USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

Erwin Byrd and Jason Langberg¹

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INTRODUCTION

Manny is a sweet, intelligent child who has suffered physical and emotional abuse all his life. Neighbors frequently reported his family to the Division of Social Services (DSS), which waited years before removing Manny from his home and placing him into foster care. In the next five years, Manny lived in thirty-six different placements, including therapeutic foster homes, "regular" foster homes, and distant and unknown relatives' homes. His defiant behavior landed him short stays in psychiatric residential treatment facilities, as well, though he never received the one-on-one counseling and therapy that several psychological evaluations recommended for him. In addition to his diagnoses of Post-Traumatic Stress Disorder (PTSD) and Oppositional Defiant Disorder (ODD), a psycho-educational evaluation conducted by his school revealed that Manny suffers from an auditory processing disorder, which has made it very difficult for him to understand instructions and progress in school, despite his high IQ . His school gave him an Individualized Education Program (IEP), which describes his disability and how it affects his academics and behavior, and details services and methods the school is supposed to use to help him succeed. However, the IEP is rarely followed, and Manny is failing all of his classes and repeatedly gets in trouble without effective interventions from his teachers or administrators. Last week, Manny was completely frustrated trying to complete an English assignment with multiple-step directions that he could not follow, and got very upset, shouting at the teacher when he felt he wasn't being heard. Though his behavioral intervention plan in his IEP requires adults to allow him to visit the school counselor when he finds himself getting frustrated, his teacher did not let him leave the room and called a School Resource Officer (SRO), instead. When the officer arrived, Manny was throwing a chair across the room and accidentally injured another student. The school resource officer got involved, TASERed and handcuffed Manny, and charged him with assault.

It has always been critical for juvenile defenders to have a deep understanding of their clients' backgrounds and needs. Today, that understanding is imperative, as resource starvation in the public education, child welfare, and mental health systems has led the juvenile justice system to become a dumping ground for children and youth who are not getting their educational, medical, mental health, and safety needs met. Children who end up as juvenile defendants are typically followed by a paper trail far longer and sadder than any child should have, but it is a paper trail that juvenile defenders can use to understand and better represent their client. Juvenile delinquency charges are far more likely for children:

- 1) who have been failed by their parents or guardians, and who thus have had extensive involvement with the Division of Social Services (DSS), all of which should be well-documented in agency and court records;²
- 2) who have been failed by their schools, and thus are shadowed by suspensions, expulsions, and bad grades, all of which should be included in the child's education records; and
- 3) who are mentally or physically disabled, conditions that should be reflected in special education files and medical and Medicaid records.³

USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

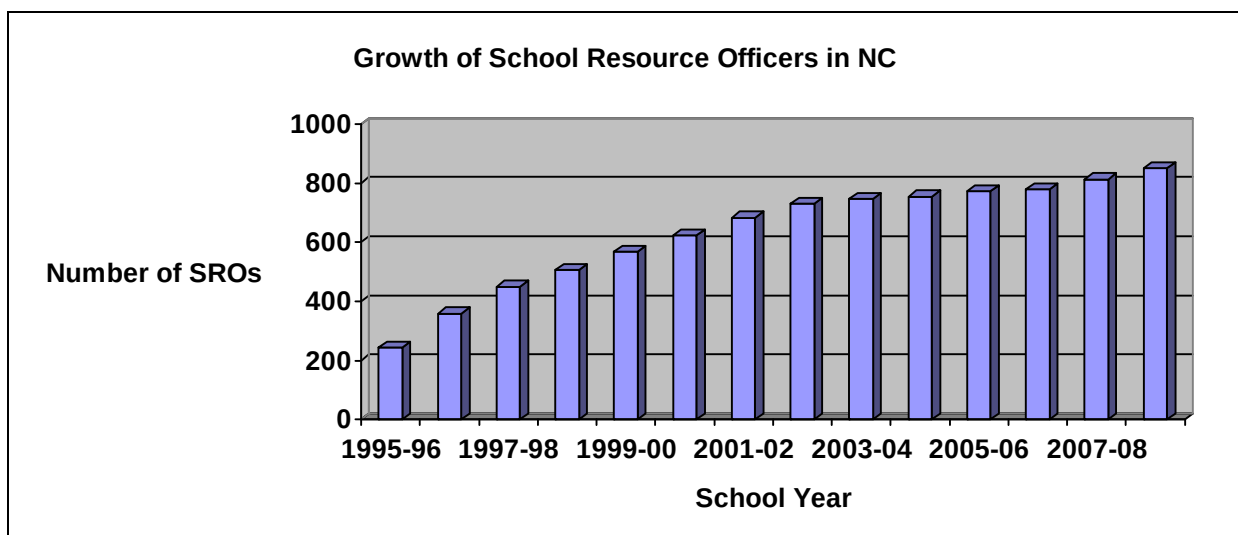
Juvenile defenders will improve the quality of their representation and be more zealous advocates for their clients if they understand how clients have been served (or not served) in these systems, and then use that understanding in delinquency proceedings and to spot issues that require appropriate referrals. Obtaining records helps juvenile defenders win cases, and the records also help those who may represent their clients in the future.

Education

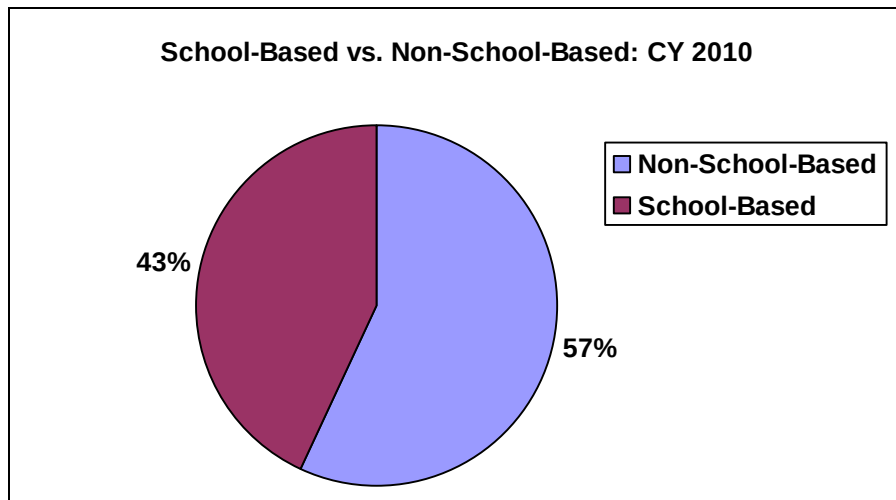
The public education and the juvenile justice systems increasingly overlap as North Carolina's school-to-prison pipeline has become enormous. The school-to-prison pipeline is a system of laws, policies, and practices that pushes students out of public schools and into the juvenile and criminal justice systems.⁴ Academic failure, zero tolerance policies, a lack of high-quality interventions and alternatives, over-policing, and excessive suspensions and school-based court referrals, among other factors, combine to funnel thousands of youth from the public education system into the prison industrial complex every year.

The juvenile justice system is often the next stop for children not receiving adequate educational services.⁵ In North Carolina, juveniles are assessed at intake for their risk of future offending and their individual needs to be addressed. In 2010, 44.6% had serious problems in school (e.g., suspension from school, expulsion, dropping out). Youth committed to youth development centers (YDCs) are also assessed. Last year, 76.8% had serious problems in school.⁶

Additionally, North Carolina public schools are moving ever closer to police states. As of the 2008-09 school year,⁷ there were 849 school resource officers (SROs)—certified law enforcement officers who are permanently assigned to provide coverage to a school or a set of schools—patrolling North Carolina public schools. The 2008-09 SRO total represented a 249% increase from the first recorded baseline of 243 in 1996. One hundred and thirteen of the 115 school districts had at least one identified SRO. Over 96% of SROs carried either pepper spray, a TASER, or both.⁸



Given the over-policing, it is no wonder that thousands of public school students are funneled from the schoolhouse to the jailhouse each year. In 2010, 16,140 students age fifteen and younger were referred to juvenile court for alleged incidents—the vast majority of which were low-level misdemeanors—on school property. Shockingly, 43% of all delinquency complaints were school-based.⁹ Fortunately, delinquency complaints in North Carolina are decreasing; however, non-school-based delinquency complaints decreased twice as fast as school-based delinquency complaints between 2007 and 2010—a 23.3% decrease versus an 11.6% decrease, respectively.¹⁰



Mental Health

The majority of juveniles who end up in the juvenile justice system have mental health disorders.¹¹ Many of these children, who should be receiving mental health treatment, are instead locked up in juvenile detention facilities, awaiting placement in community-based or residential treatment facilities.¹² In North Carolina, where funding was eliminated for all long-term Level III and IV residential treatment,¹³ where community-based mental health services are continuously reduced, and where the Department of Health and Human Services (DHHS) recently announced that probable cuts to mental health services will soon reduce or eliminate mental health treatment for the majority of Medicaid-eligible people who receive those services,¹⁴ youth with mental health needs are especially at risk of being incarcerated instead of treated.

Child Abuse/Neglect/Dependency/Abandonment and Agency Response

Children who are abused and neglected are 58% more likely to be arrested as juveniles than children who are not.¹⁵ Early and effective intervention with abused or neglected children and their families is essential to the prevention of juvenile delinquency, but resource-starved agencies charged with abuse prevention and treatment are not serving the majority of families in need.¹⁶ Even when DSS does intervene, the services are limited and often ineffective. It is well known that children placed in DSS custody frequently languish there for years at a time and are shifted from placement to placement, sometimes multiple times a year. Many of the children who land in delinquency court bear not only the scars of abuse and neglect, but also the trauma of

being removed from their homes and placed in a system of care that does not actually care for them.

Ethical Obligation

The criminalization of the school environment and the severe lack of community-based and residential mental health services for children are just two of many reasons why juvenile defenders must be knowledgeable about students' educational and Medicaid rights (see Appendix A). Gathering and using students' education and medical records will enable a juvenile defender to improve outcomes for her client both in and out of the delinquency courtroom. Not only will such knowledge improve the quality of the representation and outcomes for children, but also it is an ethical obligation and best practice.¹⁷

The North Carolina State Bar Rules of Professional Conduct mandate that a lawyer must be zealous, competent, and diligent.¹⁸ The Rules further obligate attorneys to "pursue a matter on behalf of a client despite...personal inconvenience..., and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."¹⁹ Only by obtaining a clients' education, social service, and medical can a juvenile defense attorney be fully zealous and diligent.

Best Practice

The National Juvenile Defender Center has provided standards for the role of juvenile defense counsel. It asserts that: "Competent juvenile defense counsel has a working knowledge of and maintains contacts with experts in ancillary areas of law that often intersect juvenile delinquency matters, including but not limited to the collateral consequences of adjudication and conviction, expungement, special education, abuse and neglect, mental health, cultural competency, child welfare and entitlements, and immigration." It further recommends that: "Juvenile defense counsel is familiar with special education law and works to ensure that the client is in an appropriate educational setting. Juvenile defense counsel ensures that the client's rights are protected at school discipline or expulsion hearings."²⁰

The focus of this manuscript is providing an introduction to obtaining and using juvenile clients' education, abuse/neglect/dependency, and medical/mental health records. However, it is also important that juvenile defenders do not rely solely on these records; interviews with clients can reveal the clients' perspective about their experiences with these systems, and usually reveal gaps in incomplete agency files, or information that conflicts with the files and should thus be further investigated (see Appendix B for a model client interview form). Furthermore, juvenile defenders should familiarize themselves with the policies and practices of the local agencies that affect their clients' daily lives. Finally, continuing legal education and training is recommended to develop a more comprehensive understanding of the laws and policies governing these systems and advocacy for the children affected by them.

OBTAINING RECORDS

Juvenile defense attorneys should gather their client's records as soon as possible after being retained by a client or appointed to represent a client.²¹ It is essential that juvenile defenders collect all available records from the agencies that serve the juvenile, rather than simply relying on information provided by clients, clients' families, and court counselors.

Requesting Education Records

The Family Educational Rights and Privacy Act (FERPA) is a federal law that gives parents or eligible students²² the right to review the student's education records maintained by the school.²³ FERPA applies to all public schools in North Carolina because it applies to all educational agencies and institutions that receive funding from the U.S. Department of Education.²⁴ A parent is defined as "a legal guardian or other person standing *in loco parentis* (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the welfare of the child)."²⁵

Education records are those records that are: 1) directly related to a student; and 2) maintained by an educational agency or institution or by a party acting for the agency or institution.²⁶ Under North Carolina statute, a student's official record must contain, at a minimum: 1) adequate identification data including date of birth, attendance data, grading and promotion data; and 2) notice of any suspension for a period of more than 10 days or of any expulsion and the conduct for which the student was suspended or expelled. Local boards of education may require schools in their jurisdiction to contain other factual information as may be deemed appropriate.²⁷

Education records do not include records²⁸ of the law enforcement unit²⁹ of an educational agency or institution.³⁰ As such, the law enforcement unit may refuse to provide a parent with an opportunity to review law enforcement unit records, and it may disclose law enforcement unit records to third parties without the parent's prior written consent.³¹ Records of a law enforcement unit do not include: 1) records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or 2) records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.³² In other words, records created by SROs that are maintained by the school should be provided by the school, as should records created by SROs exclusively for purposes of suspension or expulsion. In addition, it might be useful to obtain the Memorandum of Understanding (MOU) that exists between the school system and local law enforcement agencies, as well as any local school district policies that relate to SROs.³³

Juvenile defenders can review a client's education records from the client's school by obtaining written consent from the client's parent or guardian.³⁴ The release must specify the records to be released, the reasons for such release, and to whom the records will be released (see Appendix C for a sample release).³⁵ The release should be sent to the principal of the client's school, along with a letter detailing the specific records being requested (see Appendix D for a

sample letter). It is advisable to send the release and request letter to the juvenile's guidance counselor because he or she is often the person who ultimately fulfill the request.

The school must comply with a request for records within a reasonable period of time, but not more than 45 days after it has received the request.³⁶ However, schools most often fulfill records within two weeks, especially if emails are sent and calls are made to follow up on the request. Additionally, schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records.³⁷ However, schools often provide copies of the records to attorneys who send requests, especially if the records can be scanned and emailed or faxed in order to save copying costs.

Schools sometimes refuse to share records that contain the personally identifiable information of other students. Though it is true that a parent only has the right to view information about his or her student, and not personally identifiable information about any other students contained in the same document,³⁸ schools can, and do, redact any identifying information about other students and release the redacted records.³⁹ Thus, ask for redacted records if the school attempts to block access due to other students' privacy.

If a school refuses to comply with an adequate records request, the remedies are somewhat limited. There is no private right of action to enforce FERPA under a § 1983 action.⁴⁰ Two remedies remain available. First, counsel could file a complaint, on behalf of the client's parent, with the U.S. Department of Education's Family Policy Compliance Office.⁴¹ Second, counsel could file a grievance, on behalf of the client's parent, with the client's current school--the school that received the records request. Each local education agency is required to have a grievance policy.⁴²

The school may charge a fee for a copy of an education record,⁴³ unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records.⁴⁴ Therefore, if the client's family is indigent, the juvenile defender should request a waiver of copying fees, or alternatively, that the records be scanned and emailed or faxed. A school is not required to provide information that is not maintained or to create education records in response to a parent's request.⁴⁵ The school must respond to reasonable requests for explanations and interpretations of the records.⁴⁶ If the records contain information about another student, the attorney may inspect only the specific information about her client.⁴⁷ However, the attorney can request that any identifiable information for other students be redacted.

Parents of students who require services from the school system due to identified disabilities (generally, this will be a child who has an individualized education program, an "IEP") are specifically guaranteed access to their students' educational records under state and federal law.⁴⁸ Though these provisions, and the accompanying enforcement regulations, do not necessarily require more from the school than FERPA already does, pointing out these additional requirements could bolster your request for records.⁴⁹

Requesting Social Services Records Concerning Abuse/Neglect/Dependency/Abandonment

The North Carolina general statutes, the North Carolina Administrative Code, and Division of Social Services (DSS) manuals specify what the DSS record for a juvenile who has been the victim or alleged victim of abuse, neglect, dependency or abandonment (hereinafter "the DSS file" and, more importantly, make it clear that the child is always entitled to review that file.⁵⁰ The following section describes the contents of a typical DSS file, a record well worth requesting for any client, even if she has never been in DSS custody.

Reports and Investigations of Abuse, Neglect, Dependency or Abandonment

As soon as a call is made to DSS child protective services (CPS), reporting suspected child abuse, neglect, dependency, or abandonment, DSS creates a record for the suspected child victim. If the reporter's description of the behavior meets the definition of abuse, neglect, dependency or abandonment, DSS must investigate the child's situation immediately following the report.⁵¹ The juvenile victim of the reported abuse/neglect/dependency/abandonment, and presumably that juvenile's attorney, can access the records of the report and the ensuing DSS investigation on her own -- i.e., without a court order or a release from a parent.⁵² Even if the DSS investigation concluded that the child need not be taken into DSS custody, the family may nevertheless have been involved with DSS through a safety plan monitored by DSS. Thus, even a child who has never been in DSS custody is entitled to examine her own DSS record, which should consist of many documents, including:

- 1) the report of abuse/neglect/dependency itself, though the reporter's name will likely be redacted;
- 2) documentation of whether previous reports of abuse/neglect/dependency concerning the same child victim have been made;
- 3) an intake report form, which should include information about the child's educational, mental health, and medical needs and other needs and supports;
- 4) documentation of visits to the household and interviews with members of the family or others, including safety assessment forms, which contain detailed information about the household, safety issues in the house, and proposed resolutions to any safety issues; and
- 5) documentation of any referrals to the district attorney or law enforcement concerning the abuse, neglect, dependency or abandonment.⁵³

These records, which juvenile defenders will not get unless they request them, give the defense attorney a perspective on the child's home life that could prove invaluable in representing that child. Children may be unlikely to speak about, or even remember, this kind of limited DSS involvement, so it is always worth requesting DSS records for every juvenile client.

Children in Protective DSS Custody

If the investigation following a report of abuse/neglect/dependency/abandonment resulted in the child being taken out of her home, then a much larger file will result, all of which DSS is statutorily required to share with a juvenile and a juvenile's attorney upon request. The DSS director must maintain a separate file for each child in DSS custody or in other court placement

due to abuse or neglect.⁵⁴ These files must contain: "family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; [and] interviews with the juvenile's family[.]"⁵⁵ The administrative code enumerates more specifically the documents, in addition to those listed the section above, that must be in this file, the most relevant of which are: 1) child medical evaluations and child mental health evaluation requests, consents, and reports; and 2) any other medical, psychological, or psychiatric reports.⁵⁶ DSS additionally requires, in its manuals detailing record-keeping protocol for both its child protective services and child placement services divisions, that these files contain a plethora of useful documents, for example:

- 1) the placement history log, which lists all of the child's prior placements, including caregivers' names and addresses, as well as the dates of placement, and specific reasons for the move;
- 2) educational information, including educational reports, records, and IEPs when appropriate;
- 3) court documents; and
- 4) annual photos of the child.⁵⁷

Though juvenile defenders can usually gather a child's medical documents from his or her doctors, and the education files from the school system, the DSS file can be accessed by the defense attorney and the client without a parental release, which is extremely helpful if the parent is not available or cooperative. Many other documents are included in every child's file, and it is helpful to look at the DSS manuals, which list and describe what records DSS is required to maintain for each child.

Be aware that a child who was placed out of her parent's home should have both a CPS (child protective services) file and a file with Child Placement Services. Much of the information in these files will overlap, yet it is still critical to request and receive both the Child Protective and Child Placement files.

Clerk's Court File

If a petition alleging abuse, neglect or dependency was actually filed by DSS against the child's parent or guardian, then the clerk must keep a record of that case, including: "the summons, petition, custody order, court order, written motions, the electronic or mechanical recording of the hearing, and other papers filed in the proceeding."⁵⁸ The juvenile and her attorney are allowed access to that record,⁵⁹ but the clerk will likely redact information about other juveniles from the file, which can be time-consuming and may result in less informative records.

Requesting Health Records

The Health Insurance Portability and Accountability Act (HIPAA) controls the security and privacy of protected health information, or "PHI," defined basically as individually identifiable health information.⁶⁰ With a valid authorization, the individual who is the subject of the PHI can authorize her attorney to access her PHI, which includes any information created by

a health care provider or health plan that: "relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual."⁶¹

Because minors are not typically considered "individuals" according to the federal HIPAA regulations, and thus cannot access their own health information, a "personal representative" acting for the minor (usually the parent) must generally sign any authorization an attorney uses to access his minor client's health information.⁶² Thus, juvenile defense attorneys should, as soon as possible after assuming representation of the client, ask the client's parent, or whomever is authorized to make medical decisions for the client (his DSS social worker, for example), to sign an authorization enabling health care providers and health plans to release the client's health information to the juvenile defense attorney. It is important to get a list from the parent and client of all the child's recent health care providers, including physicians, physician's assistants, nurses, psychologists, psychiatrists, and licensed clinical social workers, among others. If the juvenile is Medicaid-eligible and has a Medicaid case manager, the case manager may have gathered many of the health records already, which the defense attorney can access with valid authorization.

A Minor's Access to Her Own Health Records

A minor can access her own health records, and can presumably authorize her attorney to do the same, under a few important circumstances. If the minor herself had the legal ability to consent to her own medical services, then the records of that medical service can be accessed by the minor, with no need for authorization from the minor's personal representative.⁶³ In North Carolina, the treatments to which a minor can consent without a representative's input are: "medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130A-135 [], (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance."⁶⁴

Even if the minor's personal representative also consented to any of these medical services for the minor, the minor can access the record of those services on her own.⁶⁵ Thus, the minor's attorney can access these particular records with an authorization signed only by the minor; the parent or guardian's signature is not necessary. These include records that may be crucial to a juvenile's defense, including records concerning treatment of emotional disturbance.

Most psychiatric residential facilities in North Carolina publish their own policies concerning access to confidential patient records. Some facilities' policies specifically allow a minor patient to access her own records, without parental consent. Therefore, if the parent or guardian will not sign an authorization, it is worth checking the policies of facilities that have treated a client to see if the records can be accessed with only an authorization from the minor.

USING RECORDS

After obtaining and carefully reviewing a client's records, a juvenile defense attorney should create a plan to use the records during the delinquency proceedings.⁶⁶ (Note that juvenile defenders can also use the records to: 1) better know how to listen and understand clients;⁶⁷ 2) provide more holistic civil legal advocacy to clients (e.g., requesting an evaluation to determine eligibility for special education services, representing a student in a long-term suspension appeal, representing a child in a Medicaid appeal); and 3) making appropriate referrals to legal services agencies (see appendix G). However, such topics are not addressed in detail in this manuscript.)

Capacity to Proceed

A juvenile who lacks the mental capacity to proceed may not be subjected to an adjudicatory or dispositional proceeding in juvenile court.⁶⁸ A juvenile does not have the capacity to proceed when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.⁶⁹ The question of the capacity of the juvenile to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the juvenile's capacity to proceed.⁷⁰ When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed.⁷¹

Counsel has a duty to make a "reasonable investigation" into the juvenile's capacity to proceed to an adjudicatory hearing.⁷² Juvenile defenders, therefore, should use a client's records to inform the decisions about whether to file a motion, and if a motion is filed, to help inform the evaluator.⁷³ It is also a good idea to try to get an independent evaluation.

Custody Hearings

A juvenile may be held in secure custody during three stages of the proceeding: pre-adjudication, post-adjudication/pre-disposition, and post-disposition.⁷⁴ There are three types of custody in juvenile delinquency proceedings.⁷⁵ Temporary custody means taking physical custody of a juvenile until a court order for custody can be obtained, such as where a law enforcement officer arrests a juvenile based on reasonable grounds to believe the juvenile is an absconder (i.e., a juvenile who has unlawfully left a detention center or residential facility) or has committed a crime for which arrest would be lawful, if the juvenile were an adult.⁷⁶ Secure custody is the placement of a juvenile in an approved locked facility after a petition has been filed and pending an adjudicatory or dispositional hearing, or pending placement pursuant to a dispositional order.⁷⁷ Nonsecure custody is the placement of a juvenile without restriction on the juvenile's freedom of movement in the custody of the Division of Social Services (DSS) or a person designated by the court. The juvenile may be placed in nonsecure custody after a petition has been filed and pending an adjudicatory or dispositional hearing, or pending placement pursuant to a dispositional order.⁷⁸ Judges may issue an order for secure or nonsecure custody if the criteria set forth in G.S. 7B-1903 are met.⁷⁹

Counsel must be prepared to argue against all secure and nonsecure custody during all three stages of the proceedings.⁸⁰ A client's records can be used to persuade the judge not to detain a client.⁸¹ For example, counsel could argue against ongoing temporary custody because detention will disrupt special education or mental health services⁸² or that being in the community will facilitate proper evaluations.⁸³ Additionally, the client's records may provide insight into available community-based, less intrusive, more appropriate alternatives that can be offered to the court as providing both protection and supervision for the juvenile and protection of the public.⁸⁴ The records can also be used to argue against specific bases for custody. For example, one basis for custody is "[t]he juvenile has willfully failed to appear on a pending delinquency charge or on charges of violation of probation or post-release supervision[.]"⁸⁵ A juvenile's records can provide counsel with good argument that the failure to appear was not willful.

Suppression

Prior to searching a student, school officials must have reasonable suspicion to believe the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."⁸⁶ North Carolina courts have generally, although not always, considered school resource officers (SROs) to be school officials, and therefore, have applied the same reasonable suspicion standard to searches by SROs on school grounds.⁸⁷ Outside police officers who conduct a school-based searches are generally held to a probable cause standard. Of course, voluntary consent of a student eliminates such requirements. Finally, lockers and computers are generally considered school property and not protected.

A juvenile in custody is entitled to statutory protections that include and go beyond the requirements of *Miranda* warnings.⁸⁸ The right to have a parent, custodian, or guardian present during custodial interrogation applies to all juveniles, including those who are 16 or over and no longer under the jurisdiction of the juvenile court.⁸⁹ A custodial confession or admission of a juvenile who is less than 14 years of age may not be admitted into evidence unless made in the presence of the juvenile's parent, guardian, custodian, or attorney.⁹⁰ Interrogation must cease when the right to remain silent or have a parent, guardian, custodian, or attorney present is invoked.⁹¹ Lastly, waiver by juveniles must be "knowingly, willingly, and understandingly."⁹²

Juvenile defenders handling school-based delinquency cases should review the client's education records to help determine whether the client's Fourth or Fifth Amendment rights were violated, and thus the fruits of an unlawful search or interrogation should be suppressed.⁹³ The records can reveal answers to important questions, such as: who conducted the search or interrogation (e.g., police officer?, school resource officer?, school official?); where did the search or interrogation take place (e.g., expectation of privacy?); why did the search or interrogation take place (e.g., reasonable suspicion?, probable cause?); and how did the search or interrogation take place (e.g., in custody?, parent present?, questioning techniques?).⁹⁴

For any type of delinquency case, school-based or not, records can potentially provide counsel with support for a motion to suppress.⁹⁵ For example, in determining whether a waiver of rights was voluntary, courts must look at the "totality of the circumstances," including custody, mental capacity, physical environment, and manner of interrogation.⁹⁶ The court must consider the specific facts and circumstances of each case, including background, experience,

and conduct of the accused.⁹⁷ If a juvenile has a learning disability or a mental health issue, the *Miranda* waiver may not have been knowing and intelligent.⁹⁸ Further, when arguing that a client's statement to an officer was not voluntary under the Fourteenth Amendment, a defender can submit education and mental health records to a judge to show that a client's mental illness or learning disability rendered her statement involuntary.⁹⁹

Transfer

Jurisdiction over a juvenile may be transferred to superior court if the juvenile was at least 13-years-old at the time of allegedly committing an offense that would be a felony, other than a Class A felony, if committed by an adult.¹⁰⁰ At the transfer hearing, the juvenile may be heard and may offer evidence.¹⁰¹ In the transfer hearing, the court must determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court by considering, among other factors: the maturity of the juvenile; the intellectual functioning of the juvenile; prior attempts to rehabilitate the juvenile; the likelihood that the juvenile would benefit from treatment or rehabilitative efforts; and whether the alleged offense was committed in a willful manner.¹⁰²

A juvenile's records may provide valuable information about:

- Mitigating factors, such as educational history, mental and emotional state, intellectual functioning, developmental issues, family history, and other factors that dispel images such as criminal sophistication;
- Witnesses who can provide helpful insight into the juvenile's character, such as teachers, counselors, psychologists, and other persons with a positive personal or professional opinion of the juvenile, may be called to testify; and
- Whether the juvenile has a disability or mental health condition that can only be addressed through services only available in state's juvenile detention center and youth development centers (YDCs) -- and therefore, are not available if the juvenile is transferred to superior court.¹⁰³

Negotiations¹⁰⁴

A juvenile's records can also be helpful during negotiations with court counselors and district attorneys. For example, a juvenile defense attorney could use the records to argue that:

- school-based special education services could obviate the need for juvenile court proceedings;¹⁰⁵
- disciplinary proceedings at school constitute sufficient punishment; and
- an IEP Team meeting record showed that a school-based incident was a manifestation of the client's disability, and therefore, the charges should be dismissed or reduced because of lack of capacity, culpability, and/or *mens rea*

Adjudicatory Proceedings

The adjudicatory hearing is the hearing before a district court judge to determine whether a juvenile is delinquent. Allegations in the petition must be proved beyond a reasonable doubt by the State. Counsel for the juvenile may cross-examine the State's witnesses and may present testimony and other evidence.¹⁰⁶

The contents of a juvenile's records can be used for a variety of purposes in adjudicatory proceedings. For example:

- the write up in a notice of suspension can support a self-defense theory;
- special education records showing that student's school-based delinquent conduct was a manifestation of her disability could help negate intent;¹⁰⁷
- mental health records could support an insanity defense;¹⁰⁸
- special education records and mental health records can be used to argue that the case should be dismissed in the interest of justice because the disability is so severe that it may be difficult or impossible to comply with court orders;¹⁰⁹ and
- an unclean hands defense may be available if a client's education records show that the school failed to provide the client with necessary services and interventions (e.g., an IEP and a behavior intervention plan), the client's behavior was closely related to the failure, and the school filed a delinquency complaint against the client for the alleged misconduct.¹¹⁰

Even if these defenses are not successful, the presentation to the court of records during the adjudicatory hearing can prime the judge to be more sympathetic toward your client and thus lenient at disposition.

Dispositional Proceedings

Following an adjudication of delinquency the court proceeds to a dispositional hearing.¹¹¹ The purpose of dispositions in juvenile actions is to design an appropriate plan that: 1) meets the needs of the juvenile; and 2) achieves the objectives of the State in exercising jurisdiction, including the protection of the public.¹¹² The court should develop a disposition in each case that, among other things, provides the appropriate treatment and rehabilitation to assist the juvenile toward becoming a non-offending, responsible, and productive member of the community.¹¹³ The court must consider, among other things, the degree of culpability indicated by the circumstances of the particular case; and the rehabilitative and treatment needs of the juvenile. Statutory alternatives range from dismissal of the case to commitment to the Department of Juvenile Justice.¹¹⁴

The juvenile has an opportunity to present evidence and advise the court concerning the disposition they believe to be in the best interests of the juvenile.¹¹⁵ A client's records can help the defense attorney:¹¹⁶

- verify and supplement the contents of a predisposition report;¹¹⁷
- provide a basis for cross-examination of a court counselor during a disposition hearing;

- argue for the dispositional proceedings to be continued for up to six month in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision, through placement in a private or specialized school or agency, or through some other plan approved by the court;¹¹⁸
- determine the need to request an expert evaluation, and inform the evaluator, if the evaluation takes place;¹¹⁹
- argue that rehabilitation and treatment will be better addressed in the community;¹²⁰
- argue that a client should not be placed in a detention facility because it will be a major disruption in her education and/or treatment, or that she will not receive the instruction and services as mandated in her IEP or person centered plan.¹²¹
- argue for diminished culpability;¹²²
- identify appropriate witnesses for the hearing (e.g., teachers, counselors, therapists, psychiatrists);¹²³
- argue against any terms of probation for which compliance will be unduly difficult for the client (e.g., a juvenile may not be able to "remain on good behavior" if she has a severe behavior disorder;¹²⁴ a juvenile cannot "attend school regularly"¹²⁵ if she is suspended; a juvenile may not be able to "maintain passing grades in up to four courses during each grading period"¹²⁶ if she has a severe learning disability and the school has not provided her with an adequate IEP; a juvenile cannot "not associate with specified persons"¹²⁷ if she lives with the person in a group home, foster home, or other child welfare placement)
- Communicate (in writing) the juvenile's educational, medical, mental health, and other needs to the appropriate (e.g., juvenile detention facility, youth development center,).¹²⁸

CONCLUSION

The children who end in delinquency court have stories that need to be heard, read, and re-told in a way that will make a difference in their defense and in their lives. Until juvenile defenders delve into the written documents created by the teachers, guidance counselors, school principals, social workers, DSS investigators, doctors, nurses, and therapists who have encountered their clients through the years, they will not know the whole story and will likely miss something critical to their clients' cases. Hopefully, this manuscript makes it easier for juvenile defense attorneys to do their jobs fully and zealously.

**Appendix A:
Summary of Juveniles' Education Rights**

Students attending North Carolina public schools have the right to:

- The equal opportunity to a sound basic education. At a minimum, students must receive a free education that teaches them to read and write, and to use science, math and technology. Students must know history, civics, geography, and economics well enough to be an informed member of society and participate in the democratic process. Students must be able to successfully go on to college or vocational education after graduation. Students must have learned enough knowledge and skills to compete for further education or a decent job.
- Have their parents inspect and review their complete educational records.
- The creation of a Personal Education Plan for students who are at risk of academic failure or scored a Level I or Level II on their EOGs/EOCs.
- Clear rules and policies defining prohibited behavior and potential consequences (check your local board of education policies or code of conduct).
- Freedom of speech and expression, although it cannot be vulgar, lewd, threatening, or disruptive speech.
- Freedom of religion, both to express religious views and also to be free from the establishment of religion by the school.
- Freedom of assembly. Students have a right to form non-disruptive protests, although the school can restrict the location when on school property.
- Freedom from discrimination based on race, national origin, gender, religion, or sexual orientation.
- Remain silent when questioned by the police.
- Freedom from unreasonable searches and seizures. Student should know that:
 - School officials may search students' lockers any time without any suspicion, notice, or probable cause.
 - School officials only need reasonable suspicion to search students and their belongings.
 - Police need probable cause—and usually a search warrant—to search students and their property.

Students facing short-term suspension (10 days or fewer) have the right to:

- Receive an explanation from the school as to why they are being suspended (what rule they broke and the evidence against them).
- Tell their side of the story.
- Take textbooks home, get homework, and have a chance to make up tests (parents should request this from the school's front office).

Students facing long-term suspension (more than 10 days) or expulsion have the right to:

- Take textbooks home, get homework and have a chance to make up tests during the first ten days of the suspension and during the appeals process.

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- Receive written notice of the charge(s) that must include: a description of the incident; the specific policies or rule from the student code of conduct that the student is charged with violating; the specific process for parents to request a hearing to challenge the suspension or expulsion, including how many days a parent has to request it; and the format for holding a hearing.
- Have an informal hearing before an unbiased decision-maker where students can present evidence in their defense, bring witnesses to testify on their behalf, and question the witnesses, evidence or statements used against them by the school. The student can make a recording of the hearing.
- Bring an attorney to the hearing. In addition to having a parent or attorney speak, some districts also allow students to bring a community advocate to the hearing. Check your local board of education policies on advocates and see below for a listing of free legal resources.
- Appeal to the local board of education.
- Appeal to the local superior court.

Students with a disability have the right to:

- A free, appropriate public education, including special education and related services to meet the students' needs.
- An individualized education program (IEP) designed to meet their unique educational needs.
- Receive their education in the least restrictive environment, with their non-disabled peers as much as possible.
- A free independent educational evaluation if the student's parent disagrees with the evaluation conducted by the school.

Students with disabilities who are suspended for more than ten days (total) in one school year have the right to:

- A special meeting called a manifestation determination review to decide if the alleged misbehavior was: 1) caused by or directly and substantially related to the disability; or 2) a direct result of the school's failure to implement the student's individualized education program (IEP).
- Request a functional behavioral assessment to figure out the causes of the behavior problems and to identify ways to prevent problem behaviors.
- Request a behavior intervention plan to reduce the likelihood of misconduct; identify supports or strategies that will improve behavior; establish steps to be taken when misconduct happens; and identify consequences for misconduct.

**Appendix B:
Summary of Juveniles' Medicaid Rights**

Right to Medically Necessary Services:

The federal law governing Medicaid requires states to provide "early and periodic screening, diagnostic, and treatment," (hereinafter "EPSDT") services to all Medicaid recipients under the age of 21.¹ EPSDT requires states to cover:

*necessary health care, diagnostic services, treatment, and other measures described in [42 U.S.C. § 1396d (a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.*²

In accordance with this broad statutory language, the scope of benefits covered by the EPSDT program is generous, as courts have held over and over again. Any service within the scope of those listed in the federal statute must be covered if it is necessary to "correct or ameliorate"³ a child's condition, regardless of whether that service was chosen by the state for coverage for adults.⁴ Among the services mandated to be covered for children under EPSDT are:

other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services (provided in a facility, a home, or other setting) *recommended by a physician or other licensed practitioner of the healing arts* within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level.⁵

Since the 1989 EPSDT amendments were passed, every court addressing the issue has held that EPSDT truly delivers the promise it embodies: **any service within the scope of the federal Medicaid Act that is medically necessary shall be provided to a child under age 21.**⁶

¹ 42 U.S.C. § 1396d(a)(4)(B).

² 42 U.S.C. § 1396d (r)(5) (emphasis added).

³ The N.C. D.H.H.S. has defined "ameliorate" quite broadly: "'Ameliorate' means to improve or maintain the recipient's health in the best condition possible, compensate for a health problem, prevent it from worsening, or prevent the development of additional health problems. Even if the service will not cure the recipient's condition, it must be covered if the service is medically necessary to improve or maintain the recipient's overall health." *See*, N.C. D.H.H.S. EPSDT Policy Instruction Update, p. 2 (Aug. 28, 2007), available at <http://www.ncdhhs.gov/mhddsas/epsdt/epsdt-policy8-17-07Instructupdate.pdf>.

⁴ *See* 42 U.S.C. § 1396d(r)(5); *Pereira v. Kozlowski*, 996 F.2d 723 (4th Cir. 1993), *Salazar v. D.C.*, 954 F.Supp. 278, 328 (D.D.C. 1996); *Parents League for Effective Autism Servs. v. Jones-Kelley*, 565 F.Supp.2d 905, 911 (S.D. Ohio 2008); *Rosie D. v. Romney*, 410 F.Supp.2d 18, 25 (D. Mass. 2006).

⁵ 42 U.S.C. § 1396d (a)(13) (emphasis added).

⁶ *See, e.g., Pereira*, 996 F.2d at 725-26, *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 293 F.3d 472, 480 (8th Cir. 2002), *Pittman v. Sec'y, Fla. Dep't of Health & Rehab. Servs.*, 998 F.2d 887 (11th Cir. 1993).

Right to Notice of and Fair Hearing Concerning any Reduction or Denial of Medically Necessary Services and Right to Continued Services Pending Appeal

Because Medicaid enrollees have a property interest in their Medicaid benefits, those benefits are protected by the Due Process Clause of the U.S. Constitution.¹ In North Carolina, when a Medicaid recipient receives notice that her benefits are going to be reduced or denied altogether, she has the right to a fair, *de novo* hearing before an impartial Administrative Law Judge at the Office of Administrative Hearings.² The decision of the ALJ can be appealed by either party to the agency itself, the NC Department of Health and Human Service (DHHS).³ **Pending a fair hearing and a final agency decision concerning a reduction or denial of Medicaid benefits that the child is currently receiving, she has the right to continue to receive those benefits.**⁴ If the Medicaid recipient wants to appeal the resulting decision -- the final decision of DHHS -- she can file a petition for judicial review in Superior Court.⁵

Medicaid recipients can also go to federal court to litigate their Medicaid entitlements; the above description is in no way meant to be an exhaustive description of Medicaid rights or procedures. However, it is important to note that the Medicaid hearing process in North Carolina is streamlined, fairly speedy, and can achieve extremely effective results for the children who are routinely denied health benefits to which they are clearly entitled.

The Juvenile Defense Attorney's Role

If a medical professional has recommended that a Medicaid-eligible child receive treatment, including mental health treatment, to correct or ameliorate that child's condition (which means to improve or maintain the child's health in the best condition possible), then the child is entitled to receive what the doctor orders. For example, sometimes it will come up in court that the juvenile is in detention because no bed is available in a psychiatric residential treatment facility. **If a Medicaid-eligible child is not receiving services that a medical professional has recommended for him due to a denial from Medicaid or a lack of available services, an appeal should be filed in the Office of Administrative Hearings.** If a child is being held in custody pending mental health treatment or placement, the defense attorney can continue to schedule secure custody hearings and question those who should be appealing this denial of services -- case managers and social workers, for example -- to alert the judge to the situation and try to force some action on a clearly illegal situation.

¹See U.S. Const., amend. XIV, § 1; *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976); see also Jane Perkins, *Issue Brief: Appeal Rights and Medicaid Benefit Reductions*, National Health Law Program (Dec. 2010). Available at www.healthlaw.org/images/stories/Issue_Brief_Appeal_Rights_and_Medicaid_Benefit_Reductions.pdf.

² N.C. Gen. Stat. § 150B, Article 3; see also S.L. 2009-550/House Bill 274 (the Medicaid hearing portions of which are detailed at <http://www.ncoah.com/hearings/medicaid.html#regulations>), North Carolina Department of Health and Human Services: Medicaid Recipient Due Process Rights and Prior Approval Policies and Procedures, available at <http://www.lssp.org/mccartneysettlement.html> (Exhibit B, *McCartney v. Dempsey* settlement agreement, October 2010).

³ N.C. Gen. Stat. § 150B, Article 3.

⁴ 42 C.F.R. §§ 431.210.431.230.

⁵ N.C. Gen. Stat. § 150B, Article 3.

**Appendix C:
Sample Interview Form**

Current school: _____ **Current grade:** ____

Current classes:

Class	Teacher	Grade

School staff who would be good character witnesses for client?

Unexcused absences during current school year (or previous school year, if summer): ____

Guidance Counselor: _____

Mental health professionals:

	Name	Agency
Therapist		
Psychologist		
Psychiatrist		

Disability/Disabilities? _____

Medications? _____

Individualized Education Program (IEP)? Yes No

If not, ever been evaluated? Yes No

If so, when? _____

Special education classes? Yes No

Behavior Intervention Plan (BIP)? Yes No

Section 504 Plan? Yes No

Personal Education Plan (PEP)? Yes No

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Extra services at school (e.g., tutoring, counseling, special classes)?

Extracurricular activities (e.g., sports, clubs, student government)?

Schools:

Grade	School	Grade	School
1		7	
2		8	
3		9	
4		10	
5		11	
6		12	

Retention(s):

Grade	Reason

What kind of grades does your student usually make?

Circle one: All As As & Bs Bs & Cs Cs & Ds Ds & Fs All Fs

What kind of standardized test scores does your students get?

Circle one: All 4s 4s & 3s 3s & 2s 2s & 1s All 1s

Suspension(s)/Expulsion(s):

Type Short-Term/Long-Term/Expulsion	Reason(s)

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Average absences per school year over last three full school years?

0-10	11-20	21-30	31-40	41-50	51-60	61-70	71-80	81-90	91-100	>100

**Appendix D:
Sample Education Records Release**

Client's/Student's Name: _____

Social Security Number: _____ Date of Birth: _____

I request and authorize _____ and _____
(name of school) (name of school system)

to provide _____ education records to _____
(client's name) (attorney's name)

or his/her staff.

Need for Disclosure: _____

(e.g., investigation, representation)

I understand that:

- This authorization expires in one calendar year;
- This authorization may be revoked at any time, except to the extent that the holder of the information/records has already taken substantial action in reliance on the authorization;
- Any further disclosure may be made only as provided by law;
- A photocopy of this form is as valid as the original;
- The information and records to be released are protected under Federal Educational Rights and Privacy Act (FERPA); and
- My signature below authorizes release of all education records and information.

Printed Name of Client

Signature of Client

Date

Relationship of Representative to Client

Printed Name of Representative

Signature of Client's Representative

Date

**Appendix E:
Sample Education Records Request**

[Date]

Via facsimile ([Fax Number of School]) and email ([Principal's Email Address])

[Name of Principal]

[Name of School]

[Address of School]

[City, State Zip]

Re: [Name of Client]

Dear Principal [Last Name of Principal],

I am an attorney and have been retained by [Name of Client], a [Number] grade student at your school. I would like to review [Name of Client]'s cumulative file. In particular, I would like copies of any of the following that the school or school district has in its possession that relate to [Name of Student]:

- a complete academic transcript;
- level of achievement on all standardized tests, including all end-of-grade and end-of-course exams and State writing assessments, and any nationally-normed test the student has taken;
- attendance data;
- teacher or counselor ratings and observations;
- progress reports;
- records or reports of behavioral incidents, including referral forms, notices of in-school or out-of-school suspensions, or records from disciplinary proceedings;
- results of any benchmark tests the student has taken in current or already completed courses or grade levels;
- the results and raw data from any writing test the student has taken;
- any current or former Personal Education Plan;
- records of the student's involvement in any school-sponsored tutoring, drop-out prevention, or other enrichment program;
- any writing portfolio the student has completed or a teacher has maintained; and
- the coursework, graded assignments, and grade histories for core academic classes (Language and Math for grades 1 through 8, and English I, U.S. History, Algebra I, Civics/Economics, and Biology) the student has taken.

I also would like a copy of [Name of Client]'s confidential psychological file, if one exists, including:

- information regarding any special education services and testing, including any IEPs or student assistance plans, that have been in place for the student;

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- documents pertaining to any home/hospital ("homebound") services that have been provided;
- the results of any testing or evaluations; and
- minutes of IEP meetings.

Finally, I would like a copy of [Name of Client]'s complete discipline records, including any records and documents related to her most recent suspension.

Enclosed is an authorization to release education records, signed by [Client's Name]'s [Mother/Father/Legal Guardian], [Name of Mother/Father/Legal Guardian]. The authorization allows me to inspect and copy [Name of Client]'s records. Feel free to fax the records to my office ([Fax Number]) or email me ([Email Address]) a scanned copy. I am also happy to come to the school to pick up copies of the records. If you have any questions or need additional information, please do not hesitate to call ([Phone Number]) or email me.

Sincerely,

[Your Name], Esq.

**Appendix F:
Sample DSS Records Request**

[Date]

[Name of Recipient]

[Name of County] County Department of Social Services

[Address]

[Address]

Re: [Client's Name] (DOB: [Date of birth])

Dear [Name of Recipient],

I write to request, on [Name of client]'s behalf, any records maintained by the [Name of county] County Department of Social Services (DSS) pertaining to [Client's name].

The North Carolina Administrative Code (NCAC) allows the juvenile named in the case record and that juvenile's attorney to examine and copy the DSS record without a court order. *See* 10A NCAC 70A.0113(a)(2).

Enclosed is an authorization to release confidential information, signed by [Name of client]. I can come to your office to go through the file and copy only what is necessary, or feel free to fax the records to my office ([Fax number]) or email me ([Email address]) a scanned copy. If you have any questions or need additional information, please do not hesitate to contact me at [Your phone number].

Sincerely,

[Your name]

[Name of client]'s Defense Attorney

Appendix G: Advocacy Organizations

Education

Name	Geographic Focus	Contact Information	Website
Advocates for Children's Services	Statewide	919-226-0052 acsinfo@legalaidnc.org	www.legalaidnc.org/acs
Council for Children's Rights	Mecklenburg Co.	704-372-7961 info@cfcrights.org	www.cfcrights.org
Disability Rights NC	Statewide	919-856-2195 info@disabilityrightsnc.org	www.disabilityrightsnc.org
Duke Children's Law Clinic	Triangle	919-613-7169	www.law.duke.edu/childedlaw
Exceptional Children's Assistance Center	Statewide	800-962-6817 ecac@ecacmail.org	www.ecac-parentcenter.org
Legal Aid of NC	Statewide	1-866-219-5262	www.legalaidnc.org
Parents Supporting Parents	Guilford Co.	psp.org@triad.rr.com	www.parents-supporting-parents.org
Pisgah Legal Services	Western NC	828-253-0406 info@pisgahlegal.org	www.pisgahlegal.org
Wake Help Initiative	Wake Co.	919-576-9253 wakehelp@gmail.com	www.wakehelp.org
Autism Society of NC	Statewide	1-800 442-2762	www.autismsociety-nc.org

Mental Health/Medicaid

Name	Geographic Focus	Contact Information	Website
Disability Rights NC	Statewide	919-856-2195 info@disabilityrightsnc.org	www.disabilityrightsnc.org
Legal Services of the Southern Piedmont	Charlotte area & west-central NC	704-376-1600 info@lssp.org	www.lssp.org
National Health Law Program	Nationwide	919-968-6308 nhelpnc@healthlaw.org	www.healthlaw.org
Duke Children's Law Clinic	Triangle	919-613-7169	www.law.duke.edu/childedlaw
National Alliance on Mental Illness - NC (NAMI)	Statewide	800-451-9682 (NC only) mail@naminc.org	www.naminc.org
Autism Society of NC	Statewide	1-800-442-2762	www.autismsociety-nc.org
TEACCH (autism spectrum)	Statewide	TEACCH@unc.edu	www.teacch.com

Foster Children

Name	Geographic Focus	Contact Information	Website
Strong Able Youth Speaking Out (SAYSO)	Statewide	919-384-1457	www.saysoinc.org

Endnotes

Note: Short cites were not used in order to make the citations more user-friendly.

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² See English, D., Widom, C., & Brandford, C. (2004). Another look at the effects of child abuse. *National Institute of Justice Journal*, 251, 23-24.

³ See Kathleen Skowrya and Joseph J. Coccozza, *A Blueprint for Change: Improving the System Response to Youth with Mental Health Needs Involved in the Juvenile Justice System*, National Center for Mental health and Juvenile Justice (June 2006), at www.ncmhjj.com/Blueprint/pdfs/ProgramBrief_06_06pdf.

⁴ What is the School-to-Prison Pipeline?, American Civil Liberties Union, www.aclu.org/racial-justice/what-school-prison-pipeline.

⁵ See *Juvenile Defender Delinquency Notebook*, National Juvenile Defender Center, Spring 2006, p. 8 (citation omitted). Available at www.njdc.info/2006resourceguide/start.swf; Joseph Tulman and Douglas Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. Sch. L. Rev. 875, 876-77 (2009/2010); Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 28-29 (2003); Joseph Tulman, *The Best Defense is a Good Offense: Incorporating Special Education Law Into Delinquency Representation in the Juvenile Law Clinic*, 42 Wash. U. J. Urb. & Contemp. L. 223 (1992).

⁶ *2010 Annual Report*, North Carolina Department of Juvenile Justice and Delinquency Prevention, p. 26, Available at www.juvjus.state.nc.us/resources/pdf_documents/annual_report_2010.pdf.

⁷ The data was tracked by the Center for the Prevention of School Violence. However, more recent data does not exist because the Center was defunded by the General Assembly.

⁸ *Annual School Resource Officer Census 2008-2009*, North Carolina Department of Juvenile Justice and Delinquency Prevention, Center for the Prevention of School Violence, p. 1. Available at www.juvjus.state.nc.us/cpsv/pdf_files/SRO_Census_08_09.pdf.

⁹ *2010 Annual Report*, North Carolina Department of Juvenile Justice and Delinquency Prevention, p. 21, Available at www.juvjus.state.nc.us/resources/pdf_documents/annual_report_2010.pdf.

¹⁰ *2010 Annual Report*, North Carolina Department of Juvenile Justice and Delinquency Prevention, p. 21, Available at www.juvjus.state.nc.us/resources/pdf_documents/annual_report_2010.pdf.

¹¹ See Kathleen Skowrya and Joseph J. Coccozza, *A Blueprint for Change: Improving the System Response to Youth with Mental Health Needs Involved in the Juvenile Justice System*, National Center for Mental health and Juvenile Justice (June 2006), at www.ncmhjj.com/Blueprint/pdfs/ProgramBrief_06_06pdf.

¹² See U.S. House of Representatives Committee on Government Reform—Minority Staff Special Investigation Division, *Incarceration of Youth Who Are Waiting for Community Mental Health Services in the United States*, July 2004.

¹³ N.C. Sess. Law 2009-451, at p. 112 (reducing stays at Level III and IV residential facilities to a maximum of 120 days) and p. 113 (requiring DHHS to report on "its plan for transitioning children out of Level III and Level IV group homes"). LINK?

¹⁴ NC Dept. of Health and Human Services, Division of Medical Assistance, Medicaid 2012: Report on Financial Reality & Expectations, slides 37-39. Available at: www.ncdhhs.gov/dma/mcac/MCACBudgetPresentation082011.pdf.

¹⁵ North Carolina Child Advocacy Institute, *Childhood Abuse and Neglect: The Link to Delinquency and Criminal Behavior* (Nov. 2005). Available at http://www.ncchild.org/sites/default/files/For_Web--Child_Abuse__Crime_Factsheet,_bnb,_12-1-05.pdf

¹⁶ See U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice Bulletin, Improving Delinquency Through Improved Child Protection Services* (July 2001); North Carolina Child Advocacy Institute, *Childhood Abuse and Neglect: The Link to Delinquency and Criminal Behavior* (Nov. 2005). Available at http://www.ncchild.org/sites/default/files/For_Web--Child_Abuse__Crime_Factsheet,_bnb,_12-1-05.pdf (reporting that, in 2004, only 30,000 of the 130,000 reports of abuse and neglect in North Carolina received intervention from DSS Child Protective Services).

¹⁷ See Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 51 (2003) (arguing that if public defenders do not know about and raise issues related to clients' disabilities, it could be considered incompetent and discriminatory representation, and the courts might be liable under Americans with Disabilities Act for not screening attorneys appropriately for such knowledge and practice).

¹⁸ North Carolina State Bar, Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, 0.1(2), 0.1(4). Available at www.ncbar.gov/rules/rules.asp.

¹⁹ North Carolina State Bar, Rules of Professional Conduct, Rule 1.3(1). Available at www.ncbar.gov/rules/rules.asp.

²⁰ *Role of Juvenile Defense Counsel in Delinquency Court*, National Juvenile Defender Center, Spring 2009, p. 21. Available at http://www.njdc.info/pdf/njdc_role_of_counsel_book.pdf; see also *Ten Core Principles For Providing Quality Delinquency Representation Through Public Defense Delivery Systems*, National Juvenile Defender Center and National Legal Aid & Defender Association, July 2008, 2nd Edition, p. 3. Available at www.njdc.info/pdf/10_Core_Principles_2008.pdf.

²¹ See Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice Bulletin*, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; Joseph Tulman and Joyce McGree, *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System*, 1998, pp. 4-2, 11-3. Available at www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

²² "Eligible students" are students age eighteen and older or emancipated students. See 20 U.S.C.A. 1232h(c)(5)(B). This manuscript does not address "eligible students" because it is created for juvenile defenders and juvenile court jurisdiction in North ends at age sixteen. See N.C.G.S.A. § 7B-1501(7).

²³ 34 C.F.R. 99.10(a).

²⁴ See 20 U.S.C.A. 1232g(a)(B); 34 C.F.R. 99.1; Family Educational Rights and Privacy Act (FERPA), U.S. Department of Education, www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html; The Family Educational Rights and Privacy Act, Guidance for Parents, U.S. Department of Education, February 2011, p. 1. Available at www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html.

²⁵ 20 U.S.C.A. § 1232h(c)(6)(D).

²⁶ 34 C.F.R. 99.3.

²⁷ See 20 U.S.C.A. 1232h(c)(1)(A); N.C. Gen. Stat. § 115C-402(b); *see e.g.*, Wake County Public School System, Board Policy 6300(B). Available at www.wcpss.net/policy-files/series/policies/6300-bp.html.

²⁸ Records of a law enforcement unit means those records, files, documents, and other materials that are: 1) created by a law enforcement unit; 2) created for a law enforcement purpose; and 3) maintained by the law enforcement unit. 34 C.F.R. 99.8(b)(1).

²⁹ A “law enforcement unit” means any individual, office, department, division, or other component of a school, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by the school to: enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any law against any individual or organization; or to maintain the physical security and safety of the school. The law enforcement unit does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the school, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceeding against a student. 34 C.F.R. 99.8(a)(1).

³⁰ 34 C.F.R. 99.3.

³¹ The Family Educational Rights and Privacy Act, Guidance for Parents, U.S. Department of Education, February 2011, p. 5. Available at www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html.

³² 34 C.F.R. 99.8(b)(2).

³³ *See* Defending Clients Who Have Been Searched and Interrogated at School, National Juvenile Defender Center, p. 14. Available at www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf.

³⁴ See 20 U.S.C.A. 1232g(b)(2)(A).

³⁵ See 20 U.S.C.A. 1232g(b)(2)(A); Family Educational Rights and Privacy Act (FERPA), U.S. Department of Education, <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>; *The Family Educational Rights and Privacy Act, Guidance for Parents*, U.S. Department of Education, February 2011, p. 2. Available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html>.

³⁶ 34 C.F.R. 99.10(b).

³⁷ See 34 C.F.R. 99.10(d); Family Educational Rights and Privacy Act (FERPA), U.S. Department of Education, www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html.

³⁸ See 34 C.F.R. s. 99.12(a).

³⁹ See U.S. Dept. of Educ. Family Policy Compliance Office, Letter of Technical Assistance to School District re: Disclosure of education records containing information on multiple students (10/31/03).

⁴⁰ See *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

⁴¹ See Family Policy Compliance Office, U.S. Department of Education, www2.ed.gov/policy/gen/guid/fpco/index.html.

⁴² See *e.g.*, Wake County Public School System, Board Policy 6520, www.wcpss.net/policy-files/series/policies/6520-bp.html.

⁴³ However, “[a]n educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.” 34 C.F.R. 99.11(b).

⁴⁴ 34 C.F.R. 99.11(a).

⁴⁵ See Family Educational Rights and Privacy Act (FERPA), U.S. Department of Education, www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html; *The Family Educational Rights and Privacy Act, Guidance for Parents*, U.S. Department of Education, February 2011, p. 2. Available at www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html.

⁴⁶ See 34 C.F.R. 99.10(c).

⁴⁷ See 34 C.F.R. 99.12(a).

⁴⁸ See N.C. Gen. Stat. § 115C-109.3; 34 C.F.R. 300.613.

⁴⁹ 34 CFR 300.626; NC 1505-2.17 (located in the North Carolina Department of Public Instruction, Exceptional Children Division, Policies Governing Services for Children with Disabilities (amended June 2010), available at www.dpi.state.nc.us/ec/policy/resources/).

⁵⁰ N.C. Gen. Stat. § 7B-302(a1)(2), § 7B-2901(a)(1), 7B-2901(b)(1),

⁵¹ N.C. Gen. Stat. § 7B-302(a).

⁵² N.C. Gen. Stat. § 7B-302(a1).

⁵³ See N.C. DHHS online manuals, Division of Social Services, Family Support and Child Welfare, Chapter VIII: Protective Services, Section 1424. Available at <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/>.

⁵⁴ N.C. Gen. Stat. § 7B-2901

⁵⁵ N.C. Gen. Stat. § 7B-2901.

⁵⁶ 10A NCAC 70A .0112.

⁵⁷ See N.C. DHHS online manuals, Division of Social Services, Family Support and Child Welfare, Chapter VIII: Protective Services, Section 1424. Available at <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/>.

⁵⁸ N.C. Gen. Stat. § 7B-2901.

⁵⁹ N.C. Gen. Stat. § 7B-2901.

⁶⁰ 45 C.F.R. 160.103 (HIPAA Definitions), which, incidentally, specifically exclude from the definition of protected health information any education records that are covered by FERPA.

⁶¹ 45 C.F.R. 160.103

⁶² 45 C.F.R. 164.502(g).

⁶³ 45 C.F.R. 164.502(g).

⁶⁴ N.C. Gen. Stat. § 90-21.5.

⁶⁵ 45 CFR 164.502 (g).

⁶⁶ See Thomas Mayes and Perry Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U.C. Davis J. Juv. L. & Pol'y 125, 133-34 (2000); Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; Eric Zogry, Special Education Information Checklist, North Carolina Juvenile Defender, Annual Juvenile Defender Conference, August 2006. Available at www.ncids.org/Juvenile%20Defender/Training%20Seminars/2006%20Juvenile%20Defender%20Conference/12%20Zogry%2004%20-%20special%20ed%20checklist.pdf.

⁶⁷ See Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 42-44 (2003).

⁶⁸ N.C. Gen. Stat. § 7B-2401; North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 92. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf.

⁶⁹ N.C. Gen. Stat. §§ 7B-2401; 15A-1001(a).

⁷⁰ N.C. Gen. Stat. §§ 7B-2401; 15A-1002(a).

⁷¹ N.C. Gen. Stat. §§ 7B-2401; 15A-1002.

⁷² See *Becton v. Barnett*, 920 F.2d 1190, 1192-93 (4th Cir. 1990) (counsel must make reasonable investigation into defendant's capacity to proceed and must use reasonable diligence in investigating capacity; counsel may not rely on own belief that defendant was incapable of proceeding).

⁷³ See Juvenile Defender Delinquency Notebook, National Juvenile Defender Center, Spring 2006, p. 54. Available at www.njdc.info/2006resourceguide/start.swf; North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, pp. 97-98, 109. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf; Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 46-47 (2003).

⁷⁴ N.C. Gen. Stat. § 7B-1903(b)-(c).

⁷⁵ See North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, pp. 125-26. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf.

⁷⁶ N.C. Gen. Stat. § 7B-1900(1).

⁷⁷ See North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 125. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf.

⁷⁸ See North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 126. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf.

⁷⁹ N.C. Gen. Stat. § 7B-1902.

⁸⁰ See North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 125. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf; *Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level*, North Carolina Commission on Indigent Defense Services, Adopted December 14, 2007, p. 6. Available at www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm.

⁸¹ See Joseph Tulman and Joyce McGree, *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System*, 1998, p. 1-5. Available at www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

⁸² Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html.

⁸³ Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at https://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; Joseph Tulman and Joyce McGree, *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System*, 1998, p. 2-12. Available at www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

⁸⁴ See N.C. Gen. Stat. § 7B-1906(d); North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, pp. 128, 134. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf.

⁸⁵ See N.C. Gen. Stat. § 7B-1903(b)(3).

⁸⁶ See *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42; *In re Murray*, 136 N.C. App. 648 (2000); *In re P.J.M.*, 136 N.C. App. 648 (2000).

⁸⁷ See *In re S.W.*, 171 N.C. App. 335 (2005); *In re J.M.F. & T.J.B.*, 168 N.C. App. 143 (2005); *In re D.D.*, 146 N.C. App. 309 (2001); *In re D.L.D.*, 2010 N.C. App. LEXIS 683; contrast *In re KDL*, 706 S.E.2d 478 (2011).

⁸⁸ N.C. Gen. Stat. § 7B-2101.

⁸⁹ N.C. Gen. Stat. § 7B-2101(a)(3).

⁹⁰ N.C. Gen. Stat. § 7B-2101(b).

⁹¹ See *State v. Branham*, 153 N.C. App. 91 (2002).

⁹² N.C. Gen. Stat. § G.S. 7B-2101(d).

⁹³ See *Defending Clients Who Have Been Searched and Interrogated at School*, A Guide for Juvenile Defenders, National Juvenile Defender Center, Fall 2009. Available at www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf.

⁹⁴ See *Defending Clients Who Have Been Searched and Interrogated at School*, A Guide for Juvenile Defenders, National Juvenile Defender Center, Fall 2009. Available at www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf.

⁹⁵ See *In re W.R.*, 179 N.C. App. 642 (2006).

⁹⁶ See *State v. Bunnell*, 340 N.C. 74, 80 (1995).

⁹⁷ See *State v. Johnson*, 136 N.C. App. 683, 693 (2000).

⁹⁸ See *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 46-47 (2003); Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency

Prevention, *Juvenile Justice Bulletin*, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; *Juvenile Defender Delinquency Notebook*, National Juvenile Defender Center, Spring 2006, p. 272; See Joseph Tulman and Joyce McGree, *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System*, 1998, pp. 2-2, 2-14. Available at www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

⁹⁹ See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

¹⁰⁰ N.C. Gen. Stat. § 7B-2200.

¹⁰¹ N.C. Gen. Stat. § 7B-2203(a).

¹⁰² N.C. Gen. Stat. § 7B-2203(b).

¹⁰³ See Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 *Whittier J. Child & Fam. Advoc.* 3, 46-47 (2003); *Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level*, North Carolina Commission on Indigent Defense Services, Adopted December 14, 2007, p. 7. Available at www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm; Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice Bulletin*, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 145. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_09.pdf.

¹⁰⁴ *Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level*, North Carolina Commission on Indigent Defense Services, Adopted December 14, 2007, p. 6. Available at www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm.

¹⁰⁵ Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice Bulletin*, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; Joseph Tulman and Joyce McGree, *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System*, 1998, p. 2-9. Available at www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

¹⁰⁶ N.C. Gen. Stat. § 7B-2400 et. seq.; North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 185. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_09.pdf.

¹⁰⁷ If a student with an individualized education program (IEP) is suspended for more than ten consecutive school days or a pattern of suspension accumulates to more than ten school days in a school year, the school must conduct a manifestation determination review (MDR). See 34 C.F.R. § 300.519. At the MDR, the IEP Team decides if the conduct in question was: 1) caused by, or had a direct and substantial relationship to, the child's disability; or 2) the direct result of the local educational agency's failure to implement the IEP. See Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice Bulletin*, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; *Juvenile Defender Delinquency Notebook*, National Juvenile Defender Center, Spring 2006, p. 272; See Joseph Tulman and Joyce McGree, *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System*, 1998, p. 2-2. Available at www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

¹⁰⁸ Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice Bulletin*, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html.

¹⁰⁹ Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html.

¹¹⁰ "a court will not redress a wrong when he who invokes its aid has unclean hands"¹¹⁰ *Olmstead v. United States*, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting).

¹¹¹ North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 198. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_09.pdf.

¹¹² N.C. Gen. Stat. § 7B-2500.

¹¹³ N.C. Gen. Stat. § 7B-2500.

¹¹⁴ N.C. Gen. Stat. § 7B-2501(d).

¹¹⁵ N.C. Gen. Stat. § 7B-2501(b).

¹¹⁶ See Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771, 796 (2010); *Juvenile Defender Delinquency Notebook*, National Juvenile Defender Center, Spring 2006, p. 226. Available at www.njdc.info/2006resourceguide/start.swf; *Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level*, North Carolina Commission on Indigent Defense Services, Adopted December 14, 2007, pp. 24-25. Available at www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm; North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 203. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_13.pdf.

¹¹⁷ N.C. Gen. Stat. § 7B-2413.

¹¹⁸ N.C. Gen. Stat. § 7B-2501(d).

¹¹⁹ N.C. Gen. Stat. § 7B-2502.

¹²⁰ N.C. Gen. Stat. §§ 7B-2501(c)(5); 7B-2506.

¹²¹ See *Juvenile Defender Delinquency Notebook*, National Juvenile Defender Center, Spring 2006, p. 272.

¹²² See NCGSA 7B-2501(c)(4); Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at https://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html.

¹²³ See N.C. Gen. Stat. § 7B-2501(b).

¹²⁴ See N.C. Gen. Stat. § 7B-2510(a)(1).

¹²⁵ See N.C. Gen. Stat. § 7B-2510(a)(4).

¹²⁶ See N.C. Gen. Stat. § 7B-2510(a)(5).

¹²⁷ See N.C. Gen. Stat. § 7B-2510(a)(6).

¹²⁸ See Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html.

Cruel and Unusual Punishment: The Juvenile Death Penalty

Adolescence, Brain Development and Legal Culpability

"[They] frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.... Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."

Atkins v. Virginia, 536 U.S. 304, 318, 122 S.Ct. 2242, 2250 (2002)

In 2002, the U.S. Supreme Court banned the execution of mentally retarded persons. This decision, *Atkins v. Virginia*, cited the underdeveloped mental capacities of those with mental retardation as a major factor behind the Justices' decision.

Adolescence is a transitional period during which a child is becoming, but is not yet, an adult. An adolescent is at a crossroads of changes where emotions, hormones, judgment, identity and the physical body are so in flux that parents and even experts struggle to fully understand.

As a society, we recognize the limitations of adolescents and, therefore, restrict their privileges to vote, serve on a jury, consume alcohol, marry, enter into contracts, and even watch movies with mature content. Each year, the United States spends billions of dollars to promote drug use prevention and sex education to protect youth at this vulnerable stage of life. When it comes to the death penalty, however, we treat them as fully functioning adults.

The Basics of the Human Brain

The human brain has been called the most complex three-pound mass in the known universe. This is a well deserved reputation, for this organ contains billions of connections among its parts and governs countless actions, involuntary and voluntary, physical, mental and emotional.

The largest part of the brain is the *frontal lobe*. A small area of the frontal lobe located behind the forehead, called the *prefrontal cortex*, controls the brain's most advanced functions. This

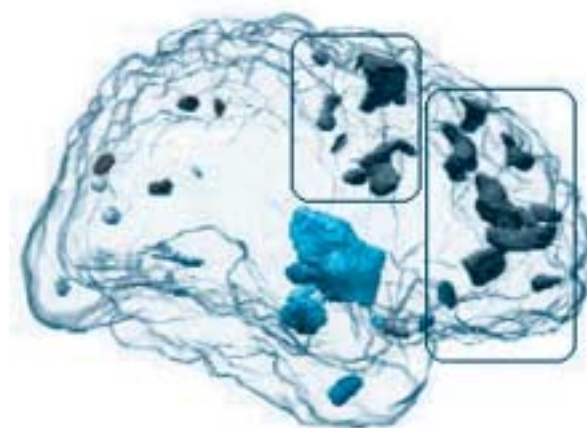
part, often referred to as the "CEO" of the body, provides humans with advanced cognition. It allows us to prioritize thoughts, imagine, think in the abstract, anticipate consequences, plan, and control impulses.

Along with everything else in the body, the brain changes significantly during adolescence. In the last five years, scientists, using new technologies, have discovered that adolescent brains are far less developed than previously believed.

New Technology, New Discoveries

Scientists are now utilizing advances in magnetic resonance imaging (MRI) to create and study three-dimensional images of the brain without the use of radiation (as in an x-ray). This breakthrough allows scientists to safely scan children over many years, tracking the development of their brains.¹

Researchers at Harvard Medical School, the National Institute of Mental Health, UCLA, and others, are collaborating to "map" the development of the brain from childhood to adulthood and examine its implications.



A three dimensional "map" showing portions of gray matter "pruned" from the brain between adolescence and adulthood. The dark portions in the two boxes indicate sections that will be discarded from the **frontal lobe**. The box on the far right indicates the **prefrontal cortex**, a subsection of the frontal lobe that controls judgment.

Image adapted from *Nature Neuroscience*.

Lobes of the Brain:



©2002 Hybrid Medical Animation

The scientists, to their surprise, discovered that the teenage brain undergoes an intense overproduction of *gray matter* (the brain tissue that does the “thinking”). Then a period of “pruning” takes over, during which the brain discards gray matter at a rapid rate.² This process is similar to pruning a tree: cutting back branches stimulates health and growth.

In the brain, pruning is accompanied by *myelination*, a process in which *white matter* develops. White matter is fatty tissue that serves as insulation for the brain’s circuitry, making the brain’s operation more precise and efficient.³

Researchers have carefully scrutinized the pace and severity of these changes and have learned that they continue into a person’s early 20s. Dr. Elizabeth Sowell, a member of the UCLA brain research team, has led studies of brain development from adolescence to adulthood. She and her colleagues found that the frontal lobe undergoes far more change during adolescence than at any other stage of life.⁴ It is also the last part of the brain to develop, which means that even as they become fully capable in other areas, adolescents cannot reason as well as adults: “[m]aturation, particularly in the frontal lobes, has been shown to correlate with measures of cognitive functioning.”⁵

Biology and Behavior

Jay Giedd, a researcher at the National Institute of Mental Health, explains that during adolescence the “part of the brain that is helping organization, planning and strategizing is not done being built yet.... It’s sort of unfair to expect [adolescents] to have adult levels of organizational skills or decision making before their brain is finished being built.”⁶

Dr. Deborah Yurgelun-Todd of Harvard Medical School has studied the relation between these new findings and teen behavior and concluded that adolescents often rely on emotional parts

of the brain, rather than the frontal lobe. She explains, “one of the things that teenagers seem to do is to respond more strongly with gut response than they do with evaluating the consequences of what they’re doing.”⁷

Also, appearances may be deceiving: “Just because they’re physically mature, they may not appreciate the consequences or weigh information the same way as adults do. So we may be mistaken if we think that [although] somebody looks physically mature, their brain may in fact not be mature.”⁸

This discovery gives us a new understanding into juvenile delinquency. The frontal lobe is “involved in behavioral facets germane to many aspects of criminal culpability,”⁹ explains Dr. Ruben C. Gur, neuropsychologist and Director of the Brain Behavior Laboratory at the University of Pennsylvania. “Perhaps most relevant is the involvement of these brain regions in the control of aggression and other impulses.... If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes.

“The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.... Indeed, age 21 or 22 would be closer to the ‘biological’ age of maturity.”¹⁰

Other Changes in the Body

In addition to the profound physical changes of the brain, adolescents also undergo dramatic hormonal and emotional changes. One of the hormones which has the most dramatic effect on the body is testosterone. Testosterone, which is closely associated with aggression, increases tenfold in adolescent boys.¹¹

“Just because they’re physically mature, they may not appreciate the consequences or weigh information the same way as adults do. So, [although] somebody looks physically mature, their brain may in fact not be mature.”

Deborah Yurgelun-Todd, PhD
Brain Imaging Laboratory,
McClean Hospital
Harvard University Medical School

Emotionally, an adolescent “is really both part child and part adult,”¹² explains Melvin Lewis, an expert in child psychiatry and pediatrics at Yale University School of Medicine. Normal development at this time includes self-searching, during which the adolescent tries to grow out of his or her childlike self. This change is complicated by the conflict between an adolescent’s new sense of adult identity and remaining juvenile insecurities.

The behaviors associated with this process include self-absorption, a need for privacy, mood swings, unique dress, and escapism, such as video games, music, and talking on the phone, as well as riskier behaviors, such as drug use or sexual activity.¹³

Childhood Abuse and Violence

In addition to this context of change and volatility, research shows that abusive childhood experiences can trigger violent behavior. The American Academy of Pediatrics has identified several risk factors that can spark violence in adolescents, including being witness to domestic violence or substance abuse within the family, being poorly or inappropriately supervised, and being the victim of physical or sexual assault.¹⁴

Researcher Phyllis L. Crocker of Cleveland-Marshall College of Law has written that “the nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse and crime is so tight in the lives of many capital defendants as to form a kind of social historical profile.”¹⁵

“The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable....”

Ruben Gur, MD, PhD
Director, University of
Pennsylvania Medical Center

Dr. Chris Mallett, Public Policy Director at Bellefaire Jewish Children’s Bureau in Ohio, recently completed the most comprehensive study of traumatic experiences in the lives of death row juvenile offenders to date.¹⁶ He found that:

- 74% experienced family dysfunction¹⁷
- 60% were victims of abuse and/or neglect¹⁸
- 43% had a diagnosed psychiatric disorder¹⁹
- 38% suffered from substance addictions²⁰
- 38% lived in poverty²¹

More than 30% of death row juvenile offenders had experienced six or more distinct areas of childhood trauma with an overall average of four such experiences per offender. Most children and adolescents do not face even one of these defined areas of difficulty.²² Mallett also found that such mitigating evidence was presented to juries in fewer than half of the offenders’ trials.²³

Mallett’s research confirmed findings in previous studies. In 1992, researchers found that two-thirds of all juveniles sentenced to death had backgrounds of abuse, psychological disorders, low IQ, indigence, and/or substance abuse.²⁴



Dr. Jay Giedd of the National Institute of Mental Health. Image courtesy of PBS Frontline report *Inside the Teenage Brain*.

In 1987, an investigation into 14 juveniles on death row²⁵ (40% of the total at the time) revealed that nine had major neuropsychological disorders²⁶ and seven had psychotic disorders since early childhood.²⁷ All but two had IQ scores under 90.²⁸ Only three had average reading abilities, and another three had learned to read only after arriving on death row.²⁹ Twelve reported having been physically or sexually abused, including five who were sodomized by relatives.³⁰

Delinquency Link

The turmoil often associated with adolescence can result in poor decisions and desperate behaviors. For example, studies have found that 20 to 30% of high school students consider suicide. Suicide is the third-leading cause of death among teenagers, occurring once every two hours, or over 4,000 times a year, according to the U.S. Surgeon General.³¹ Approximately 30% of youths reported using an illicit drug at least once during their lifetime, and 22.2% reported using an illicit drug within the past year.³²

Conclusion

New discoveries provide scientific confirmation that the teen years are a time of significant transition. They shed light on the mysteries of adolescence and demonstrate that adolescents have significant neurological deficiencies that result in stark limitations of judgment. Research suggests that when compounded with risk factors (neglect, abuse, poverty, etc.), these limitations can set the psychological stage for violence.

These discoveries support the assertion that adolescents are less morally culpable for their actions than competent adults and are more capable of change and rehabilitation. The ultimate punishment for minors is contrary to the idea of fairness in our justice system, which accords the greatest punishments to the most blameworthy.

This fresh understanding of adolescence does not excuse juvenile offenders from punishment for violent crime, but it clearly lessens their culpability. This concept is not new; it is why we refer to those under 18 as “minors” and “juveniles”—because, in so many respects, they are *less than adult*.

American Bar Association Juvenile Justice Center

Notes

¹ For an excellent overview, see Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind*, Oxford University Press (2001).

² Sowell, Elizabeth R, Paul M. Thompson, Colin J. Holems, Terry L. Jernigan and Arthur W. Toga. *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*. 2 Nature Neuroscience 10 (1999), also Paus, Tomas, Jay Giedd, et. al. *Structural maturation of neural pathways in children and adolescents: in vivo study*. Science, 283 (1999).

³ Id.

⁴ Id.

⁵ Sowell, Elizabeth R, Paul M. Thompson, Kevin D. Tessner and Arthur W. Toga. *Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: inverse relationships during postadolescent brain maturation*, 21 Journal of Neuroscience 22 (2001), at 8819, also Reiss, A.L., et. al., *Brain development, gender and IQ in children, a volumetric imaging study*. Brain, 119 (1996).

⁶ PBS Frontline, *Inside the Teen Brain*. See *Interview with Jay Giedd*, online at www.pbs.org/wgbh/pages/frontline/shows/teenbrain/.

⁷ Id, at *Interview with Deborah Yurgelun-Todd*.

⁸ Id.

⁹ Gur, Ruben C. Declaration of Ruben C. Gur., PhD, *Patterson v. Texas*. Petition for Writ of Certiorari to US Supreme Court, J. Gary Hart, Counsel. (Online at: www.abanet.org/crimjust/juvjus/patterson.html)

¹⁰ Id.

¹¹ See Adams, Gerald R., Raymond Montemayor, and Thomas P. Gullota, eds. *Psychosocial Development during Adolescence*. Thousand Oaks, CA, Sage Publications (1996).

¹² Lewis, Melvin. *Child and Adolescent Psychiatry: A comprehensive textbook*, Lippincott Williams and Wilkins (2002).

¹³ See id, and Cobb, Nancy J. *Adolescence: Continuity, Change and Diversity*. Mayfield Publishing, CA (1998).

¹⁴ American Society of Pediatrics, *Policy Statement*, 1 Pediatrics, 103 (1999).

¹⁵ Phyllis L. Crocker. *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 NC L. Rev. 1143 (1999).

¹⁶ Mallett, Chris. *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 3 Juv. Corr. Mental Health Report 65 (2003).

¹⁷ Id., at 77.

¹⁸ Id., at 78.

¹⁹ Id., at 77.

²⁰ Id., at 78.

²¹ Id.

²² Id.

²³ Id.

²⁴ Robinson, DA and Stephens, OH; *Patterns of mitigating factors in juvenile death penalty cases*, 3 Criminal Law Bulletin 28 (1992).

²⁵ Lewis, DO, Pincus, Bard, Richardson, Pritchep, Feldman, Yeager. *Neuropsychiatric, psychoeducational, and family characteristics of 14 juveniles condemned to death in the United States*, 5 Am. J. of Psychiatry 145 (1988).

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Office of the U.S. Surgeon General, *At a Glance, Suicide Among the Young*: Online at www.surgeongeneral.gov/library/calltoaction/fact3.htm

³² White House Office of National Drug Control Policy, *Juveniles and Drugs*, at www.whitehousedrugpolicy.gov/drugfact/juveniles/index.html

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Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System

**A Report on Recommendations of the Task Force
on Community Preventive Services**



**DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR DISEASE CONTROL AND PREVENTION**

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Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System

A Report on Recommendations of the Task Force on Community Preventive Services*

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Summary

The independent, nonfederal Task Force on Community Preventive Services (Task Force), which directs the development of the Guide to Community Preventive Services (Community Guide), conducted a systematic review of published scientific evidence concerning the effectiveness of laws and policies that facilitate the transfer of juveniles to the adult criminal justice system to determine whether these transfers prevent or reduce violence among youth who have been transferred and among the juvenile population as a whole. For this review, transfer is defined as placing juveniles aged <18 years under the jurisdiction of the adult criminal justice system. The review followed Community Guide methods for conducting a systematic review of literature and for providing recommendations to public health decision makers. Available evidence indicates that transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth. Available evidence was insufficient to determine the effect of transfer laws and policies on levels of violent crime in the overall juvenile population. On the basis of these findings, the Task Force recommends against laws or policies facilitating the transfer of juveniles to the adult criminal justice system for the purpose of reducing violence.

* Points of view expressed are those of the contributors and the Task Force on Community Preventive Services and do not necessarily reflect those of CDC, the National Institutes of Health, the National Institute of Justice, the U.S. Department of Justice, or the U.S. Department of Health and Human Services.

Background

The purpose of this review was to determine whether laws or policies that facilitate the transfer of juveniles from the juvenile to the adult criminal justice system reduce interpersonal violence, either specifically among juveniles who have experienced the adult justice system or in the general juvenile population. One rationale for the transfer of juveniles to the adult justice system is to deter future criminal activity, on the premise that the adult system is more severe and punitive than the juvenile system. For this review, transfer (also referred to as “waiver” to denote the

The material in this report originated in the National Center for Health Marketing, Jay M. Bernhardt, PhD, Director; and the Division of Health Communication and Marketing, Cynthia E. Baur, PhD, Director.

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relinquishing of authority by the juvenile courts) refers to placing juveniles under the jurisdiction of the adult criminal justice system. Although the legal term “juvenile” is defined differently among states, for purposes of this review, a juvenile is considered a person aged <18 years. Juveniles who are not transferred to the adult court system are said to be retained in the juvenile system.

The reduction of violence through transfer policies is hypothesized to occur by two mechanisms—specific deterrence and general deterrence—both of which rely on the perceived severity of the adult criminal justice system compared with the juvenile system. “Specific deterrence” refers to juveniles who have been subjected to the adult justice system and “general deterrence” refers to all youth in the population who might be subject to transfer provisions if charged with a crime. “Deterrence” applies to the behavioral outcome of reduced offending or re-offending and not to decision processes made by the affected youth. Incapacitation is the inability of incarcerated convicts to commit crimes in society during incarceration; incapacitation is thought to be increased for juveniles in adult settings compared with those in juvenile settings.

In a representative national survey in 2002, rates of the perpetration of violent crime, including simple and aggravated assault, robbery, and rape, were highest among persons aged 15–20 years (1,2). U.S. adults reported approximately 1.9 million incidents of victimization by perpetrators estimated to be aged 12–20 years, a rate of 5.1 incidents per year of victimization per 100 juveniles in this age group (3,4). Although arrest and victimization data indicate declines among juveniles for violent acts in general following a peak during 1993–1994, self-report of offenses continues to indicate high rates of violence (3).

Juvenile and criminal law in the United States are principally state matters. Juvenile courts were first established in 1899 in Illinois. By 1925, all states except Maine and Wyoming had separate juvenile courts (5). Separate judicial process for juveniles has been justified on several grounds related to the psychosocial development of this population (6). Certain developmental differences are cited in justification of the Supreme Court decision to ban capital punishment for crimes committed by offenders aged <18 years at the time of the crime (7). In general, juveniles differ from adults in their biologic development and mental processes and capacities. Juveniles are less aware of consequences, less able to regulate impulses or inhibit behavior, and thus less culpable for their actions than adults. In addition, juveniles have less ability to understand and thus participate in the standard adult judicial process (8). Finally, juveniles are more malleable and amenable to reform of

their behavior. Therefore, an emphasis of the judicial response to their deviant behavior should be on reform rather than, or in addition to, punishment—in contrast to the punitive focus of the adult criminal justice system (6). The policy implications of these developmental issues with respect to court jurisdiction remain controversial, especially because of the variations in adolescent cognitive and social development for which chronologic age is not a precise marker.

In contrast to the adult criminal court, which is oriented toward punishment, the traditional juvenile court has acted “in the interests of the child” and focused on rehabilitation rather than punishment because juveniles are assumed to be more amenable than adults to treatment (9). Juvenile courts in the United States have always followed the principle of *parens patriae*—the state acts as a guardian for those who cannot take care of themselves, such as children and the mentally ill (10,11). Traditionally, transfer from juvenile to adult court jurisdiction has required a determination that the juvenile was not amenable to treatment (5,10). Recent changes to the juvenile court’s mission weighs protection of the community and the interests of the child (11).

Although states establish their own juvenile and adult criminal law, common trends are discernible across states. Following the increases in violent juvenile crime in the late 1980s and early 1990s, during 1992–1999, all states except Nebraska expanded their transfer provisions to facilitate prosecuting juveniles in the adult justice system (12–16). An estimated 210,000–260,000 juveniles, or 20%–25% of all juvenile offenders, were prosecuted as adults in 1996 (14).

Persons aged <18 years can be tried in the adult criminal justice system by one of six main mechanisms. In “judicial waiver,” the traditional mechanism, a juvenile court judge can waive a youth to the adult system, generally based on perceived lack of amenability to treatment, which is often based on considerations such as age, seriousness of the current offense, and previous delinquency (13). In “prosecutorial waiver,” the prosecutor has the discretion to file a case in the juvenile or the adult criminal court system. In “statutory exclusion,” youth of particular ages charged with particular crimes (e.g., homicide) are excluded by statute from juvenile justice system jurisdiction. When particular charges are excluded from juvenile court by statutory means, discretion resides with prosecutors, who decide which charges are filed; choice of charge might determine whether the juvenile is transferred (15).

The increases in transfer resulting from the preceding three mechanisms are amplified by a policy that “once an adult, always an adult,” whereby youth once transferred to

adult court also are automatically transferred for any future offending (13). With lowered age of adult court jurisdiction, states set the age at which a person is considered responsible for criminal actions, and no longer eligible for juvenile court, to an age younger than the traditional age of 18 years. Finally, in certain states, juveniles who are married or otherwise “emancipated” (i.e., released from parental authority) are excluded from juvenile court. In a mechanism typically referred to as “reverse waiver,” youth who have not reached the age of majority can be transferred from the adult court back to the juvenile court when cases are deemed inappropriate for the adult criminal court system.

States also are experimenting with “blended sentencing,” which allows a juvenile to be sentenced to both juvenile and adult sanctions by one court. Blended sentencing by the juvenile court allows the court to monitor youth beyond the traditional end of juvenile jurisdiction (16). This frequently involves juvenile incarceration until the age of majority, followed by adult incarceration. Greater sentencing flexibility might reduce the pressure to transfer court jurisdiction, but little research has been conducted on how blended sentencing is used in practice (17).

Introduction

The independent, nonfederal Task Force on Community Preventive Services (Task Force) develops the *Guide to Community Preventive Services* (*Community Guide*), with the support of the U.S. Department of Health and Human Services (DHHS), in collaboration with public and private partners (18,19). Although CDC provides staff support to the Task Force for development of the *Community Guide*, the recommendations presented in this report were developed by the Task Force and do not necessarily reflect the viewpoints of CDC or DHHS.

This report is one in a series included in the *Community Guide*, a resource that includes multiple systematic reviews addressing preventive public health topics (e.g., violence prevention, preventing tobacco use, and reducing the incidence of cancer) (19). This section provides an overview of the process used by the Task Force to select and review evidence and summarize its recommendations regarding interventions to prevent or reduce violence. A full report on the recommendations, supporting evidence, and remaining research questions regarding the effects of strengthened transfer laws and policies on violence is published elsewhere (20).

Using effective interventions to reduce violence might help to achieve certain objectives specified in *Healthy People 2010* (21), the disease prevention and health promotion agenda for the United States. *Healthy People 2010* objectives iden-

tify some of the substantial preventable threats to health and can help focus the efforts of public health systems, legislators, and law enforcement officials for addressing those threats by establishing measurable targets. Many of the *Healthy People 2010* objectives regarding injury and violence prevention (e.g., the reduction of rates of assault, homicide, rape, and robbery) might be positively affected by the intervention reviewed in this report.

Methods

In this review, *Community Guide* procedures were used to assess systematically whether policies that facilitate the transfer of juveniles from the juvenile to adult criminal justice system have been effective in reducing violence among juveniles. *Community Guide* methods for systematic reviews have been discussed elsewhere (22). In the *Community Guide*, evidence is summarized about the effectiveness of interventions in changing one or more health-related outcomes and about other positive or negative effects of the intervention. If an intervention is effective, evidence also is summarized regarding the applicability of the findings (i.e., the extent to which available effectiveness data might apply to diverse populations and settings), other harms or benefits of the intervention, economic efficiency, and barriers to the implementation of the intervention.

As with other *Community Guide* reviews, the process used to review evidence systematically and then translate that evidence into conclusions involves forming a systematic review development team; developing a conceptual approach to organizing, grouping, and selecting interventions; selecting interventions to evaluate; searching for and retrieving evidence; assessing the quality of and abstracting information from each study; assessing the quality of and drawing conclusions about the body of evidence (i.e., all available evidence combined) of effectiveness; and translating the evidence of effectiveness into recommendations.

Three groups comprised the systematic review development team: the coordination team, the consultation team, and the abstraction team.* The coordination team (“the team”) consisted of a Task Force member, specialists in systematic reviews and economics from the *Community Guide*

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Branch (National Center for Health Marketing, CDC), and authorities on violence from the National Center for Injury Prevention and Control (CDC), the National Institutes of Health (NIH), and the National Institute of Justice (NIJ). This team developed the conceptual framework for the review; coordinated the data collection and review process; and drafted evidence tables, summaries of the evidence, and the reports. The abstraction team—three members of the coordination team—determined which studies met *Community Guide* standards for inclusion in the systematic review and collected and recorded data from these studies. The consultation team members—national authorities on violence-related topics—nominated interventions to be reviewed, participated in the selection of priority interventions for review, provided advice, and reviewed the final products.

Searches for published research were conducted in eight computerized databases: the National Criminal Justice Reference Service (NCJRS), Education Resources Information Center (ERIC), PsycINFO, Wilson Social Sciences Abstracts, Social SciSearch, National Technical Information Service (NTIS), Medline, and Lexis/Nexis.[†] Search terms included “juvenile transfer” and its synonyms (e.g., “waiver”), and “efficacy” and “recidivism.” Relevant references listed in retrieved articles were evaluated and obtained, and subject-matter specialists were consulted to find additional published reports. The coordination team conducted Internet searches to ensure that no additional studies could be found by these means. Journal articles, government reports, books, and book chapters were eligible for inclusion in the review.

Articles published in any year before February 2003[§] were considered for inclusion if they evaluated a new or strength-

ened transfer policy or law; assessed at least one of the specified transfer-related violent outcomes as measured by arrest rates for crimes designated as “violent” (e.g., robbery or assault); were conducted in a country with a high-income economy[¶] (as defined by the World Bank); reported on a primary study rather than a guideline or review; and compared a group of persons exposed to the intervention (i.e., law or policy) with a comparison group that had not been exposed or who had been less exposed. While searching for evidence, the team also sought information about effects on other outcomes (i.e., not violence-related), such as reductions in property crime and disproportionate minority representation among transferred juveniles.

Design suitability was assessed for each candidate study (those meeting the inclusion criteria). The review team’s assessment might result in classification of study design that differs from the nomenclature used by study authors. According to *Community Guide* nomenclature, greatest design suitability refers to studies with a concurrent comparison group and prospective data collection; moderate design suitability refers both to retrospective studies and studies with one pre-intervention and multiple post-intervention measurements but no concurrent comparison group; and least suitable design refers to cross-sectional studies or studies with only single pre- and post-intervention measurements and no concurrent comparison groups.

Research on specific deterrence uses different study designs and effect measures than research on general deterrence. In specific deterrence research, studies aim to compare the recidivism (subsequent criminal activity) of youth transferred to the adult justice system with the recidivism of youth retained in the juvenile system. Transferring juveniles to the adult criminal justice system might involve a court with more formal and adversarial procedures, fewer possibilities of pretrial diversion from court, different detention alternatives, and different sanctions. In this review, outcomes of transferred versus retained juveniles were compared, whether or not the juveniles had been found guilty (or the juvenile court equivalent, adjudicated “delinquent”), or sanctioned.

[†] These databases can be accessed as follows: NCJRS: http://abstractsdb.ncjrs.org/content/AbstractsDB_Search.asp; ERIC: <http://www.eric.org/Eric/>; PsycInfo: DIALOG <http://www.dialogclassic.com> (requires id/password account), <http://www.apa.org/psycinfo/products/psycinfo.html>; Wilson Social Sciences Abstracts: <http://library.dialog.com/bluesheets/html/bl0142.html> (requires id/password account); Social SciSearch: <http://library.dialog.com/bluesheets/html/bl0007.html> (requires id/password account); NTIS: DIALOG <http://www.dialogclassic.com> (requires id/password account), <http://grc.ntis.gov/ntisdb.htm>; Medline: <http://www.ncbi.nlm.nih.gov/pubmed>; Lexis/Nexis: www.lexisnexis.com.

[§] Two articles were published on the general deterrent effects of strengthened transfer laws after the completion of this review. (Steiner B, Hemmens C, Bell V. Legislative waiver reconsidered: general deterrent effects of statutory exclusions laws enacted post-1979. *Justice Q* 2006;23:34–59. Steiner B, Wright E. Assessing the effects of state direct file waiver laws on violent juvenile crime: deterrence or irrelevance? *J Crim Law Criminology* 2006;96:1451–77.) Although findings from these studies are not included in this review, they are among the stronger studies regarding the general deterrence effect of increasing transfer. Both studies used time series methods to examine the effects of increased statutory exclusion and direct file in individual states. In both studies, the findings indicate that transfer laws do not promote the general deterrence of violent crime.

[¶] High-income economies as defined by the World Bank are Andorra, Antigua & Barbuda, Aruba, Australia, Austria, Bahamas, Bahrain, Barbados, Belgium, Bermuda, Brunei Darussaleem, Canada, Cayman Islands, Channel Islands, Cyprus, Czech Republic, Denmark, Estonia, Faeroe Islands, Finland, France, French Polynesia, Germany, Greece, Greenland, Guam, Hong Kong (China), Iceland, Ireland, Isle of Man, Israel, Italy, Japan, Republic of Korea, Kuwait, Liechtenstein, Luxembourg, Macao (China), Malta, Monaco, Netherlands, Netherlands Antilles, New Caledonia, New Zealand, Norway, Portugal, Puerto Rico, Qatar, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, Taiwan (China), United Arab Emirates, United Kingdom, United States, and U.S. Virgin Islands.

A major methodologic concern in studies of specific deterrence is selection bias: transfer to adult criminal court is typically intended for those youth who are considered to be more serious offenders. Consequently, transferred youth would be expected to have greater risk for subsequent violence, independent of any effect of their experience with the adult criminal justice system. All of the included studies attempted to control for possible selection bias by restricting the cases under consideration to serious ones that would be eligible for transfer and by comparing the outcomes of cases transferred with those of cases retained in the juvenile system. In addition, they attempted to reduce selection bias by one of three methods: 1) by using statistical methods to control for factors that might affect transfer decisions (23–25); 2) by matching transferred and retained juveniles on background characteristics (26,27); or 3) by comparing the outcomes of juveniles matched on background demographics, economics, and crime characteristics, but in jurisdictions with difference transfer laws (28). Because juveniles charged with minor offenses are unlikely to be transferred, and juveniles charged with extremely serious offenses are unlikely to be retained, studies that match or otherwise control for severity of criminal background will probably exclude juveniles at both extremes.

In general deterrence research, outcomes are measured in terms of offending rates in the general population of juveniles (e.g., the number of juveniles per 100,000 arrested for violent crimes). Comparison groups must necessarily be in another place or of a different age. Researchers strive for comparison groups unaffected by the transfer law being studied but who are otherwise as similar as possible and similarly affected by many of the other social forces that influence offending.

The team's assessment of general deterrence included only studies that compared rates of violence before and after implementation of a strengthened transfer policy and used a separate comparison group. Juvenile offending rates change over time for many reasons, as evidenced by the dramatic increase and then decrease in crime in general and in juvenile violence in particular during the late 1980s and early 1990s (29,30). Without comparison groups, any law enacted during a period of decline in crime would seem to have a deterrent effect, as indicated by simple before-and-after differences in offending within the same population. As a result, the team considered comparison groups unaffected by the law to be a critical design feature in evaluating the deterrent effect on crime of this particular law.

The team assessed limitations in the execution of all candidate studies. Limitations included failure to describe

study population, use of proxy rather than direct measures of violent outcomes (e.g., general offending outcomes [such as re-arrest] rather than violent offending), and not controlling for background characteristics of transferred and retained juveniles. This assessment might differ from an assessment of limitations for the study's original purposes. Using *Community Guide* methods (22), each study could be coded for as many as nine specific limitations: good execution refers to studies with one or fewer limitations, fair execution to studies with 2–4 limitations, and limited execution to studies with five or more limitations. Studies with limited execution did not qualify for the review.

Unless otherwise noted, results of each study are presented as the relative change in violent crime rates attributable to the interventions. Relative change was calculated as relative percent change using the following formulas:

$$\text{Effect size} = (I_{\text{post}}/I_{\text{pre}}) / (C_{\text{post}}/C_{\text{pre}}) - 1$$

where

I_{post} is the last reported outcome rate in the intervention group after the intervention;

I_{pre} is the reported outcome rate in the intervention group immediately before the intervention;

C_{post} is the last reported outcome rate in the comparison group after the intervention;

C_{pre} is the reported outcome rate in the comparison group immediately before the intervention.

In specific deterrence studies, intervention groups were composed of transferred juveniles, and control groups were composed of juveniles retained in the juvenile system. In general deterrence studies, intervention groups were populations of juveniles (e.g., in states or cities) exposed to a changed transfer policy, and control groups were populations not exposed to such a change.

If results were reported from logistic regression models, odds ratios were transformed into relative rate changes (31,32) so that these effect measures could be more appropriately compared with other studies in the body of evidence.** If effect measures could not be converted into relative percent changes (e.g., results presented only in graphs), the reported findings are described in the text. In the reporting of study findings, the standard two-tailed p-value of ≤ 0.05 was used as a measure of statistical significance.

** $RR = OR / ((1 - P_0) + (P_0 \times OR))$, where RR is the relative risk, OR the odds ratio to be converted, and P_0 is the incidence of the outcome of interest in the unexposed population (i.e., juveniles retained in the juvenile justice system).

When available, measures adjusted for potential confounders through multivariate analysis were preferred over crude effect measures. Follow-up periods of <1 year were considered a limitation. When studies included several follow-up periods, the longest period available was used.

Using standard *Community Guide* methods (22), the findings of individual studies were aggregated, and the strength of the body of evidence was summarized on the basis of the number of available studies, the strength of their design and execution, and the magnitude and consistency of effects. For an effect to be considered sufficient evidence of effectiveness, its magnitude must be deemed of public health importance; statistical significance is generally considered only when just one study of greatest design suitability and good execution has qualified for review. Three studies of moderate design suitability and fair execution can provide sufficient evidence if findings are consistent in direction and magnitude. Results deemed sufficient to draw a conclusion are summarized both graphically and statistically.

Results

Specific Deterrence Effects

Six studies were identified that examined the effects of juvenile transfer on subsequent violent offending (23–28). All were of greatest design suitability and good execution. Studies followed juveniles for periods ranging from 18 months (23) to 6 years (27) to assess recidivism. More detailed descriptions and evaluations of these studies are available from the *Community Guide's* Violence Prevention website (<http://www.thecommunityguide.org/violence>) and have been published elsewhere (20).

In a prospective cohort study, the re-arrest of 400 youth aged 15–16 years initially arrested in the New York City metropolitan area during 1981–1982 (where the age of adult court jurisdiction is age 16 years and where youth aged 15 years are legislatively excluded from juvenile court when accused of any of 15 felonies) was compared with re-arrest of 400 demographically similar youth in counties in New Jersey (where age 18 years is the age of criminal responsibility and no legislative exclusion exists) (33). To enhance the comparability of the two regions, counties were matched by key crime and socioeconomic indicators (i.e., crime and criminal justice, demographic, socioeconomic, labor force, and housing characteristics). To estimate recidivism, competing hazard models were used that control for time at risk; age, case length, and sentence length were included as covariates. The study indicate that, among those not incarcerated, transferred juveniles were 39% more

likely to be re-arrested on a violent offense than were retained juveniles. Among those incarcerated, exposure to longer sentences was associated with a further increase in violent recidivism among those transferred compared with those who were retained in the juvenile system (28).

Florida's juvenile transfer laws were evaluated by a team of researchers in two separate studies of different cohorts (26,34). The first study compared the overall re-arrest rates of juveniles who were initially arrested in 1987 and then either transferred or retained (34). Each youth transferred to adult court was matched to a youth retained in the juvenile court by six factors (i.e., most serious offense, number of counts; number of previous referrals to the juvenile system; and most serious previous offense, age, and sex), and, when possible, by race. The findings indicated that transfer increased recidivism over the short term but over the longer term reduced recidivism for some transferred juveniles and increased it for others (27). Among youth initially arrested for misdemeanors and for most types of felonies, the effects of transfer were consistent with findings in the other studies that were reviewed. But among those initially arrested for felony property crimes, re-arrest rates were lower for transferred than for retained youth.

The second study essentially replicated the first for youth arrested following implementation of "stronger" juvenile laws enacted in Florida in 1990 and 1994 that increased prosecutorial waiver (26). The outcome compared was felony re-arrest, including nonviolent and violent felonies. In this study, the recidivism examined was restricted to felonies committed after age 18 years, on the grounds that this would ensure equivalent records of offending. The findings indicated that transferred youth had 34% more felony re-arrests than retained youth.

A study on the effects of transfer in Hennepin County, Minnesota, examined all cases in which the prosecutor filed a motion to transfer a juvenile during 1986–1992 (25,35). Sixty percent of juveniles for whom the prosecutor filed a motion to transfer were actually transferred. Recidivism rates for youth who were transferred were compared with rates for those who were retained in the juvenile justice system. The study presented the results of logistic regression analyses of the effects of transfer on reconviction for violent and nonviolent crimes combined, controlling for potential confounders, including sex, criminal history, and whether the case resulted in incarceration. Transfer was associated with a 26.5% increased likelihood of further criminal conviction over that of retained juveniles (25).

A study in Pennsylvania attempted to anticipate the effects of new transfer provisions before their implementation in 1996 (24). The study included 557 males aged

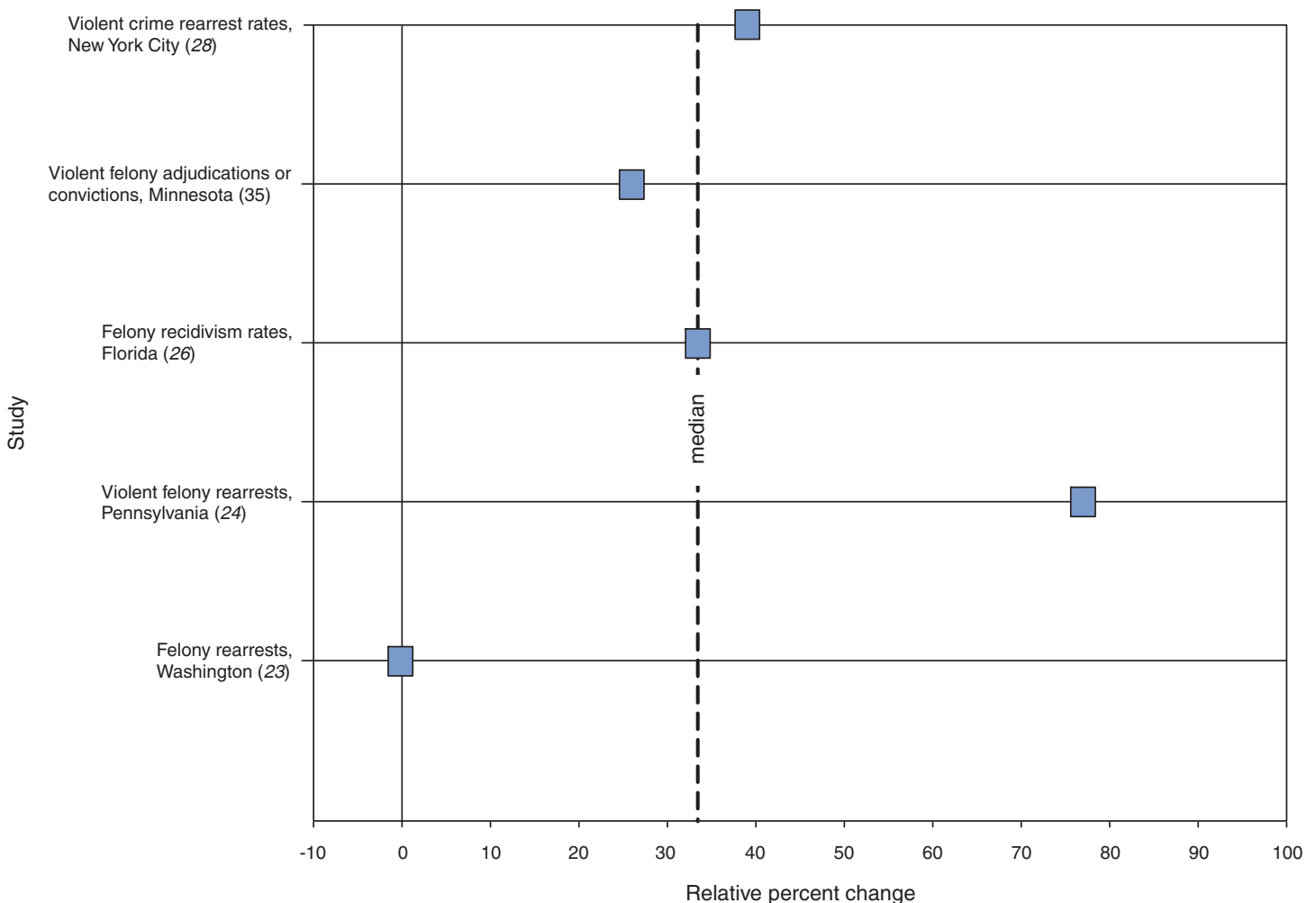
15–18 years arrested in Pennsylvania in 1994 for robbery, aggravated assault, or both, involving use of a deadly weapon. Multivariate analyses controlling for demographics and criminal background indicated that, compared with 419 retained juveniles, transfer of 138 juveniles was associated with a 77% greater likelihood of violent felony arrest following completion of the sentence.

A study in Washington attempted to determine the expected effect of the state's 1994 Violence Reduction Act as modified by the state legislature in 1997 by examining the effects of discretionary transfers before implementation of the new law that excluded from original jurisdiction in juvenile court youth aged 16–17 years with specified offending histories or charged with any of nine "serious violent felonies" (23). Controlling for offenses charged in the

case, previous record of offenses, sex, and ethnicity, no difference in recidivism was found between transferred and retained juveniles.

Among the six studies reviewed, only one indicated that transfer of juveniles to the adult justice system deterred commission of subsequent violent or general crimes among a subset of those transferred (27); one study found no effect (23). The remaining four studies all found an undesirable effect in which transferred juveniles committed more subsequent violent or general crime than retained juveniles (24–26,28). Effect sizes from the individual studies ranged from 0–77%, and the overall median effect size was a 34% relative increase in subsequent violent or general crime for transferred juveniles compared with retained juveniles (Figure). According to the *Community Guide's* rules of evidence (22), the review

FIGURE. Relative change in the percentage of juveniles rearrested after release from the adult as compared with the juvenile justice system, by selected studies — United States, 1996–2007*



* Results of a previous study (27) were not presented here because of complex effect modification by initial offense and other status characteristics.

provides sufficient evidence that the transfer of youth to the adult criminal justice system typically results in greater subsequent crime, including violent crime, among transferred youth; therefore, transferring juveniles to the adult system is counterproductive as a strategy for preventing or reducing violence.

General Deterrence Effects

Three studies evaluated the general deterrence effect of transfer laws or policies (11,23,36). All three evaluated the effects of changes to state transfer laws on rates of juvenile offending, as measured by arrest rates in the general juvenile populations of those states. All were of greatest study design suitability and fair execution. Effect sizes could not be computed because the studies provided insufficient data. More detailed descriptions of the studies included in this review and how they were evaluated are available at the *Community Guide's* Violence Prevention website (<http://www.thecommunityguide.com/violence>) and elsewhere (20).

The first study evaluated Washington's 1994 Violence Reduction Act, which legislatively excluded from initial jurisdiction in juvenile court youth aged 16–17 years with specified offending histories or charged with any of nine "serious violent felonies." Violent offending among youth aged 10–17 years in Washington peaked in 1994 and then declined, parallel to the national trend in arrests for violent crime (9,23). The study concluded that "we cannot attribute the decrease in juvenile arrests for violent crimes in Washington state solely to the automatic transfer statutes" (23).

A second study compared changes in offending rates in Idaho with those in Wyoming and Montana to determine the deterrent effect of a 1981 Idaho law mandating automatic transfer to the adult criminal justice system of youth aged 14–18 years charged with any of five violent crimes (36). Compared with violence in Wyoming and Montana, the new transfer law was associated with relative increases in violence in Idaho.

A third study examined monthly arrest rates for youth aged 13–15 years in New York during 1974–1984 (spanning the change in New York law) on four violent crimes (i.e., homicide, assault, robbery, and rape) using several comparison populations. New York City (NYC) was analyzed separately from the rest of the state (11). For NYC, two comparison populations were examined, neither of which was subject to the changed transfer legislation. The first comparison was with offenders in NYC aged 16–19 years who were unaffected by the Juvenile Offender Law because 16 is the age of adult court jurisdiction in New York; these youth were too old for the juvenile justice sys-

tem. The second comparison was with youth aged 13–15 years in Philadelphia. No consistent pattern of results was found across offenses. Only rape had a statistically significant decrease for the intervention group, but the NYC comparison group had a larger decrease that also was statistically significant. The decline was considerably smaller in Philadelphia, suggesting a local effect in NYC that is not attributable to the change in transfer. No consistent pattern of evidence suggested a general deterrence effect.

According to the *Community Guide* rules (22), the evidence from these studies is insufficient to determine whether or not laws or policies facilitating the transfer of juveniles to the adult criminal justice system are effective in preventing or reducing violence in the general juvenile population. One study of general deterrence reported no apparent effect (23), one reported heterogeneous effects (11), and one reported a counterdeterrent effect (36). Although by *Community Guide* standards the number of studies is sufficient for determining effectiveness (i.e., three studies of greatest design suitability and at least fair execution), study findings are inconsistent and typically centered on no effect and thus do not permit a conclusion.[§]

Discussion

The studies reviewed for this report assessed the effects of strengthened transfer laws in Washington, Pennsylvania, and regions of New York, Minnesota, and Florida. These states are geographically and demographically diverse, which suggests that the findings might apply in other states.

The effects of transfer policies on violence and other crime across levels of severity of crime for which the juvenile was initially charged (e.g., misdemeanors or felonies) require further study. To assure comparability, the reviewed studies control for the severity of the crime for which the juvenile is at risk for being transferred and, where possible, for the juvenile's criminal history. These studies did not generally assess whether transfer had different effects for juveniles with more or less serious offenses and offense histories. Transfer might be more effective or less harmful if restricted to the most serious offenders. The Florida studies indicated that a large number of juveniles committing misdemeanors were transferred to adult court and found greater harm (i.e., recidivism) for these offenders than for juveniles transferred for more serious offenses. In any case, the possibility of transferring the most serious juvenile offenders was available in all court systems before the strengthening and formalizing of the transfer policies. The changes assessed in this review have resulted in lowering the thresholds for the seriousness of crimes for which juveniles are transferred,

thereby facilitating transfer. Because of methodologic controls for juvenile criminal background in studies of specific deterrence, juveniles at the most and least severe ends of the criminal severity spectrum are probably not included in these studies. Therefore, inferences from these studies should exclude these extremes.

The findings in this report indicate that transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system. To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good.

Research Needs

Although the Task Force has recommended against transfer of juveniles to the adult criminal justice system to prevent or reduce violence, transfer policies are still in effect, and the following important research issues remain:

- The experiences of youth in both juvenile and adult systems should be explored by comparing the experiences of youth sentenced to juvenile and adult sanctions (37,38) and assessing factors that might reduce (e.g., exposure to rehabilitation or interaction with caring mentors) or increase (e.g., exposure to adult offenders) further violence (38–40).
 - Do youth receive more rehabilitative programming in juvenile institutions than in adult institutions?
 - Has the programming in adult corrections changed in response to the influx of youthful offenders?
 - Do youth in adult correctional institutions have extensive contact with adult offenders and, if so, does that have negative effects on them or promote more subsequent offenses?
- The effects of variations among state laws have not been assessed systematically, limiting the ability to generalize review findings. Systematic comparison of state provisions to determine whether the transfer policies of the states included in the review are representative of all state transfer provisions could support the generalizability of the review's findings.

Little research has been conducted on the economic costs of transferring youth to the adult criminal justice system versus retaining them in the juvenile system (41). In some sense, evaluating costs of interventions (e.g., transfer) that cause net harm seems counterintuitive; ideally, spending that results in increased violence and additional societal costs should be discouraged. However, documenting the variability and relative costs of the two judicial and correc-

tional systems, the distribution of responsibility for these costs across different levels of government and society, and the net balance of program costs, the costs of subsequent crime, and the costs of opportunities lost to the juveniles themselves might allow a constructive discussion of the economic consequences of change.

Use of the Recommendations

The findings of this review might encourage discussion among legislators and others interested in juvenile justice about the societal and economic costs and benefits of juvenile transfer laws and policies. This review, along with the Task Force on Community Preventive Services' recommendation against juvenile transfer laws, provides guidance for public health and juvenile justice policy makers, program planners and implementers, and researchers.

The findings in this report are subject to at least four limitations. First, transfer laws and policies vary substantially from state to state. The studies reviewed for this report were the only ones that met *Community Guide* standards and might not be representative of transfer laws in all states. Second, the outcome measures in all these studies result from official records of offending (either arrest or conviction) rather than direct measures of offending (e.g., robbery or aggravated assault). The majority of crimes do not result in an arrest (1,42), and certain wrongful arrests are made. Nevertheless, although arrest rates might reflect law enforcement activity as much or more than juvenile criminal behavior, they are among the best available and most commonly used indicators of crime (43) and thus the best available outcome for assessment in this review.

Third, the heterogeneity of laws across jurisdictions and populations studied and the impossibility of conducting experimental trials to evaluate such policies as transfer laws makes controlling for potential confounding difficult. The six specific deterrence studies reviewed have used several approaches to control for confounding, including matched pairs within jurisdictions; cross-jurisdictional comparisons with control of social, demographic, and criminological variables; and simple graphical comparison across jurisdictions. The convergence of results across these studies suggests that increased violent recidivism following transfer is a robust finding.

Finally, the relevance of the findings might be questioned because of the age of the studies reviewed (study cohorts were arrested during 1981–1996). However, the consistency of findings over a substantial period, during which patterns of violent crime varied greatly, suggests the persistence of the phenomenon reported.

Review of the effects of transfer laws on subsequent violence indicates that the experience of transfer to the adult criminal justice system is associated with subsequent violence among juvenile participants when compared with violence among juveniles retained in the juvenile justice system. In addition, little evidence supports the idea that transfer laws deter juveniles in the general population from violent crime. These policies might be favored by policymakers or the public for other reasons (e.g., societal retribution in response to serious crime or incapacitation of serious offenders). However, the review indicates that use of transfer laws and strengthened transfer policies is counterproductive to reducing juvenile violence and enhancing public safety.

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References

- Pastore, A. L., Maguire, K., and eds. Sourcebook of criminal justice statistics 2003. Washington, DC: US Department of Justice, Bureau of Justice Statistics; 2005.
- Bureau of the Census. Monthly postcensal resident population, by single year of age, sex, race, and Hispanic origin (1/1/2003-6/1/2003). Washington DC: US Department of Commerce, Bureau of the Census; 2006.
- Maguire K, Pastore AL, eds. Sourcebook of criminal justice statistics 2002. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics; 2004.
- Bureau of the Census. Statistical abstract of the United States, 2001–2005. Washington, DC: US Department of Commerce, Bureau of the Census; 2001.
- Commission on Behavioral and Social Sciences and Education. Juvenile justice, juvenile crime. Washington, DC: National Academy Press; 2000.
- Steinberg L, Cauffman E. A developmental perspective on jurisdictional boundary. In: Fagan J, Zimring FE, eds. The changing borders of juvenile justice: transfer of adolescents to the criminal court. Chicago, IL: University of Chicago Press; 2000:379–406.
- Roper, Superintendent, Potosi Correctional Center v. Simmons. 2005. 03–633, U.S. Supreme Court. 3–1–0005.
- Grisso T, Steinberg L, Woolard J, et al. Juveniles' competence to stand trial: a comparison of adolescents' and adults' capacities as trial defendants. *Law Hum Behav* 2003;27:333–63.
- Snyder HN, Sickmund M. Juvenile offenders and victims: 1999 national report. Washington, DC: US Department of Justice, Office of Juvenile Justice and Delinquency Prevention; 1999.
- Tanenhaus DS. The evolution of transfer out of the juvenile court. In: Fagan J, Zimring FE, eds. The changing borders of juvenile justice: transfer of adolescents to the criminal court. Chicago, IL: University of Chicago Press; 2000:13–44.
- Singer SI. Recriminalizing delinquency: violent juvenile crime and juvenile justice reform. Cambridge, England: Cambridge University Press; 1996.
- Sickmund M. Juveniles in court. Juvenile offenders and victims bulletin: national report series. Washington, DC: Office of Juvenile Justice and Delinquency Prevention; June 2003.
- Griffin P. Trying and sentencing juveniles as adults: an analysis of state transfer and blended sentencing laws. Pittsburgh, PA: National Center for Juvenile Justice; 2003.
- Bishop D, Frazier C. Consequences of waiver. In: Fagan J, Zimring FE, eds. The changing borders of juvenile justice: transfer of adolescents to the criminal court. Chicago, IL: University of Chicago Press; 2000:227–76.
- Zimring FE. American youth violence. New York, NY: Oxford University Press; 1998.
- Redding RE, Howell JC. Blended sentencing in American juvenile courts. In: Fagan J, Zimring FE, eds. The changing borders of juvenile justice: transfer of adolescents to the criminal court. Chicago, IL: University of Chicago Press; 2000:145–180.
- Cheesman II FL, Cohen T, Dancy D, Kleinman M, Mott N, Green H. Blended sentencing in Minnesota: on target for justice and public safety? An evaluation. Williamsburg, VA: National Center for State Courts; 2002.
- Task Force on Community Preventive Services. Introducing the Guide to Community Preventive Services: methods, first recommendations, and expert commentary. *Am J Prev Med* 2000;18:1–142.
- Zaza S, Briss PA, Harris KW, eds. The Guide to Community Preventive Services: what works to promote health? New York, NY: Oxford University Press; 2005.
- McGowan A, Hahn RA, Liberman A, et al. Effects on violence of laws and policies facilitating the transfer of juveniles from the juvenile justice system to the adult justice system: a systematic review. *Am J Prev Med* 2007;32:7–28.
- U.S. Department of Health and Human Services. Healthy People 2010 (2nd ed, 2 vols). Washington, DC: U.S. Department of Health and Human Services; 2000.
- Briss PA, Zaza S, Pappaioanou M, et al. Developing an evidence-based Guide to Community Preventive Services—methods. *Am J Prev Med* 2000;18:35–43.
- Barnoski R. Changes in Washington State's jurisdiction of juvenile offenders: examining the impact. Olympia, WA: Washington State Institute for Public Policy; 2003.
- Myers DL. Excluding violent youths from juvenile court: the effectiveness of legislative waiver. New York, NY: LFB Scholarly; 2001.
- Podkopacz MR. The juvenile court's final decision: an empirical examination of transferring juveniles to adult court; 1996.
- Lanza-Kaduce L, Frazier CE, Lane J, Bishop DM. Juvenile transfer to criminal court study: final report. Tallahassee, FL: Florida Department of Juvenile Justice; 2002.
- Winner L, Lanza-Kaduce L, Bishop DM, Frazier CE. The transfer of juveniles to criminal court: reexamining recidivism of the long term. *Crime Delinq* 1997;43:548–63.
- Fagan J. The comparative impacts of juvenile and criminal court sanctions on adolescent felony offenders. *Law Policy* 1996;18:77–119.
- Blumstein A, Rivara FP, Rosenfeld R. The rise and decline of homicide—and why. *Annu Rev Public Health* 2000;21:505–41.
- Cook PJ, Laub JH. After the epidemic: recent trends in youth violence in the United States. In: Tonry M, ed. Crime and justice, a review of research. Chicago, IL: University of Chicago Press; 2002:1–37.

31. Liberman AM. How much more likely? The implications of odds ratios for probabilities. *Am J Eval* 2005;26:253–66.
32. Zhang J, Yu KF. What's the relative risk? A method of correcting the odds ratio in cohort studies of common outcomes. *JAMA* 1998;280:1690–1.
33. Fagan J. Separating the men from the boys: the comparative advantage of juvenile versus criminal court sanctions on recidivism among adolescent felony offenders. In: Howell JC, Krisberg B, Hawkins JD, et al, eds. *A sourcebook: serious, violent, and chronic juvenile offenders*. Thousand Oaks, CA: Sage; 1995.
34. Bishop DM, Frazier CE, Lanza-Kaduce L, Winner L. The transfer of juveniles to criminal court: does it make a difference? *Crime Delinq* 1996;42:171–91.
35. Podkopacz MR, Feld BC. The end of the line: an empirical study of judicial waiver. *J Crim Law Criminol* 1996;86:449–92.
36. Jensen EL, Metsger LK. A test of the deterrent effect of legislative waiver on violent juvenile crime. *Crime Delinq* 1994;40:96–104.
37. Lane J, Lanza-Kaduce L, Frazier CE, Bishop DM. Adults versus juvenile sanctions: voices of incarcerated youths. *Crime Delinq* 2002;48:431–55.
38. Forst M, Fagan J., Vivona TS. Youth in prisons and training schools: perceptions and consequences of the treatment-custody dichotomy. *Juv Fam Court J* 1989;40:1–14.
39. Kupchik A. Prosecuting adolescents in criminal courts: criminal or juvenile justice? *Soc Probl* 2003;50:439–60.
40. U.S. General Accounting Office. *Juvenile justice: juveniles processed in criminal court and case dispositions*. Washington, DC: U.S. General Accounting Office; 1995.
41. Roman J, Butts JA. *The economics of juvenile jurisdiction: a white paper from the Research Roundtable on estimating the costs and benefits of the separate juvenile justice system*. Washington, DC: Urban Institute; 2005.
42. Elliott DS. Serious violent offenders: onset, developmental course, and termination—the American Society of Criminology 1993 presidential address. *Criminol* 1994;32:1–21.
43. US Department of Justice, Bureau of Justice Statistics. *The nation's two crime measures*. Available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ntcm.pdf>.

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Juvenile Transfer Laws: An Effective Deterrent to Delinquency?

Richard E. Redding

Beginning in the 1980s, many States passed legal reforms designed to get tough on juvenile crime. One important reform was the revision of transfer (also called waiver or certification) laws (Griffin, 2003) to expand the types of offenses and offenders eligible for transfer from the juvenile court for trial and sentencing in the adult criminal court.¹ These reforms lowered the minimum age for transfer, increased the number of transfer-eligible offenses, or expanded prosecutorial discretion and reduced judicial discretion in transfer decisionmaking (Fagan and Zimring, 2000; Redding, 2003, 2005). In 1979, for example, 14 States had automatic transfer statutes requiring that certain juvenile offenders be tried as adults; by 1995, 21 States had such laws, and by 2003, 31 States (Steiner and Hemmens, 2003). In addition, the age at which juvenile court jurisdiction ends was lowered to 15 or 16 years in 13 States (see Snyder and Sickmund, 2006), although very recently, some States have reduced the scope of transfer laws (Bishop, 2004), and one State has raised the age at which juvenile court jurisdiction ends from 16 to 18.

In the wake of these legislative changes, the number of youth convicted of felonies in criminal courts and incarcerated in

adult correctional facilities has increased (Redding, 2003), reaching a peak in the mid-1990s and then declining somewhat (Snyder and Sickmund, 2006) due, in part, to the decrease in juvenile crime. An estimated 4,100 youth were committed to State adult prisons in 1999, representing 1 percent of new prison commitments (Snyder and Sickmund, 2006). Sixty-one percent of these youth were incarcerated for person offenses, 23 percent for property offenses, 9 percent for drug offenses, and 5 percent for public order offenses (e.g., weapons possession) (Snyder and Sickmund, 2006). Transferred juveniles, particularly those convicted of violent offenses, typically receive longer sentences than those sentenced in the juvenile court for similar crimes (Bishop, 2000; Kupchik, Fagan, and Liberman, 2003; Myers, 2005; Virginia Department of Criminal Justice Services, 1996). But, they may be released on bail for a considerable period of time while they await trial in the criminal court (Myers, 2005), and many youth incarcerated in adult facilities serve no longer than the maximum time they would have served in a juvenile facility (Bishop, 2000; Fritsch, Caeti, and Hemmens, 1996; Myers, 2001). Seventy-eight percent were released from prison before their 21st birthday, and 95 percent were released before their

A Message From OJJDP

In an effort to strengthen the sanctions for serious juvenile crimes, a number of States have enacted laws increasing the types of offenders and offenses eligible for transfer from the juvenile court to the adult criminal court for trial and potential sentencing.

These laws have lowered the minimum transfer age, increased the number of offenses eligible for transfer, and limited judicial discretion, while expanding prosecutorial discretion for transfers.

Among the principal goals of such transfer laws are the deterrence of juvenile crime and a reduction in the rate of recidivism, but what does the research indicate about their effectiveness in addressing these ends?

Several studies have found higher recidivism rates for juveniles convicted in criminal court than for similar offenders adjudicated in juvenile courts. The research is less clear, however, in regard to whether transfer laws deter potential juvenile offenders.

This Bulletin provides an overview of research on the deterrent effects of transferring youth from juvenile to criminal courts, focusing on large-scale comprehensive OJJDP-funded studies on the effect of transfer laws on recidivism.

It is our hope that the information provided in this Bulletin will help inform public discussion and policy decisions on the transfer of juvenile offenders to adult criminal courts.

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Types of Transfer Laws

While the age at which juveniles can be transferred to the adult system varies across States, most States will transfer youth ages 14 and older who have committed a serious violent offense. Typically, there are four categories of offenses for which juveniles of a certain age may be transferred: (a) any crime, (b) capital crimes and murder, (c) certain violent felonies, and (d) certain crimes committed by juveniles with prior records (Snyder and Sickmund, 2006). (See Griffin, 2003, and Snyder and Sickmund, 2006, for recent comprehensive lists of States, recent transfer statutes, and statutory requirements.)

There are three types of transfer laws, all of which are referred to in this Bulletin: legislative (automatic transfer), judicial-discretionary (judicial transfer), and prosecutorial-discretionary (prosecutorial direct-file). Each type defines the kind of juvenile offender eligible for transfer under the statute, typically specifying certain offenses and minimum age criteria. Most States have two or three coexisting types of transfer laws (Redding and Mrozowski, 2005). For example, 40 States and the District of Columbia have judicial and prosecutorial transfer statutes, with the prosecutorial statutes often applicable only to older and more serious offenders (Sanborn, 2003).

Automatic transfer laws, currently in effect in 29 States (Snyder and Sickmund, 2006), require transfer of a juvenile if statutory criteria are met (for example, alleged commission of a violent felony by juveniles 14 years of age and older). Under these laws, the case either originates in criminal court, or originates in juvenile court and is then transferred to criminal court. Judicial transfer laws, currently in 45 States and the District of Columbia (Snyder and Sickmund, 2006), vest discretion with the juvenile court judge to decide whether a juvenile should be transferred after the prosecution files a transfer motion. Prosecutorial direct-file laws, currently in 14 States and the District of Columbia (Snyder and Sickmund, 2006), vest the discretion with prosecutors, allowing them to decide whether to file charges in the juvenile or criminal court. Twenty-five States also have reverse waiver laws (Snyder and Sickmund, 2006). In a reverse waiver jurisdiction, the criminal court judge has the discretion to transfer the defendant back to the juvenile court (or to treat the defendant as a juvenile for sentencing purposes).

25th birthday, with an average of 2 years, 8 months of time served on their sentences (Snyder and Sickmund, 2006).

General and Specific Deterrence

The nationwide policy shift toward transferring juvenile offenders to the criminal court is based largely on the assumption that more punitive, adult criminal sanctions will act as a deterrent to juvenile crime. In terms of specific deterrence—in other words, whether trying and sentencing juvenile offenders as adults decreases the likelihood that they will reoffend—six large-scale studies have found higher recidivism rates among juveniles convicted for violent offenses in criminal court when compared with similar offenders tried in juvenile court. With respect to general deterrence—whether transfer laws deter any would-be juvenile offenders—the picture is less clear. The studies on this issue have produced somewhat conflicting findings; however, the bulk of the empirical

evidence suggests that transfer laws have little or no general deterrent effect.

This Bulletin reviews all of the extant research on the general and specific deterrent effects of transferring juveniles to adult criminal court (Redding, 2005), focusing in particular on recent large-scale studies on specific deterrence funded by the Office of Juvenile Justice and Delinquency Prevention (Fagan, Kupchik, and Liberman, 2003; Lane et al., 2002; Lanza-Kaduce et al., 2005). It also identifies gaps in the field's knowledge base, notes challenges for further research, and discusses whether effective deterrence may be achieved through transfer.

General Deterrence: Do Transfer Laws Prevent Juvenile Crime?

Two studies conducted in the 1980s found that transfer laws did not lower juvenile crime rates. Jensen and Metsger's (1994) time-series analysis for the years 1976 to 1986 found a 13-percent increase in arrest

rates for violent crime committed by 14- to 18-year-olds in Idaho after the State implemented its transfer law in 1981. In comparison, between 1982 and 1986, the arrest rates for similarly aged juveniles decreased in the neighboring States of Montana and Wyoming (which retained transfer procedures similar to those Idaho had before 1981). In a similar time-series analysis comparing juvenile arrest rates between 1974 and 1984 in New York and Philadelphia, Singer and McDowall (1988) found that a 1978 New York State law that automatically sent violent juvenile offenders to criminal court (by lowering the ages for criminal court jurisdiction to 13 for murder and 14 for assault, arson, burglary, kidnapping, and rape) had no deterrent effect on violent juvenile crime. The law was applied widely and publicized extensively in the media.² Although limited, evidence available at the time suggested that juvenile offenders in New York were aware of the law (Singer and McDowall, 1988).

On the other hand, the results of a multi-state analysis for the years 1978 to 1993 suggest that adult sanctions, under certain conditions, may have moderate deterrent effects on juvenile crime (Levitt, 1998). Controlling for demographic and economic variables, the researchers compared the juvenile arrest rates for violent crime across States as a function of each State's minimum age for criminal court jurisdiction to the relative punitiveness of its juvenile and criminal justice systems. Punitiveness is defined as the ratio of the number of incarcerated offenders to the number of total offenders in each State system for different age groups. Researchers found relative decreases in youth crime as youth reached the age of criminal responsibility, but only in those States in which juvenile and criminal justice systems differed significantly in severity of punishment. This suggests that significantly more punitive punishments meted out by criminal courts may deter youth from offending once they reach the age of criminal responsibility.

Two multistate studies reached a different conclusion. Examining data on all felony arrests in the State of Florida between 1989 and 2002, including each offender's age and arrest history, Lee and McCrary (2005) evaluated the effect of turning age 18 on criminal offending. This study found that young people did not lower their offending rates upon turning age 18, suggesting that the prospect of adult sanctions was not a deterrent.

Steiner and Wright (2006) examined the effects of prosecutorial transfer laws in the 14 States that had such laws as of 2003.³ These States enacted their laws at different times (between 1975 and 2000), thereby providing data over different historical time periods. Using time-series analyses, researchers compared monthly juvenile arrest rates for violent index crime (homicide, rape, robbery, and aggravated assault) for each month in the 5 years before and the 5 years after each State enacted its prosecutorial transfer law. In addition, 2 States were selected as controls for each of the 14 target States. The control States resembled the target States in size, location, and juvenile arrest rates, but implemented no transfer law during or near the relevant time period. The study found that transfer laws had no general deterrent effect. Only in Michigan did juvenile crime decrease after the State enacted its prosecutorial transfer law; in the other 13 States, juvenile crime either remained constant or increased after the enactment of the law (see also Risler, Sweatman, and Nackerud, 1998).

A few researchers have interviewed juvenile offenders about the effects of transfer. Before the widespread expansion of transfer laws, Glassner and colleagues (1983) reported the results of interviews with a small number of juvenile offenders in New York, who said they had decided to stop offending once they reached the age at which they knew they could be tried as adults.

Researchers in another small-scale study (Redding and Fuller, 2004) interviewed 37 juvenile offenders who had been charged with murder or armed robbery and automatically tried as adults in Georgia. The study examined their knowledge and perceptions of transfer laws and criminal sanctions. Georgia had undertaken a public awareness campaign to inform juveniles about the State's new automatic transfer law. Nevertheless, juvenile offenders reported being unaware of the law; only 8 of the 37 youth knew that juveniles who committed serious crimes could be tried as adults. Even among those who knew about the law, none expected that it would be enforced against them for the serious crime they had committed. Many thought they would only get light sentences (e.g., a sanction of probation, boot camp, or a several-month stay in a juvenile detention facility) from the juvenile court. These results are consistent with those from a Canadian study (Peterson-Badali,

Ruck, and Koegl, 2001) finding that only 22 of the 53 juvenile offenders interviewed thought that they would receive a serious punishment if caught.

Seventy-five percent of the transferred juveniles interviewed by Redding and Fuller (2004) felt that their experiences in the adult criminal justice system had taught them the serious consequences of committing crimes. As one juvenile explained, "[Being tried as an adult] showed me it's not a game anymore. Before, I thought that since I'm a juvenile I could do just about anything and just get 6 months if I got caught" (Redding and Fuller, 2004:39). Seventy-five percent of the juvenile offenders said that if they had known they could be tried and sentenced as adults, they may not have committed the crime (Redding and Fuller, 2004).

In sum, the limited empirical research on the general deterrent effect of juvenile transfer is somewhat inconsistent and does not permit strong conclusions. The bulk of the evidence suggests that transfer laws, at least as currently implemented and publicized, have little or no general deterrent effect in preventing serious juvenile crime. Substantial further research is needed to examine whether transfer laws have—or, under the appropriate conditions, could have—a general deterrent effect. In particular, it is important to examine the following questions:

- ◆ Are juveniles aware of transfer laws?
- ◆ Do they believe the laws will be enforced against them?
- ◆ Does this awareness and belief deter criminal behavior?

In conjunction with such research, there is a need to implement and evaluate well-targeted public awareness campaigns on the State and local levels designed to apprise juveniles of the legal consequences of committing serious crimes (Redding and Fuller, 2004). Public awareness campaigns have proved effective in reducing adult crime in some contexts (e.g., Elder et al., 2004; Johnson and Bowers, 2003).

Potential Deterrence

It is possible that transfer laws resulting in significant adult sentences might have general deterrent effects if would-be juvenile offenders were made aware of such laws and if the laws were widely implemented. With respect to adult offenders, studies "plainly suggest that

when potential offenders are made aware of substantial risks of being punished, many of them are induced to desist" (Von Hirsch et al., 1999:47). However, research with adults suggests that the severity of punishment appears to have little or no effect on crime rates (Pratt and Cullen, 2005; Robinson and Darley, 2004), perhaps because potential offenders typically have much more information about the likelihood of being arrested than they do about likely sentences (Von Hirsch et al., 1999). Studies show that the general public knows little about potential sentences and tends to underestimate their severity (Robinson and Darley, 2004; Von Hirsch et al., 1999). In addition, offenders tend to discount punishment as an uncertain future event, whereas the short-term rewards of crime are more powerful pull factors (Wilson and Herrnstein, 1985). "[F]uture contingent costs may be discounted less, if their magnitude is sufficiently great *and* their likelihood of being incurred increases. Severe sentencing policies thus might possibly have an impact if coupled with much higher probabilities of conviction" (Von Hirsch et al., 1999:48).

Although studies of juvenile offenders are few in number, they suggest that arrests and sanctions have deterrent effects. For example, Mocan and Rees (2005) examined self-reported delinquency data (for drug selling, assault, robbery, burglary, and theft) for 14,942 adolescents from the 1995 National Longitudinal Study of Adolescent Health. They compared county-level arrests (of adults and juveniles) for violent crime reported in 1993 with county-level juvenile crime rates in 1995, thus providing a measure of the deterrent effects of arrest rates on subsequent juvenile crime rates. They found that the arrest rate had a general deterrent effect on the crimes of drug dealing and assault; for each additional arrest, there was a 3.6-percent decrease in the likelihood that juveniles would sell drugs and a 6.6-percent decrease in the likelihood that they would commit an assault. According to Mocan and Rees (2005:344), "this pattern of results runs counter to claims that at-risk young Americans are so present-oriented that they do not respond to incentives and sanctions."

Similarly, Smith and Gartin (1989) found that being arrested reduced recidivism among youthful male offenders, particularly first-time offenders. A 2003 study of serious juvenile offenders incarcerated in a maximum security facility found a negative

relationship between their sentence severity and self-reported intent to reoffend and a positive correlation between their self-reported intent and the number of offenses they actually committed after their release. Researchers found evidence that these offenders made “some explicit calculations about the advantages and disadvantages of committing future crimes” (Corrado et al., 2003:197).

Criminal sanctions will only have deterrent effects if potential offenders: (1) believe there is a significant likelihood of getting caught, (2) believe there is a significant likelihood of receiving a substantial sentence, and (3) consider the risk of the penalty when deciding whether to offend (see Von Hirsch et al., 1999). It is useful to consider, however, each of the necessary preconditions for successful deterrence in the context of juvenile offending. A law can act as a deterrent only if the targeted population is aware that the law exists and believes that it will be enforced.

Redding and Fuller (2004) found that few violent juvenile offenders knew that they could be tried as adults, none thought it would happen to them, and few thought they would face serious punishment. Moreover, few reported thinking about the possibility of getting caught when they committed the offense. Indeed, it seems that offenders generally underestimate the risk of arrest (Robinson and Darley, 2004). Juveniles’ psychosocial immaturity, including their tendency to focus on the short-term benefits of their choices (Beckman, 2004; Scott, Reppucci, and Woolard, 1995; Steinberg and Cauffman, 1996), may reduce the likelihood that they will perceive the substantial risk of being arrested or punished as an adult (Schneider and Ervin, 1990).

Specific Deterrence

To date, six published studies have been conducted to examine the specific deterrence effects of transfer. These large-scale studies indicate that youth tried in adult criminal court generally have greater recidivism rates after release than those tried in juvenile court. It is unclear, however, whether transfer affects recidivism for nonviolent property or drug offenders.

Fagan (1996) examined the recidivism rates of 800 randomly selected 15- and 16-year-old juvenile offenders charged with robbery or burglary during 1981–82. Controlling for eight variables (race, gender, age at first offense, prior offenses,

offense severity, case length, sentence length, and court), as well as for time residing in the community, researchers compared offenders charged in New Jersey’s juvenile courts with offenders charged in New York’s criminal courts under that State’s automatic transfer law (under which 16 is the age of full criminal responsibility). Both areas shared similar demographic, socioeconomic, and crime-indicator characteristics. Thus, the study provides a comparison of recidivism rates as a function of whether cases were processed in the juvenile or criminal court, without the sample selection problems inherent in studies comparing cases within a single jurisdiction where prosecutors or judges decide which cases to transfer.

A higher percentage of youth who were tried for robbery in criminal court were rearrested (91 percent) than those tried for robbery in juvenile court (73 percent). Of youth who were rearrested, those tried in the criminal court also were rearrested sooner and more often. However, there were no differences in recidivism rates (in terms of the percent rearrested, rearrest rate, and time to rearrest) for burglary offenders tried in the criminal court versus those tried in juvenile court. The findings on robbery offenders suggest that criminal court processing alone, irrespective of whether youth are incarcerated in juvenile or adult facilities, produces a higher recidivism rate. This finding is emphasized by the parallel finding that even those youth sentenced to probation in criminal court had a substantially higher recidivism rate than those incarcerated in the juvenile justice system (see also Mason and Chang, 2001).

Juveniles with the highest recidivism rates were those who were incarcerated after being tried in the criminal court. The study indicated that, overall, youth adjudicated in juvenile court had a 29-percent lower risk of rearrest than those tried in criminal court. Drug offenses were the one exception. Criminal court adjudication substantially reduced the risk of rearrest in those cases.

Bishop and colleagues (1996) compared the 1-year recidivism rate of 2,738 juvenile offenders transferred to criminal court in Florida in 1987 with a matched sample of 2,738 juvenile offenders who had not been transferred. Florida relies almost exclusively on prosecutorial transfer. These transfer decisions are largely offense-driven and made soon after arrest, before the

prosecutor has much information about the youth’s background. Therefore, it is less likely that the youth retained in the juvenile justice system had lower recidivism rates due to variables other than those controlled for in the analysis, such as the youth’s mental health status or amenability to treatment (Bishop and Frazier, 2000). The study controlled for seven variables (race, gender, age, number of referrals to juvenile court, most serious prior offense, number of charges, and most serious charge). Researchers found that the rearrest rates were higher (0.54 versus 0.32 offenses per person, per year of time living in the community) among transferred youth. Also, the average time to reoffending was shorter (135 versus 227 days) for the transferred youth across seven offense types (including violent felonies, property offenses, and minor misdemeanors).

Following the same Florida offenders 7 years after the initial study by Bishop et al. (1996), Winner et al. (1997) compared transferred versus nontransferred offenders matched for gender, age, race, and offending history. They found that the rearrest rates were higher and the time to reoffending shorter (adjusting for time residing in the community following release from incarceration) among those who had been transferred to criminal court. The exception was transferred property felons who had lower recidivism rates than similar offenders who remained under juvenile court jurisdiction.

Myers (2001, 2003) examined the 18-month recidivism rates of 494 juvenile offenders charged with robbery or aggravated assault in Pennsylvania in 1994, using a statistical model to control for the possibility that the transferred juveniles were the more serious offenders in the first place (and therefore more likely to recidivate) or those less amenable to treatment in the juvenile system. The study controlled for age at referral, race, geographical location, school and family status, various indices of prior offending history, use of a weapon, and various case-processing variables. Youth who were judicially transferred to criminal court were twice as likely to be rearrested, and were rearrested more quickly (and often for more serious offenses) upon their return to the community, than youth who were retained in the juvenile justice system during the same period.

Finally, two recent large-scale studies funded by OJJDP are particularly informative:

Recent OJJDP-Funded Studies

Lanza-Kaduce and colleagues (2005) conducted a second Florida study that included 950 young adult offenders.⁴ Half of the offenders had been prosecutorially transferred to the criminal court in 1995 or 1996 for offenses they had committed as juveniles; the other half had remained in the juvenile system. This resulted in a sample of 475 matched pairs of transferred and retained cases.

The cases were drawn from six urban and rural judicial circuits in Florida that differed considerably in their rates of transfer. The cases were matched within each judicial circuit (thus controlling for geographical effects in case processing and decisionmaking) along seven relevant demographic, criminal history, and offense variables: age, gender, race, number of previous juvenile referrals, most serious prior offense, offense, and number of charges. In addition, a subset of this group, consisting of 315 best matched pairs, were further matched according to an offense seriousness index created by examining local records to obtain data about 12 other case characteristics: prior juvenile referrals, multiple charges at arrest, multiple incidents involved in the case, charge consolidation, legal problems during case processing, gang involvement, codefendants or accomplices, property loss or damage, victim injury, use of weapons, felony charges, and the presence of mitigating and aggravating factors. The measure of recidivism was the number of offenses committed after youth turned age 18, and data analyses were conducted on the 475 matched pairs, as well as on the subset of 315 best matched pairs.

Transferred Juveniles More Likely To Offend

The Lanza-Kaduce study expands on the earlier Florida studies (i.e., Bishop et al., 1996; Winner et al., 1997). It includes reoffense types and a detailed matching on relevant case and offense characteristics (see Frazier et al., 1999). Its recidivism data draws on information from two different State databases. To reduce a potential lack of comparability in recidivism measures between transfers and juvenile court retainees due to differences in decision-making and recordkeeping between the two systems, it examines offending after age 18. “The focus on adult recidivism . . . captures the persistence of a criminal

career into adulthood—a pivotal policy concern” (Lanza-Kaduce et al., 2005:64). Moreover, the data “include cases transferred in 1995 and 1996, after the ‘get tough’ idea was fully entrenched in the American culture and after prosecutorial transfer had been used in Florida for a long time” (Lanza-Kaduce et al., 2005:65).

Like the earlier Florida studies, this study found that transferred offenders, particularly violent offenders, were significantly more likely to reoffend.

- ◆ Overall, 49 percent of the transferred offenders reoffended, compared with 35 percent of the retained offenders.
- ◆ For violent offenses, 24 percent of the transferred offenders reoffended, compared with 16 percent of the retained offenders.
- ◆ For drug offenses, 11 percent of the transferred offenders reoffended, compared with 9 percent of the retained offenders.
- ◆ For property offenses, 14 percent of the transferred offenders reoffended, compared with 10 percent of the retained offenders.

The results were virtually identical for the subset of 315 best matched pairs. In addition, researchers conducted paired-comparison analyses in which each matched pair was the unit of analysis. This analysis classified each pair according to whether both offenders reoffended (21 percent of cases), only the transferred offender reoffended (29 percent of cases), only the retained offender reoffended (15 percent of cases), or neither reoffended (36 percent of cases).⁵ Again, the results were virtually identical for the subgroup of best-matched pairs. However, the study failed to replicate the 1997 Florida study finding of lower recidivism rates among transferred property offenders (Winner et al., 1997).

In addition to the recidivism study, the Florida research group conducted detailed interviews with 144 serious male offenders between the ages of 17 and 20, half of whom had been transferred and the other half of whom were retained in the juvenile system (Bishop and Frazier, 2000; Lane et al., 2002). Eighty-three percent had more than one prior arrest, 60 percent began offending before the age of 14, and 47 percent had committed a violent offense as their most serious current offense. Interviews were conducted in four “deep-end” juvenile correctional institutions (i.e., 9–36

month placements in highly secure juvenile correctional facilities designed for high- and medium-risk offenders) and eight adult prisons in Florida (mostly youthful offender facilities designed to house young adults up to age 24), with youth at different stages in serving their sentence. Of the 71 youth who had been transferred to the adult system, 63 also had prior experience in the juvenile system. Fifty-eight percent of the youth rated the deep-end juvenile placements as beneficial, 33 percent rated the adult prison as beneficial, 20 percent rated the less restrictive juvenile dispositions (for example, probation, placement in low-restrictive residential programs) as beneficial, and 12 percent rated adult probation as beneficial.

The youth rated the deep-end juvenile programs the most beneficial largely because these programs provided intensive, long-term job skills training and treatment. In addition, the lengthier period of incarceration gave them more time to consider their futures and the consequences of reoffending, suggesting that the longer sanctions had an impact (Lane et al., 2002). But “[o]ften when adult sanctions were perceived as being beneficial, the benefit was not attributed to anything gained from the disposition. Rather, many youth indicated that they expected to remain crime-free because their experiences in the adult system had been so horrible. Youth who believed the adult sanctions would keep them from committing crimes primarily pointed to three reasons: pain and denigration, time spent in prison, and fear of future consequences, especially tougher sentences. Paradoxically, most of those who said the adult experience was negative also mentioned pain, denigration, and/or anger, but they gave these as reasons why the adult dispositions had made matters worse. Others attributed a negative impact to adult sanctions because they ‘learned more crime while there’” (Lane et al., 2002:444). While a substantial minority of the youth said that prison had taught them a lesson—declaring that they would not reoffend because they did not want to endure the pain of imprisonment again—61 percent said that prison had either no impact or a negative impact on their behaviors (Lane et al., 2002:448). Overall, the “findings call into question the practice of [incarcerating juveniles in adult prison and] ‘skipping’ the deep-end juvenile programs when sentencing youth for serious crimes” (p. 452).

In another OJJDP-sponsored study, Fagan and colleagues (2003) extended and largely replicated previous research (Fagan, 1996). This time, they examined the time-at-risk (i.e., residing in the community) recidivism rates for 2,382 15- and 16-year-old juveniles charged in 1992 or 1993 with robbery, burglary, or assault. The 2003 study used a larger sample drawn from more counties in each State as well as more detailed measures of important variables, such as offenders' prior juvenile record. The study compared those charged in selected counties in northern New Jersey, where such cases originate in the juvenile court, with those charged in matched counties in New York, where such cases originate in the criminal court. The New York and New Jersey counties are contiguous, and part of a large metropolitan area that shares common demographic, economic, and social characteristics as well as similar criminogenic influences and crime rate characteristics. Thus, the study design allows for comparison of recidivism rates as a function of whether cases are processed in juvenile court or criminal court, without the sample selection problems inherent in designs that compare cases retained in the juvenile court with those transferred in a single jurisdiction wherein decisionmakers decide which cases to transfer. All cases were followed for a 7-year period until 2000, by which time almost all of the offenders had served their sentences and had spent at least 2 years living in the community. The study statistically controlled for a variety of relevant demographics (age, gender, ethnicity), case and offense characteristics (for example, most serious charge, weapon use, whether detained, case length), criminal history variables (age at first arrest, number of prior arrests, previous incarcerations), and sentence length. It used statistical techniques that analyzed recidivism in different ways (first rearrest, severity of rearrest charges, time until rearrest, likelihood of subsequent incarceration).

Greater Likelihood of Rearrest

The study found a 100-percent greater likelihood of rearrest for a violent offense and a 47-percent greater likelihood of rearrest for a property offense, among the New York juveniles whose cases were processed in the criminal court than for the New Jersey juveniles. They also had a greater number of rearrests for such offenses and a 26-percent greater chance

of being reincarcerated. The pattern of findings was even stronger for first-time offenders. For drug offense rearrests, however, the results were reversed, with the juveniles tried in juvenile court having a 31-percent greater likelihood of rearrest for drug offenses. Finally, the study found that the differences in recidivism were unrelated to periods of incarceration in adult versus juvenile facilities. Thus, incarceration in adult prisons "does not seem to be responsible for the criminogenic effect of adult court processing" (Fagan et al., 2003:66).

These findings fully replicate those of the earlier Fagan (1996) study, except with respect to property offenses. The 1996 study found no difference in recidivism rates for burglary, whereas the 2003 study found that criminal court processing increased the recidivism rates for property offenses.

Transfer Found To Increase Recidivism

In sum, to date, six large-scale studies have been conducted on the specific deterrent effects of transfer. These studies used large sample sizes (between 494 and 5,476 participants), different methodologies (natural experiment across two jurisdictions, matched groups within the same jurisdictions, or statistical controls), multiple measures of recidivism, and were conducted in five jurisdictions (Florida, New Jersey, New York, Minnesota, Pennsylvania) having different types of transfer laws (automatic, prosecutorial, or judicial). The strong consistency in results across the studies is all the more compelling given that they used different samples and methodologies, thereby providing a degree of convergent validity for the findings. All of the studies found higher recidivism rates among offenders who had been transferred to criminal court, compared with those who were retained in the juvenile system. This held true even for offenders who only received a sentence of probation from the criminal court. Thus, the extant research provides sound evidence that transferring juvenile offenders to the criminal court does not engender community protection by reducing recidivism. On the contrary, transfer substantially increases recidivism. A recent review of the extant research on transfer conducted by the Centers for Disease Control arrived at the same conclusion (McGowan et al., 2007). Only two apparent exceptions challenge this

pattern of findings. For nonviolent property offenders, the effects of transfer remain unclear, with one study finding that transfer had no effect on recidivism (Fagan, 1996) and another finding that transfer decreased recidivism (Winner et al., 1997), but with two studies (conducted in the same jurisdiction as the first two studies) finding that it increased recidivism (Fagan et al., 2003; Lanza-Kaduce et al., 2005). In addition, with respect to drug offenders, two studies (Fagan, 1996; Fagan et al., 2003) found decreased recidivism rates among those tried in the criminal court.

Challenges for Future Research

Important challenges for future research are to determine: (1) whether transfer differentially impacts recidivism as a function of offense type (violent offenses, property offenses, drug offenses), and (2) what features of the criminal justice system increase recidivism, an important question for policymaking. These challenges raise such questions as the following:

- ◆ Can changes be made in the criminal court processing and adult system sanctions of juveniles to make them less detrimental? What are they?
- ◆ In what ways should the juvenile justice system guard against those features of the criminal justice system that serve to increase recidivism?
- ◆ How can States' blended sentencing systems, which allow the juvenile courts to impose adult sentences in certain cases (see Redding and Howell, 2000), incorporate the best features of the juvenile and criminal justice systems, while avoiding the negative effects of criminal justice system processing?

Why Do Juveniles Tried as Adults Have Higher Recidivism Rates?

Experts (see Bazemore and Umbreit, 1995; Myers, 2003; Thomas and Bishop, 1984; Winner et al., 1997) have identified several possible explanations for the higher recidivism rates of violent juvenile offenders tried in criminal court as compared to those adjudicated in juvenile court:

- ◆ The stigmatization and other negative effects of labeling juveniles as convicted felons.
- ◆ The sense of resentment and injustice juveniles feel about being tried and punished as adults.
- ◆ The learning of criminal mores and behavior while incarcerated with adult offenders.
- ◆ The decreased focus on rehabilitation and family support in the adult system.

A felony conviction also results in the loss of a number of civil rights and privileges (see Redding, 2003), further reducing the opportunities for employment and community reintegration.

Findings from several studies (Fagan, 1996; Fagan, Kupchik and Liberman, 2003) show that criminal court processing alone, even without the imposition of any criminal sentence, increases recidivism. Juveniles' sense of injustice at criminal court processing may cause them to react defiantly by reoffending, and it may further harden an emergent criminal self-concept (see Sherman, 1993; Thomas and Bishop, 1984; Winner et al., 1997). "The concept of fairness appears to be an important variable in an individual's perception of sentence severity and its subsequent relationship to future recidivism" (Corrado et al., 2003:183). Furthermore, it appears that many adolescents with conduct disorders already have a sense of having been dealt an unfair hand by authority figures (Chamberlain, 1998). Bishop and Frazier (2000) interviewed 95 serious and chronic juvenile offenders in Florida, roughly half of whom were transferred to the criminal court and were incarcerated in adult correctional facilities, and half of whom had been adjudicated in the juvenile court and were incarcerated in maximum-security juvenile facilities. According to the authors, many of the juveniles felt a strong sense of injustice about being tried as adults:

Many experience the court process not so much as a condemnation of their behavior as a condemnation of them. Unlike the juvenile court, the criminal court failed to communicate that young offenders retain some fundamental worth. What the youths generally heard was that they were being punished not only because their behavior was bad but also because they were personifications of their behavior. Far from viewing the criminal court and its officers as legitimate, the juvenile offenders we interviewed saw them more often as duplicitous and manipulative, malevolent in intent, and indifferent to their needs. It was common for them to experience a sense of injustice and, then, to condemn the condemners (Bishop and Frazier, 2000:263).

These findings are consistent with those of Redding and Fuller (2004), who found that juveniles tried as adults clearly felt that transfer laws were unfair. Many felt that their juvenile status and immaturity dictated that they should be tried as juveniles, despite the serious crimes they had committed. They also did not understand why the legal system was trying them as adults, and they saw themselves as being treated differently from other similarly situated juveniles. Both perceptions contributed to their sense of unfairness, perhaps leading to greater cynicism about the legal system as a result of being incarcerated (see Piquero et al., 2005).

Some studies indicate that prison incarceration "does not seem to be responsible for the criminogenic effect of adult court processing" (Fagan, Kupchik, and Liberman, 2003:66). One reason for the increased recidivism of these offenders, however, might be the reduced opportunities for meaningful rehabilitation in adult prison. Forst, Fagan, and Vivona's 1989 study, for example, found that youth in juvenile facilities gave higher marks than youth in adult facilities to the available treatment and case management services. Youth in juvenile detention described these services as helpful in providing counseling, enabling them to obtain needed services, encouraging participation in programs, teaching the consequences of rule breaking, and deepening their understanding of their problems. Similarly, in a recent study comparing the experiences of youths in adult versus juvenile correctional facilities in a large Northeastern State, all

of whom had been tried in adult criminal court, Kupchik (2007) found that youths in juvenile facilities reported far more positive, mentoring-style staff-inmate interactions than did the youths in adult facilities. However, youths in adult facilities reported having greater access to counseling and educational services, perhaps because of the larger size of the adult facilities.

Bishop and Frazier's recent Florida study (2000) vividly portrays the differences between juvenile and adult correctional facilities. They found that the juvenile correctional institutions were treatment-oriented and adhered to therapeutic models of rehabilitation (Bishop and Frazier, 2000:255). "Compared to the criminal justice system, the juvenile system seems to be more reintegrative in practice and effect" (Bishop and Frazier, 2000:265). Youths in juvenile facilities had positive feelings about the staff, who they felt cared about them and taught them appropriate behaviors. Most of the juveniles incarcerated in juvenile facilities felt confident that they would not reoffend, often crediting the staff with helping them make this positive change. Conversely, only a third of the juveniles in adult prisons said that they would not reoffend.

Juveniles in adult prison reported that much of their time was spent learning criminal behavior from the inmates and proving how tough they were. They also were much more fearful of being victimized than they had been when incarcerated in juvenile facilities, and more than 30 percent had been assaulted or had witnessed assaults by prison staff. Indeed, Beyer (1997) paints a bleak picture of life in adult prison for juveniles, who are at greater risk for suicide, as well as for physical and sexual abuse from older inmates. As compared with those in juvenile facilities, juveniles incarcerated in adult prison are eight times more likely to commit suicide, five times more likely to be sexually assaulted, and almost twice as likely to be attacked with a weapon by inmates or beaten by staff (Beyer, 1997). Because juveniles in adult prisons are exposed to a criminal culture in which inmates commit crimes against each other, these institutions may socialize delinquent juveniles into true career criminals. In an older study about life in prison (Eisikovits and Baizerman, 1983), violent juvenile offenders reported that their daily survival required finding ways to fit into the inmate culture, dealing with difficult

and authoritarian relationships with adult inmates, and adjusting to the institution by accepting violence as a part of daily life and, thus, becoming even more violent.

Finally, Redding and Fuller (2004) found that juveniles whose jail or prison experiences were worse than they had expected, and those who reported witnessing or experiencing violence while incarcerated, were less likely to say that their incarceration would deter them from committing crimes in the future. This finding raises the possibility that incarceration in adult facilities may have brutalizing effects on juveniles, which may partly account for their increased recidivism. (The term "brutalization effect" describes the finding that homicide rates in a State often increase after an execution (Bowers, 1998), perhaps because executions model and communicate that violence is an acceptable and psychologically cathartic alternative.) Likewise, juveniles' brutal experiences in adult prison may teach the wrong lessons about the acceptability and psychological benefits of criminal conduct, particularly violent crime, while also contributing to their sense of being treated unfairly, both of which may increase recidivism. Further research is needed on this issue.

Implications for Policymakers and Practitioners

The research findings on juvenile transfer have the potential to impact both policy and practice. In a recent study, Hensl and Redding (2005) found that juvenile court judges who were knowledgeable about the ineffectiveness of transfer in reducing recidivism were somewhat less likely to transfer juvenile offenders to the criminal court. This finding suggests that educating judges, prosecutors, court personnel, and legislators about the research on transfer may reduce the number of cases transferred to criminal court or the number of transferred cases that result in criminal sanctions. The Miami-Dade County Public Defender's Office developed the Juvenile Sentencing Advocacy Project, which produced a 350-percent increase in the number of transferred cases receiving a juvenile rather than an adult sanction from criminal court judges (Mason, 2000). In Florida, which has had some of the most aggressive transfer policies in the Nation, the number of juveniles prosecuted in the criminal court decreased by two-thirds between 1996 and 2003 (whereas

the total number of juvenile court cases decreased by only 9 percent), apparently due, in part, to research disseminated showing the counter-deterrent effects of transfer (Bishop, 2004). Moreover, in the last several years, some States have reduced the scope of transfer laws to make fewer juvenile offenders eligible for prosecutorial or judicial transfer (Bishop, 2004; Griffin, 2003).

Yet in Florida, for example, the data show that the transferred cases were generally no more serious, and sometimes were less serious, than the cases retained in the juvenile justice system (Lanza-Kaduce, Frazier, and Bishop, 1999). Forty-three percent of the 1,100 juveniles incarcerated in adult prisons for offenses committed when they were 15 years old or younger had not previously been committed to a juvenile justice program (Annino, 2000). Thus, the juvenile justice system never had an opportunity to rehabilitate these youth before they were transferred to the adult system, despite the fact that serious juvenile offenders in Florida report that intensive juvenile placements are relatively more beneficial than either adult prison or mild juvenile sanctions (Lane et al., 2002).

But Florida is not unique in transferring first-time offenders to the criminal court. Transfer laws, particularly automatic transfer laws, often target first-time offenders, even though they do not pose the greatest recidivism risk or threat to community safety. The frequency of offending, instead of the seriousness of the first offense, best predicts overall recidivism and the risk for committing a subsequent violent offense (see Bishop, 2004; Piquero, 2000; Redding, 1997). To best achieve reductions in recidivism, the overall number of juvenile offenders transferred to the criminal justice system should be minimized. Moreover, those who are transferred should be the chronic repeat offenders—rather than first-time offenders—particularly in cases where the first-time offense is a violent offense.

Conclusion

Most practitioners would agree, consistent with the extant research, that it is important that the juvenile courts' response to juvenile offenders be calibrated to have sufficient effectiveness as a deterrent while not being overly punitive. The practice of transferring juveniles for trial and sentencing in adult criminal court

has, however, produced the unintended effect of increasing recidivism, particularly in violent offenders, and thereby of promoting life-course criminality (Scott, 2000). But, if it was indeed true that transfer laws had a deterrent effect on juvenile crime, then some of these offenders would not have offended in the first place. Although the limited extant research falls far short of providing definitive conclusions, the bulk of the empirical evidence suggests that transfer laws, as currently implemented, probably have little general deterrent effect on would-be juvenile offenders.

Notes

1. Seventeen States currently have "blended sentencing" laws (see Redding and Howell, 2000) that permit the criminal court, after its adjudication of the youthful offender, to impose juvenile sentences in certain cases. Fifteen States permit the juvenile court to impose limited criminal sanctions (Snyder and Sickmund, 2006).
2. In addition, brochures were sent to public schools announcing the law and the legal risks juvenile offenders faced, and juvenile court judges warned youth about the risks of committing violent offenses (S. Singer, 2004, personal communication).
3. These States included Arizona, Arkansas, California, Colorado, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Vermont, Virginia, and Wyoming.
4. This is the most recent in a series of studies conducted by the Florida research group. These studies, which have been funded by the Florida Department of Justice and OJJDP, are part of an ongoing research program, beginning in the mid-1980s, studying the effects of transfer in Florida. For an overview of the Florida research program, see Frazier et al., 1999.
5. The total does not equal 100 because of rounding.

References

- Annino, P.G. 2000. Children in adult prisons: A call for a moratorium. *Florida State University Law Review* 28:471-90.
- Bazemore, G., and Umbriet, M. 1995. Rethinking the sanctioning function in juvenile court: Retributive or restorative responses to youth crime. *Crime and Delinquency* 41:296-316.

- Beckman, M. 2004. Crime, culpability, and the adolescent brain. *Science* 305:596–99.
- Beyer, M. 1997. Experts for juveniles at risk of adult sentences. In *More than meets the eye: Rethinking assessment, competency and sentencing for a harsher era of juvenile justice*, edited by P. Puritz, A. Capozello, and W. Shang, 1–22. Washington, DC: American Bar Association, Juvenile Justice Center.
- Bishop, D.M. 2000. Juvenile offenders in the adult criminal justice system. In *Crime and justice: A review of research*, vol. 27, edited by M. Tonry, 81–165. Chicago, IL: University of Chicago Press.
- Bishop, D.M. 2004. Injustice and irrationality in contemporary youth policy. *Criminology and Public Policy* 3:633–44.
- Bishop, D.M., and Frazier, C.E. 2000. Consequences of transfer. In *The changing borders of juvenile justice: Transfer of adolescents to the criminal court*, edited by J. Fagan and F.E. Zimring, 227–76. Chicago, IL: University of Chicago Press.
- Bishop, D.M., Frazier, C.E., Lanza-Kaduce, L., and Winner, L. 1996. The transfer of juveniles to criminal court: Does it make a difference? *Crime and Delinquency* 42:171–91.
- Bowers, W.C. 1998. Deterrence, brutalization, and the death penalty: Another examination of Oklahoma's return to capital punishment. *Criminology* 36:711–33.
- Chamberlain, P. 1998. *Family connections: A treatment foster care model for adolescents with delinquency*. Eugene, OR: Northwest Media.
- Corrado, R.R., Cohen, I.M., Glackman, W., and Odgers, C. 2003. Serious and violent young offenders' decisions to recidivate: An assessment of five sentencing models. *Crime and Delinquency* 49:179–200.
- Eisikovits, Z., and Baizerman, M. 1983. "Doin' time": Violent youth in a juvenile facility and in an adult prison. *Journal of Offender Counseling, Services, and Rehabilitation* 6(3):5–20.
- Elder, R.W., Shults, R.A., Sleet, D.A., Nicholas, J.L., Thompson, R.S., and Rajab, W. 2004. Effectiveness of mass media campaigns for reducing drinking and driving and alcohol-involved crashes: A systemic review. *American Journal of Preventive Medicine* 27(1):57–65.
- Fagan, J.A. 1996. The comparative advantage of juvenile versus criminal court sanctions on recidivism among adolescent felony offenders. *Law and Policy* 18:77–113.
- Fagan, J., Kupchik, A., and Liberman, A. 2003. *Be careful what you wish for: The comparative impacts of juvenile versus criminal court sanctions on recidivism among adolescent felony offenders*. Public Law Research Paper No. 03–61. New York: Columbia University Law School.
- Fagan, J., and Zimring, F.E., eds. 2000. *The changing borders of juvenile justice: Transfer of adolescents to the criminal court*. Chicago, IL: University of Chicago Press.
- Forst, M., Fagan, J., and Vivona, S.T. 1989. Youth in prisons and training schools: Perceptions and consequences of the treatment-custody dichotomy. *Juvenile and Family Court Journal* 40:1–14.
- Frazier, C.E., Bishop, D.M., Lanza-Kaduce, L., and Marvasti, A. 1999. Juveniles in criminal court: Past and current research from Florida. *Quinnipiac Law Review* 18:573–96.
- Fritsch, E.J., Caeti, T.J., and Hemmens, C. 1996. Spare the needle but not the punishment: The incarceration of waived youth in adult prisons. *Crime and Delinquency* 42:593–609.
- Glassner, B., Ksander, M., Berg, B., and Johnson, B.D. 1983. A note on the deterrent effect of juvenile versus adult jurisdiction. *Social Problems* 31:219–21.
- Griffin, P. 2003. *Trying and sentencing juveniles as adults: An analysis of state transfer and blended sentencing laws*. Pittsburgh, PA: National Center for Juvenile Justice.
- Hensl, K.B., and Redding, R.E. 2005 (March). *The relationship among juvenile court judges' personal characteristics and attitudes, juvenile offender characteristics, and judicial transfer decisions*. Paper presented at the American Psychology-Law Society annual conference. La Jolla, CA.
- Jensen, E.L., and Metsger, L.K. 1994. A test of the deterrent effect of legislative waiver on violent juvenile crime. *Crime and Delinquency* 40:96–104.
- Johnson, S.D., and Bowers, K.J. 2003. Opportunity is in the eye of the beholder: The role of publicity in crime prevention. *Criminology and Public Policy* 2:497–524.
- Kupchik, A. 2007. The correctional experiences of youth in adult and juvenile prisons. *Justice Quarterly* 24:247–70.
- Kupchik, A., Fagan, J., and Liberman, A. 2003. Punishment, proportionality, and jurisdictional transfer of adolescent offenders: A test of the leniency gap hypothesis. *Stanford Law and Policy Review* 14:57–83.
- Lane, J., Lanza-Kaduce, L., Frazier, C.E., and Bishop, D.M. 2002. Adult versus juvenile sanctions: Voices of incarcerated youths. *Crime and Delinquency* 48:431–55.
- Lanza-Kaduce, L., Frazier, C.E., and Bishop, D.M. 1999. Juvenile transfers in Florida: The worst of the worst? *University of Florida Journal of Law and Public Policy* 10:277–312.
- Lanza-Kaduce, L., Lane, J., Bishop, D.M., and Frazier, C.E. 2005. Juvenile offenders and adult felony recidivism: The impact of transfer. *Journal of Crime and Justice* 28:59–77.
- Lee, D.S., and McCrary, J. 2005. *Crime, punishment, and myopia*. Working Paper 11491. Cambridge, MA: National Bureau of Economic Research.
- Levitt, S.D. 1998. Juvenile crime and punishment. *Journal of Political Economy* 106:1156–85.
- Mason, C.A. 2000. *Juvenile sentencing advocacy project: Evaluation report*. Miami, FL: Miami-Dade County Public Defender's Office.
- Mason, C.A., and Chang, S. 2001. *Rearrest rates among youth incarcerated in adult court*. Miami, FL: Miami-Dade County Public Defender's Office.
- McGowan, A., Hahn, R., Liberman, A., Crosby, A., Fullilove, M., Johnson, R., Moscicki, E., Price, L., Snyder, S., Tuma, F., Lowry, J., Briss, P., Cory, S., and Stone, G. 2007. Effects on violence of laws and policies facilitating the transfer of juveniles from the juvenile justice system to the Adult System. *American Journal of Preventive Medicine* 32: S7–S28.
- Mocan, H.N., and Rees, D.I. 2005. Economic conditions, deterrence, and juvenile crime: Evidence from micro data. *American Law and Economics Review* 7:319–49.
- Myers, D.L. 2001. *Excluding violent youths from juvenile court: The effectiveness of legislative waiver*. New York: LFB Scholarly.

- Myers, D.L. 2003. The recidivism of violent youths in juvenile and adult court: A consideration of selection bias. *Youth Violence and Juvenile Justice* 1:79–101.
- Myers, D.L. 2005. *Boys among men: Trying and sentencing juveniles as adults*. Westport, CT: Praeger.
- Peterson-Badali, M., Ruck, M.D., and Koegl, C.J. 2001. Youth court dispositions: Perceptions of Canadian juvenile offenders. *International Journal of Offender Therapy and Comparative Criminology* 45:593–605.
- Piquero, A.R. 2000. Assessing the relationships between gender, chronicity, seriousness, and offense skewness in criminal offending. *Journal of Criminal Justice* 28:103–16.
- Piquero, A.R., Fagan, J., Mulvey, E.P., Steinberg, L., and Odgers, C. 2005. Developmental trajectories of legal socialization among serious adolescent offenders. *Journal of Criminal Law and Criminology* 96:267–98.
- Pratt, T.C., and Cullen, F.T. 2002. Assessing macro-level predictors and theories of crime: A meta-analysis. In *crime and justice: A review of research*, vol. 32, edited by M. Tonry, 373–450. Chicago, IL: University of Chicago Press.
- Redding, R.E. 1997. Juveniles transferred to criminal court: Legal reform proposals based on social science research. *Utah Law Review* 3:709–97.
- Redding, R.E. 2003. The effects of adjudicating and sentencing juveniles as adults: research and policy implications. *Youth Violence and Juvenile Justice* 1:128–55.
- Redding, R.E. 2005. Adult punishment for juvenile offenders: Does it reduce crime? In *Handbook on Children, Culture and Violence*, edited by Nancy Dowd, Dorothy Singer, and Robin Fretwell Wilson, 375–95. Thousand Oaks, CA: Sage Publications, Inc.
- Redding, R.E., and Fuller, E.J. 2004 (summer). What do juvenile offenders know about being tried as adults?: Implications for deterrence. *Juvenile and Family Court Journal* 35–45.
- Redding, R.E., and Howell, J.C. 2000. Blended sentencing in American juvenile courts. In *The changing borders of juvenile justice: Transfer of adolescents to the criminal court*, edited by J. Fagan and F.E. Zimring, 145–80. Chicago, IL: University of Chicago Press.
- Redding, R.E., and Mrozowski, B.S. 2005. Adjudicatory and dispositional decision-making in juvenile justice. In *Juvenile delinquency: Prevention, assessment, and intervention*, edited by K. Heilbrun, N. Goldstein, and R. Redding, 232–56. New York: Oxford University Press.
- Risler, E.A., Sweatman, T., and Nackerud, L. 1998. Evaluating the Georgia legislative waiver's effectiveness in deterring juvenile crime. *Research on Social Work Practice* 8:657–67.
- Robinson, P.H., and Darley, J.M. 2004. Does criminal law deter? A behavioral science investigation. *Oxford Journal of Legal Studies* 24(2):173–205.
- Sanborn, J.B. 2003. Hard choices or obvious ones: Developing policy for excluding youth from juvenile court. *Youth Violence and Juvenile Justice* 1:198–214.
- Schneider, A.L., and Ervin, L. 1990. Specific deterrence, rational choice, and decision heuristics: Applications in juvenile justice. *Social Science Quarterly* 71:585–601.
- Scott, E.S. 2000. The legal construction of adolescence. *Hofstra Law Review* 29:547–98.
- Scott, E.S., Reppucci, N.D., and Woolard, J.L. 1995. Evaluating adolescent decision making in legal contexts. *Law and Human Behavior* 19:221–44.
- Sherman, L.W. 1993. Defiance, deterrence, and irrelevance: A theory of the criminal sanction. *Journal of Research in Crime and Delinquency* 30:445–73.
- Singer, S.I., and McDowall, D. 1988. Criminalizing delinquency: The deterrent effects of the New York juvenile offender law. *Law and Society Review* 22:521–35.
- Smith, D.A., and Gartin, P.R. 1989. Specifying specific deterrence: The influence of arrest on future criminal activity. *American Sociological Review* 54:94–105.
- Snyder, H.N., and Sickmund, M. 2006. *Juvenile offenders and victims: 2006 national report*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.
- Steinberg, L., and Cauffman, E. 1996. Maturity of judgment in adolescence: Psychosocial factors in adolescent decisionmaking. *Law and Human Behavior* 20:249–72.
- Steiner, B., and Hemmens, C. 2003 (spring). Juvenile waiver 2003: Where are we now? *Juvenile and Family Court Journal* 54(2):1–24.
- Steiner, B., and Wright, E. 2006. Assessing the relative effects of state direct file waiver laws on violent juvenile crime: Deterrence or irrelevance? *Journal of Criminal Law and Criminology* 96:1451–77.
- Thomas, C.W., and Bishop, D.M. 1984. The impact of legal sanctions on delinquency: A longitudinal comparison of labeling and deterrence theories. *Journal of Criminal Law and Criminology* 75:1222–45.
- Virginia Department of Criminal Justice Services. 1996. *Juvenile murder in Virginia: A study of arrests and convictions*. Richmond, VA: Virginia Department of Criminal Justice Services.
- Von Hirsch, A., Bottoms, A.E., Burney, E., and Wikstrom, P.O. 1999. *Criminal deterrence and sentence severity: An analysis of recent research*. Oxford, England: Hart.
- Wilson, J.Q., and Herrnstein, R.J. 1985. *Crime and human nature*. New York: Simon and Schuster.
- Winner, L., Lanza-Kaduce, L., Bishop, D.M., and Frazier, C.E. 1997. The transfer of juveniles to criminal court: Reexamining recidivism over the long term. *Crime and Delinquency* 43:548–63.

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A DEVELOPMENTAL FRAMEWORK FOR JUVENILE CASES

ROPER	DEVELOPMENT	STATEMENT	TRIAL	DISPOSITION	
•Behavioral immaturity mirrors anatomical immaturity of brain •Rely on amygdala, primitive emotion center of brain when adults would process similar information through frontal cortex •Frontal lobe --responsible for impulse control, decision-making, judgment-- develops slowly until early 20's •Prone to risk-taking; it is statistically aberrant to refrain from risk-taking in adolescence • More susceptible to stress, which further distorts already poor cost-benefit analysis •More vulnerable to peer pressure Importance of approval makes already risk-prone impulsive teen even more so •Normal adolescents cannot be expected to operate with maturity, judgment, risk aversion or impulse control of an adult; teen who has suffered brain trauma, dysfunctional family, violence, or abuse cannot be presumed to operate even at standard levels for adolescents	IMMATURITY			Must be tailored to each youth's unique needs, but could include services (in a facility or the community) such as:	
	• Immature thinking	-Unable to anticipate	Can't look ahead to statement in court	Did not plan: "it happened;" impulsive	Instruction in anticipating consequences
		-Unable to see choices	Only way to go home=say what they want	Carried weapon with no plan to use	Instruction in how to see choices & pros & cons
		-Minimizes risk	Can always take back what I said	Believed it was "just talk" (fantasy)	Instruction in decision-making: think before acting
	• Immature identity	-Not successful	Self-conscious about being "slow"	Sensitive to being picked on	Instruction in planning & following a plan
		-Unstable self-definition	Unsure of self; hurt if called a liar	Does not ask for adult help	Being successful at something & opportunities to show it
		-Wants acceptance	Compliant; does what is asked	Wants to belong even with negative peers	Guided process for defining self; becoming a leader
		-Can't function independently	Naively trusts police; taught to tell truth	Easily influenced by older co-defendants	Instruction in how to think without being influenced
	• Moral development	-Fairness fanatic	Can't believe police would manipulate, lie	Can't walk away, especially when high, even though knows right from wrong	Improved social skills to be acceptable to positive peers
		-Fragile moral reasoning	Does not understand rights	May have been righting a wrong	Preparation for work & deciding to live on modest income
	-Empathy	In shock about offense; shame	Did not realize there would be a victim	Developing job skills; support on the job for good decisions	
				Learning positive ways to deal with unfairness	
				Practicing good moral reasoning under stress	
				Victim empathy training	
				Specialized instruction to:	
				• Improve reading by learning how to decode words	
				• Improve reading by digesting more of the meaning	
				• Improve sequencing: seeing cause & effect	
				• Practicing comprehending instructions	
				• Improve organization; learn how to prioritize	
				• Learn how to concentrate & manage distractibility	
				• Learn how to manage stress	
				Trauma treatment to:	
				• Talk about traumatic events	
				• Hear about others' trauma	
				• Separate past maltreatment from present provocations	
				• Learn not to blame self and stop self-destructive acts	
				• Not assume others are hostile; not act like a victim	
				Learning to anticipate loss of control & how to manage	
				Learning to soothe self when agitated without substances	
				Positive, realistic view of self in future	
				Help with family where there is active substance abuse	
	DISABILITIES				
	• Processing problems (digesting information)	Doesn't comprehend meaning of Miranda	Can't comprehend others' intentions		
		Can't follow questions-doesn't ask	Things happened too fast		
		Can't read well			
	• Limited executive functions	Focuses on getting it over with	Poor planner		
	• Impaired sequencing	Thinking compromised by lack of sleep,	Couldn't envision what would happen next		
	• Difficulty concentrating	cold, hunger, other conditions	Became agitated under stress		
	TRAUMA (causes delayed development)				
	• Over-reacts to threat	Scared of police, especially 2-on-1	If victim aggressive, responds as if a repeat of past maltreatment (primitive reflex)		
	• Depressed	Tearful, exhausted, poor eye contact; slow thinking; gives in easily	Feels worthless, anxious, powerless; life is out-of-control; self-destructive		
	• Numbs feelings with substances	High, coming down during questioning	Lowered inhibitions, poor judgment if high during offense		

DEVELOPMENT	MIRANDA	ASSISTING COUNSEL	CAPACITY/INTENT	DISPOSITIONAL SERVICES
IMMATURITY				<i>Must be tailored to each youth's unique needs, but could include services (in a facility or the community) such as:</i>
• <i>Immature thinking</i>				Instruction in anticipating consequences
-Unable to anticipate	Can't look ahead to statement in court	Does not have future timeframe	Did not plan: "it happened;" impulsive	Instruction in how to see choices & pros & cons
-Unable to see choices	Only way to go home=say what they want	Unable to weigh alternatives simultaneously	Carried weapon with no plan to use	Instruction in decision-making: think before acting
-Minimizes risk	Can always take back what I said	Sure won't get arrested again: bravado	Believed it was "just talk" (fantasy)	Instruction in planning & following a plan
• <i>Immature identity</i>				Being successful at something & opportunities to show it
-Not successful	Self-conscious about being "slow"	Accustomed to tuning out	Sensitive to being picked on	Guided process for defining self; becoming a leader
-Unstable self-definition	Unsure of self; hurt if called a liar	Changeable/ moody	Does not ask for adult help	Instruction in how to think without being influenced
-Wants acceptance	Compliant; does what is asked	Tries to please	Wants to belong even if with negative peers	Improved social skills to be acceptable to positive peers
-Can't function independently	Naively trusts police; taught to tell the truth	Unable to make decisions on own	Easily influenced by older co-defendants	Preparation for work & deciding to live on modest income
• <i>Moral development</i>				Developing job skills; support on the job for good decisions
-Fairness fanatic	Snitching=morally wrong	Gets stuck on something unfair	May have been righting a wrong	Learning positive ways to deal with unfairness
	Can't believe police would manipulate, lie	Can't believe will be severely punished	Can't walk away, especially when high,	Learning how to face complex moral questions
-Fragile moral reasoning	Does not understand rights	for something unintended	even though knows right from wrong	Victim empathy training
-Empathy	In shock about offense; shame	"It was accidental" misinterpreted as	Did not realize there would be a victim	Specialized instruction to:
		lack of remorse		• Improve reading by learning how to decode words
				• Improve reading by digesting more of the meaning
DISABILITIES				• Improve sequencing: seeing cause & effect
• <i>Processing problems</i>	Doesn't comprehend meaning of Miranda	Can't grasp bigger picture	Can't comprehend others' intentions	• Comprehend instructions
(digesting information)	Can't follow questions-doesn't ask	Can't follow explanations-doesn't ask	Things happened too fast	• Improve organization; learn how to prioritize
	Can't read well	Can't abstract; literal; focuses on details		• Learn how to concentrate & manage distractibility
• <i>Limited executive functions</i>	Focuses on getting it over with	Difficulty strategizing	Poor planner	• Learn how to manage stress
• <i>Impaired sequencing</i>	Thinking compromised by lack of sleep, cold,	Can't weigh alternatives	Could not envision what would happen next	Trauma treatment to:
• <i>Difficulty concentrating</i>	hunger, other conditions of questioning	Trouble sitting still	Became agitated under stress	• Talk about traumatic events
				• Hear about others' trauma
				• Separate past maltreatment from present provocations
TRAUMA (causes delayed development)				• Learn not to blame self and stop self-destructive acts
• <i>Over-reacts to threat</i>	Scared of police, especially 2-on-1	Trouble trusting adults	If victim aggressive, responds as if a repeat	• Not assume others are hostile; not act like a victim
		Scared in detention	of past maltreatment (primitive reflex)	Learning to anticipate loss of control & how to manage
• <i>Depressed</i>	Tearful, exhausted, poor eye contact, slow	Irritable, sad, unresponsive; needy	Feels worthless, anxious, powerless; life is	Learning to soothe self when agitated without substances
	thinking, gives in easily	Hopeless about future	out-of-control; self-destructive	Positive, realistic view of self in future
• <i>Numbs feelings with</i>	High, coming down during questioning	A different kid in detention than at the	Lowered inhibitions, poor judgment if	Help with family where traumatized & active substance use
<i>substances</i>		time of the offense	high during offense	

No. 03-633

IN THE
Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, AMERICAN
PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY FOR
ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF CHILD &
ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF
PSYCHIATRY AND THE LAW, NATIONAL ASSOCIATION OF SOCIAL
WORKERS, MISSOURI CHAPTER OF THE NATIONAL ASSOCIATION
OF SOCIAL WORKERS, AND NATIONAL MENTAL HEALTH
ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the execution of an offender who committed the crime at the age of 16 or 17 constitute cruel and unusual punishment in violation of the Eighth Amendment?

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Cases	
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	3, 21-22
<i>Bellotti v. Baird</i> , 443 U.S. 622 (1979)	21
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<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	22
<i>Stanford v. Kentucky</i> , 492 U.S. 361 (1989)	9, 10
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988)	3, 10, 21, 22
Scientific Authorities	
Adolphs, Ralph, <i>et al.</i> , <i>Fear and the Human Amygdala</i> , 15 J. NEUROSCIENCE 5879 (1995)	12, 15
Adolphs, Ralph, <i>Neural Systems for Recognizing Emotion</i> , 12 CURRENT OPINION IN NEUROBIOLOGY 169 (2002)	12
Adolphs, Ralph, <i>The Human Amygdala and Emotion</i> , 5 NEUROSCIENTIST 125 (1999)	15

Cited Authorities

	<i>Page</i>
Anderson, Steve W., <i>et al.</i> , <i>Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex</i> , 2 <i>NATURE NEUROSCIENCE</i> 1032 (1999)	14
Antoine, Florence, <i>Cooperative Group Evaluating Diagnostic Imaging Techniques</i> , 81 <i>J. NAT'L CANCER INST.</i> 1347 (1989)	10
Arnett, Jeffrey Jensen, <i>Adolescent Storm and Stress, Reconsidered</i> , 54 <i>AM. PSYCHOLOGIST</i> 317 (1999)	9
Arnett, Jeffrey Jensen, <i>Reckless Behavior in Adolescence: A Developmental Perspective</i> , 12 <i>DEVELOPMENTAL REV.</i> 339 (1992)	9
Baird, Abigail A., <i>et al.</i> , <i>Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents</i> , 38 <i>J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY</i> 1 (1999)	13
Beauregard, Mario, <i>et al.</i> , <i>Neural Correlates of Conscious Self-Regulation of Emotion</i> , 21 <i>J. NEUROSCIENCE</i> 165RC (2001)	14
Bechara, Antoine, <i>et al.</i> , <i>Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions</i> , 123 <i>BRAIN</i> 2189 (2000)	14

Cited Authorities

	<i>Page</i>
Bechara, Antoine, <i>et al.</i> , <i>Dissociation of Working Memory From Decision Making Within the Human Prefrontal Cortex</i> , 18 J. NEUROSCIENCE 428 (1998)	13
Breiter, Hans C., <i>et al.</i> , <i>Response and Habituation of the Human Amygdala During Visual Processing of Facial Expression</i> , 17 NEURON 875 (1996)	12
Casey, B.J., <i>et al.</i> , <i>Structural and Functional Brain Development and Its Relation to Cognitive Development</i> , 54 BIOLOGICAL PSYCHOLOGY 241 (2000)	13, 16, 19
Cauffman, Elizabeth & Steinberg, Laurence, <i>(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults</i> , 18 BEHAV. SCI. & L. 741 (2000)	6, 7, 8
Dias, R., <i>et al.</i> , <i>Dissociable Forms of Inhibitory Control Within Prefrontal Cortex with an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence From "On-Line" Processing</i> , 17 J. NEUROSCIENCE 9285 (1997)	14
Durston, Sarah, <i>et al.</i> , <i>Anatomical MRI of the Developing Human Brain: What Have We Learned?</i> , 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012 (2001)	9-10, 14, 17, 18

Cited Authorities

	<i>Page</i>
Elliott, R., <i>et al.</i> , <i>Differential Neural Response to Positive and Negative Feedback in Planning and Guessing Tasks</i> , 35 NEUROPSYCHOLOGIA 1395 (1997)	14
Furby, Lita & Beyth-Marom, Ruth, <i>Risk Taking in Adolescence: A Decision-Making Perspective</i> , 12 DEVELOPMENTAL REV. 1 (1992)	5, 6, 8
Gardner, William & Herman, Janna, <i>Adolescents' AIDS Risk Taking: A Rational Choice Perspective</i> , 50 ADOLESCENTS IN THE AIDS EPIDEMIC 17 (1990)	5
Gardner, William, <i>A Life-Span Rational-Choice Theory of Risk Taking</i> , ADOLESCENT AND ADULT RISK TAKING: THE EIGHTH TEXAS TECH SYPOSIUM ON INTERFACES IN PSYCHOLOGY (N. Bell & R. Bell eds., 1993)	6
Gazzaniga, Michael S., <i>et al.</i> , COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND (2d ed. 2002)	<i>passim</i>
Giedd, Jay N., <i>et al.</i> , <i>Brain Development During Childhood and Adolescence: A Longitudinal MRI Study</i> , 2 NATURE NEUROSCIENCE 861 (1999) ..	11, 16, 19, 20
Gläscher, Jan & Adolphs, Ralph, <i>Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala</i> , 23 J. NEUROSCIENCE 10274 (2003)	12

Cited Authorities

	<i>Page</i>
Gogtay, Nitin, <i>et al.</i> , <i>Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood</i> , 101 PROCEEDINGS NAT'L ACAD. SCI. 8174 (2004)	10, 11, 16, 20
Goldberg, Elkhonon, <i>THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND</i> (2001)	12, 13, 17
Hariri, Ahmad, <i>et al.</i> , <i>Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System</i> , 11 NEUROREPORT 43 (2000)	15
Huttenlocher, Peter R., <i>Synaptic Density in Human Frontal Cortex: Developmental Changes and Effects of Aging</i> , 163 BRAIN RESEARCH 195 (1979)	19
Kandel, Denise B. & Andrews, Kenneth, <i>Processes of Adolescent Socialization by Parents and Peers</i> , 22 INT'L J. ADDICTIONS 319 (1987)	9
Kandel, Eric R., <i>et al.</i> , <i>PRINCIPLES OF NEURAL SCI.</i> (4th ed. 2000)	17, 18
Kennedy, David N., <i>et al.</i> , <i>Basic Principles of MRI and Morphometry Studies of Human Brain Development</i> , 5 DEVELOPMENTAL SCI. 268 (2002)	19
Killgore, William D.S. & Yurgelun-Todd, Deborah, <i>Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces</i> , 21 NEUROIMAGE 1215 (2004)	13

Cited Authorities

	<i>Page</i>
LaBar, Kevin S., <i>et al.</i> , <i>Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study</i> , 20 NEURON 937 (1998)	12
Lane, Richard D., <i>et al.</i> , <i>Neuroanatomical Correlates of Pleasant and Unpleasant Emotion</i> , 35 NEUROPSYCHOLOGIA 1437 (1997)	12
Langleben, D.D., <i>et al.</i> , <i>Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study</i> , 15 NEUROIMAGE 727 (2002)	14
LeDoux, Joseph, <i>THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE</i> (1996)	15
Lewis, Dorothy Otnow, <i>et al.</i> , <i>Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States</i> , 145 AM. J. PSYCHIATRY 584 (1988)	21
Mallet, Chris, <i>Socio-Historical Analysis of Juvenile Offenders on Death Row</i> , 39 CRIM. L. BULL. 445 (2003)	21
Manes, Facundo, <i>et al.</i> , <i>Decision-Making Processes Following Damage to the Prefrontal Cortex</i> , 125 BRAIN 624 (2002)	13

Cited Authorities

	<i>Page</i>
McGivern, Robert F., <i>et al.</i> , <i>Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children</i> , 50 <i>BRAIN & COGNITION</i> 73 (2002)	18, 19, 20
Moll, Jorge, <i>et al.</i> , <i>Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects</i> , 59 <i>ARQ NEUROPSIQUIATR</i> 657 (2001) ...	14
O'Doherty, J., <i>et al.</i> , <i>Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex</i> , 4 <i>NATURE NEUROSCIENCE</i> 95 (2001)	14
Paus, Tomas, <i>et al.</i> , <i>Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study</i> , 283 <i>SCI.</i> 1908 (1999)	16, 17, 18
Pfefferbaum, Adolf, <i>et al.</i> , <i>A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood</i> , 51 <i>ARCHIVES OF NEUROLOGY</i> 874 (1994)	17
Phan, K. Luan, <i>et al.</i> , <i>Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI</i> , 16 <i>NEUROIMAGE</i> 331 (2002)	12, 13
Rogers, Robert D., <i>et al.</i> , <i>Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex</i> , 20 <i>J. NEUROSCIENCE</i> 9029 (1999)	14

Cited Authorities

	<i>Page</i>
Rubia, K., <i>et al.</i> , <i>Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI</i> , 24 NEUROSCIENCE & BIOBEHAV. REVS.13 (2000)	15, 18
Scott, Elizabeth S., <i>et al.</i> , <i>Evaluating Adolescent Decision Making in Legal Contexts</i> , 19 LAW & HUM. BEHAV. 221 (1995)	6
Siegel, Daniel J., <i>THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE</i> (Guilford Press 1999)	12, 13, 18
Sowell, Elizabeth R., <i>et al.</i> , <i>Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study</i> , 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002)	10-11, 18, 19
Sowell, Elizabeth R., <i>et al.</i> , <i>In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions</i> , 2 NATURE NEUROSCIENCE 859 (1999)	<i>passim</i>
Sowell, Elizabeth R., <i>et al.</i> , <i>Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation</i> , 21 J. NEUROSCIENCE 8819 (2001)	11, 16, 17
Sowell, Elizabeth R., <i>et al.</i> , <i>Mapping Cortical Change Across the Human Life Span</i> , 6 NATURE NEUROSCIENCE 309 (2003)	11, 16, 17, 18

Cited Authorities

	<i>Page</i>
Spear, L.P., <i>The Adolescent Brain and Age-Related Behavioral Manifestations</i> , 24 NEUROSCIENCE & BIOBEHAV. REVS. 417 (2000)	<i>passim</i>
Steinberg, Laurence & Scott, Elizabeth S., <i>Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty</i> , 58 AM. PSYCHOLOGIST 1009 (2003)	6, 8, 9
Steinberg, Laurence & Silverberg, Susan, <i>The Vicissitudes of Autonomy in Early Adolescence</i> , 57 CHILD DEV. 841 (1986)	9
Talukder, Gargi, <i>Decision-Making Is Still a Work in Progress for Teenagers</i> , Report dated July 2000 at www.brainconnection.com	15
Towbin, Kenneth E. & Schowalter, John E., <i>Adolescent Development</i> , PSYCHIATRY (Allan Tasman ed., 2d ed. 2003)	16, 18
Yurgelun-Todd, Deborah, <i>Inside the Teen Brain</i> , Frontline (2002) (interview)	15

INTERESTS OF *AMICI CURIAE**

The American Medical Association, the American Psychiatric Association, the American Society for Adolescent Psychiatry, the American Academy of Child & Adolescent Psychiatry, the American Academy of Psychiatry and the Law, the National Association of Social Workers, the Missouri Chapter of the National Association of Social Workers, and the National Mental Health Association file this brief as *amici curiae* in support of respondent by written consent of both parties, pursuant to Rule 37.3(a) of the Rules of this Court.

With approximately 250,000 members, the American Medical Association is the nation's largest professional organization of physicians and medical students. Founded in 1847, its purpose is to promote the science and art of medicine and the betterment of public health. The American Psychiatric Association was founded in 1844 and today has more than 35,000 member physicians who specialize in psychiatry. The American Society for Adolescent Psychiatry was founded in 1967 and today has approximately 500 members. The American Academy of Child & Adolescent Psychiatry was founded in 1953 and today has approximately 6500 child and adolescent psychiatrists and other interested physicians. The American Academy of Psychiatry and the Law, with approximately 2000 physician members, is devoted to issues at the intersection of psychiatry and the law. Established in 1955, the National Association of Social Workers (NASW) is the largest association of professional social workers in the world with 153,000 members and chapters throughout the United States, in Puerto Rico, Guam,

* No counsel for a party authored this brief in whole or in part and no person or entity other than the *amici curiae* or their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of the brief of the *amici curiae*, and their letters of consent have been filed with the Clerk of the Court.

the Virgin Islands, and an International Chapter in Europe, with the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole. The Missouri Chapter of NASW has 2,700 members. The National Mental Health Association is the country's oldest and largest nonprofit organization addressing all aspects of mental health and mental illness since 1909. It has 340 affiliates in 43 states.

Each of the above-referenced *amici* is committed to the advancement of science. *Amici* submit this brief to describe the scientific findings of medical, psychiatric, and psychological research relevant to the legal issues under consideration.

SUMMARY OF ARGUMENT

The adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures have presumed it for decades or more. And now, new scientific evidence sheds light on the differences.

Scientists have documented the differences along several dimensions. Adolescents as a group, even at the age of 16 or 17, are more impulsive than adults. They underestimate risks and overvalue short-term benefits. They are more susceptible to stress, more emotionally volatile, and less capable of controlling their emotions than adults.

In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult.

Behavioral scientists have observed these differences for some time. Only recently, however, have studies yielded evidence of concrete differences that are anatomically based. Cutting-edge brain imaging technology reveals that regions of the adolescent brain do not reach a fully mature state until after the age of 18. These regions are precisely those associated with impulse control, regulation of emotions, risk

assessment, and moral reasoning. Critical developmental changes in these regions occur only after late adolescence.

Science cannot, of course, gauge moral culpability. Scientists can, however, shed light on certain measurable attributes that the law has long treated as highly relevant to culpability. This Court has concluded that both adolescents who are under age 16 and mentally retarded persons exhibit characteristics — “disabilities in areas of reasoning, judgment, and control of their impulses,” *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) — that categorically disqualify them from the death penalty. Offenders at age 16 and 17 exhibit those characteristics as well.

ARGUMENT

SCIENCE CONFIRMS THAT ADOLESCENT OFFENDERS AT THE AGES OF 16 AND 17 EXHIBIT DEFICIENCIES THIS COURT HAS IDENTIFIED AS WARRANTING EXCLUSION FROM THE DEATH PENALTY.

This Court has held that adolescents who commit capital crimes before the age of 16 and offenders who are mentally retarded are categorically exempt from the death penalty because they exhibit “disabilities in areas of reasoning, judgment, and control of their impulses.” *Atkins*, 536 U.S. at 306; *Thompson v. Oklahoma*, 487 U.S. 815 (1988). Because of these pervasive deficiencies, this Court has concluded that members of these groups “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.” *Atkins*, 536 U.S. at 306.

Neither moral culpability, nor qualification for the death penalty is susceptible to scientific measurement. But the particular attributes this Court has recognized as critical to those legal judgments are scientifically identifiable. This brief focuses on what science can tell us about the neurological,

physiological, psychological, and emotional development of older adolescents from the perspective of scientists and medical professionals. Although, for convenience, this brief refers to the oldest of minors as “teens” or “adolescents,” all the scientific conclusions recounted are relevant to minors who are 16 and 17 years of age.

Contrary to what some laypersons may believe, *see Amicus Br. of the State of Alabama, et al.* at 3, the evidence reveals that these older adolescents do not have adult levels of judgment, impulse control, or ability to assess risks. Recent advances in brain-imaging technology confirm that the very regions of their brains involved in governing these behavior-control capacities are anatomically immature. *See Point A, infra.*

This evidence describes the characteristics of the normal, healthy adolescent. To the extent that adolescents who commit capital offenses suffer from serious psychological disturbances that substantially exacerbate the already existing vulnerabilities of youth, they can be expected to function at sub-standard levels. *See Point B, infra.*

If, as this Court has observed, executing adolescents under 16 and mentally retarded offenders does not serve the death penalty’s legal purposes, the same must be true of 16- and 17-year-old offenders. *See Point C, infra.*

A. Older Adolescents Behave Differently Than Adults Because Their Minds Operate Differently, Their Emotions Are More Volatile, and Their Brains Are Anatomically Immature.

Anyone who remembers being a teenager, who has been the parent or caretaker of a teenager, or who has observed adolescent behavior, knows intuitively that adolescents do not think or behave like adults. These behavioral differences are pervasive and scientifically documented.

Teens (including, again, the oldest of minors) are different. Their judgments, thought patterns, and emotions are different from adults', and their brains are physiologically underdeveloped in the areas that control impulses, foresee consequences, and temper emotions. They handle information processing and the management of emotions differently from adults.

1. Adolescents are inherently more prone to risk-taking behavior and less capable of resisting impulses because of cognitive and other deficiencies.

Adolescents, as a group, "are risk takers."¹ "Relative to individuals at other ages, . . . adolescents . . . exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking."² Risk taking of all sorts — whether drunk driving, unprotected sex, experimentation with drugs, or even criminal activity — is so pervasive that "it is statistically aberrant to refrain from such [risk-taking] behavior during adolescence."³ In short, teenagers are prone to making bad judgments.

Cognitive experts have shown that the difference between teenage and adult behavior is not a function of the adolescent's inability to distinguish right from wrong. Nor is it a function, as early studies suggested, of an inability to conduct any cost-benefit analysis at all.⁴ Rather, the difference

1. L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 *NEUROSCIENCE & BIOBEHAV. REVS.* 417, 421 (2000); see also William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, 50 *ADOLESCENTS IN THE AIDS EPIDEMIC* 17 (1990).

2. Spear, *supra* note 1, at 421.

3. *Id.*

4. See Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 *DEVELOPMENTAL*
(Cont'd)

lies in what scientists have characterized as “deficiencies in the way adolescents think,”⁵ an inability to perceive and weigh risks and benefits *accurately*.⁶ “[B]ecause of developmental influences,” teens “differ from adults in the subjective value[s] that they attach to various perceived consequences in the process of making choices.”⁷ They focus more on opportunities for gains and less on protection against losses.⁸ They put greater emphasis on short-term consequences than adults and discount future consequences more than adults.⁹ It is not that adolescents do not perform cost-benefit analyses; rather, they skew the balancing, resulting in poor judgments.

(Cont’d)

REV. 1, 9-11 (1992); *see also* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, ADOLESCENT AND ADULT RISK TAKING: THE EIGHTH TEXAS TECH SYMPOSIUM ON INTERFACES IN PSYCHOLOGY at 66, 69 (N. Bell & R. Bell eds., 1993).

5. Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); *see also* Gardner (1993), *supra* note 4, at 67.

6. *See* Furby, *supra* note 4, at 17; *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003). For this reason, Missouri’s contention that Christopher Simmons was able to perform some kind of cost-benefit analysis when he committed his crime, Petitioner’s Br. at 35, may be technically correct, but it fails to acknowledge that neither Simmons, nor adolescents generally, can be expected to perform such an analysis the way adults do.

7. *See* Elizabeth S. Scott *et al.*, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 233 (1995).

8. *See id.* at 231.

9. *See id.*

Adolescents' cognitive deficiencies are compounded by "deficiencies in adolescents' social and emotional capability."¹⁰ One group of psychosocial researchers gauging these factors, along with cognitive development, "maturity of judgment," or "psychological maturity," as compared to adults', has been able to draw conclusions about the adolescent in three respects: "responsibility" (including factors such as self-reliance and independence); "perspective" (which covers the capacity to "consider[] situations from different viewpoints"); and "temperance" (encompassing the ability "to limit impulsivity").¹¹ Thus, "observed differences in risky decision-making between adolescents and adults" reflect "differences in capabilities, and not simply priorities."¹²

This study, based on a sample of more than 1,000 adolescents and adults, established that psychosocial maturity is incomplete until age 19, at which point it plateaus.¹³ Adolescents "score lower on measures of self-reliance and other aspects of personal responsibility, they have more difficulty seeing things in long-term perspective, they are less likely to look at things from the perspective of others, and they have more difficulty restraining their aggressive impulses."¹⁴ Perspective and temperance, in particular, do not mature until late in adolescence.¹⁵

Researchers have found that the deficiencies in the adolescent mind and emotional and social development are

10. Cauffman, *supra* note 5, at 743.

11. *Id.* at 745.

12. *Id.* at 744.

13. *See id.* at 756.

14. *Id.* at 759.

15. *See id.* at 756.

especially pronounced when other factors — such as stress, emotions, and peer pressure — enter the equation. These factors affect everyone’s cognitive functioning, but they operate on the adolescent mind differently and with special force.

The interplay among stress, emotion, and cognition in teenagers is particularly complex — and different from adults. Stress affects cognitive abilities, including the ability to weigh costs and benefits and to override impulses with rational thought.¹⁶ But adolescents are more susceptible to stress from daily events than adults, which translates into a further distortion of the already skewed cost-benefit analysis.¹⁷

Emotion, like stress, also plays an important role in cognition, influencing decision-making and risk-taking behavior.¹⁸ Because of both greater stress and more drastic hormonal fluctuations, adolescents are more emotionally volatile than adults — or children, for that matter.¹⁹ They tend to experience emotional states that are more extreme and more variable than those experienced by adults.²⁰

The typical adolescent is also more vulnerable to peer pressure than an adult. “Social interactions and affiliation with peers take on particular importance during ... adolescence.”²¹ Adolescents spend twice as much time with peers as with parents or other adults.²² The pronounced

16. See Spear, *supra* note 1, at 423; Furby, *supra* note 4, at 22.

17. See Spear, *supra* note 1, at 423; Furby, *supra* note 4, at 22.

18. See Steinberg, *supra* note 6, at 1011-13.

19. See Spear, *supra* note 1, at 429.

20. See *id.* at 429; Cauffman, *supra* note 5, at 757.

21. Spear, *supra* note 1, at 420.

22. See *id.*

importance of approval and acceptance by friends will make an already risk-prone or impulsive adolescent even more so.²³ Adolescents not only are more susceptible to peer pressure, but they gravitate toward peers who reinforce their own predilections. In other words, a risk-prone and impulsive teen will have a comparatively high propensity to gravitate toward others who reinforce that behavior.²⁴ Unsurprisingly, an adolescent who spends time with risk-prone friends is more likely to “engag[e] in risky behavior.”²⁵

In sum, the conclusion of the scientific research is that, for a variety of interrelated reasons, adolescents as a group are less able than adults to moderate risky behavior or control impulses.

2. Brain studies establish an anatomical basis for adolescent behavior.

Modern brain research technologies developed a body of data in the late 1990s — well after this Court decided *Stanford v. Kentucky*, 492 U.S. 361 (1989) — that provides a compelling picture of the inner workings of the adolescent brain.²⁶

23. See Steinberg, *supra* note 6, at 1012; see also Laurence Steinberg & Susan Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 845 (1986).

24. See generally Jeffrey Jensen Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 354-55 (1992).

25. Denise B. Kandel & Kenneth Andrews, *Processes of Adolescent Socialization by Parents and Peers*, 22 INT’L J. ADDICTIONS 319, 334-335 (1987); see also Jeffrey Jensen Arnett, *Adolescent Storm and Stress, Reconsidered*, 54 AM. PSYCHOLOGIST 317, 321 (1999) (“Unlike conflict with parents or mood disruptions, rates of risk behavior peak in late adolescence/emerging adulthood rather than early or middle adolescence.”)

26. See Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1037, 1040 (2001) (Cont’d)

Adolescents' behavioral immaturity mirrors the anatomical immaturity of their brains.²⁷ To a degree never before understood, scientists can now demonstrate that adolescents are immature not only to the observer's naked eye, but in the very fibers of their brains.

This insight emerges from sophisticated and non-invasive brain imaging techniques, performed by high-resolution structural and functional magnetic resonance imaging ("MRI") and other technologies.²⁸ These imaging techniques are a quantum leap beyond previous mechanisms for assessing brain development. Before the rise of neuroimaging, the understanding of brain development in the days of *Thompson* and *Stanford* was gleaned largely from post-mortem examinations,²⁹ which shed little light on how a live brain operates and how a particular brain develops over time, or "longitudinally."³⁰ Brain imaging,

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ADOLESCENT PSYCHIATRY 1012, 1012 (2001) (reviewing results of MRI studies of brain development in childhood and adolescence); Michael S. Gazzaniga *et al.*, COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND at 20-21, 138 (2d ed. 2002).

27. See Nitin Gogtay *et al.*, *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT'L ACAD. SCI. 8174, 8177 (2004).

28. "MRI measures the response of atoms in different tissues when they are pulsed with radio waves that are under the influence of magnetic fields thousands of times the strength of the earth's. Each type of tissue responds differently, emitting characteristic signals from the nuclei of its cells. The signals are fed into a computer, the position of those atoms is recorded, and a composite picture of the body area being examined is generated and studied in depth." Florence Antoine, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 J. NAT'L CANCER INST. 1347, 1348 (1989).

29. See Gazzaniga, *supra* note 26, at 63.

30. See generally Elizabeth R. Sowell *et al.*, *Development of Cortical and Subcortical Brain Structures in Childhood and*
(Cont'd)

in contrast, allows researchers to study how a live brain progresses longitudinally.

Technological breakthroughs have not only enabled scientists to confirm some of what was previously known or believed, but they have provided new evidence that has changed the way scientists understand the development of the human brain as it progresses from childhood through adolescence and into adulthood.³¹ “Structural brain imaging studies in normal children and adolescents have been helpful in relating the dramatic maturation of cognitive, emotional, and social functions with the brain structures that ultimately underlie them.”³²

In this regard, two complementary observations have been especially revealing. First, adolescents rely for certain tasks, more than adults, on the amygdala, the area of the brain associated with primitive impulses of aggression, anger, and fear. Adults, on the other hand, tend to process similar information through the frontal cortex, a cerebral area associated with impulse control and good judgment. Second, the regions of the brain associated with impulse control, risk assessment, and moral reasoning develop last, after late adolescence.

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Adolescence: A Structural MRI Study, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002); Elizabeth R. Sowell *et al.*, *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819 (2001).

31. See Elizabeth R. Sowell *et al.*, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859 (1999); see also Jay N. Giedd *et al.*, *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999).

32. Elizabeth R. Sowell *et al.*, *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCIENCE 309 (2003); see also Gogtay, *supra* note 27, at 8177.

- a. **Research shows that adolescent brains are more active in regions related to aggression, anger, and fear, and less active in regions related to impulse control, risk assessment, and moral reasoning than adult brains.**

The brain is a complex network of interrelated parts. Each part is associated with different functions and capabilities. The regions relevant to understanding the adolescent behaviors discussed in the previous section are the areas of the brain associated with (1) emotional impulses, particularly aggression; and (2) impulse control, risk assessment, and moral reasoning.

The emotional center of the brain is the limbic system.³³ Within the limbic system is the amygdala, which is associated with aggressive and impulsive behavior.³⁴ The amygdala is “a neural system that evolved to detect danger and produce

33. See generally Daniel J. Siegel, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE* at 10-11 (Guilford Press 1999).

34. See generally Jan Gläscher & Ralph Adolphs, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. NEUROSCIENCE 10274 (2003); Ralph Adolphs, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIOLOGY 169 (2002); Gazzaniga, *supra* note 26, at 553-572; K. Luan Phan *et al.*, *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 336 (2002); Elkhonon Goldberg, *THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND* at 31 (2001); Kevin S. LaBar *et al.*, *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937 (1998); Richard D. Lane, *et al.*, *Neuroanatomical Correlates of Pleasant and Unpleasant Emotion*, 35 NEUROPSYCHOLOGIA 1437, 1441 (1997); Hans C. Breiter *et al.*, *Response and Habituation of the Human Amygdala During Visual Processing of Facial Expression*, 17 NEURON 875 (1996); Ralph Adolphs *et al.*, *Fear and the Human Amygdala*, 15 J. NEUROSCIENCE 5879, 5889 (1995).

rapid protective responses without conscious participation.”³⁵ It dictates instinctive gut reactions, including fight or flight responses.³⁶

When it comes to “response inhibition, emotional regulation, planning and organization,” the so-called executive functions, the most important components of the brain are the frontal lobes.³⁷ In particular, “the neocortex at the top of the brain[] mediate[s] ‘more complex’ information-processing functions such as perception, thinking, and reasoning,”³⁸ and the prefrontal cortex is associated with a variety of cognitive abilities,³⁹ including decision making,⁴⁰ risk assessment,⁴¹ ability to judge future

35. Abigail A. Baird *et al.*, *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1, 1 (1999) (study found that adolescents 12-17 years old showed significant amygdala activation in response to a task that required the judgment of fearful facial affect); *see also* William D.S. Killgore & Deborah Yurgelun-Todd, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 NEUROIMAGE 1215 (2004); Phan, *supra* note 34, at 336.

36. *See* Goldberg, *supra* note 34, at 31; Phan, *supra* note 34, at 336.

37. Sowell (1999), *supra* note 31, at 860; *see also* Gazzaniga, *supra* note 26, at 75, 547.

38. Siegel, *supra* note 33, at 10.

39. *See* B.J. Casey *et al.*, *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOLOGY 241, 244 (2000).

40. *See* Antoine Bechara *et al.*, *Dissociation of Working Memory From Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCIENCE 428 (1998).

41. *See* Facundo Manes *et al.*, *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002).

consequences,⁴² evaluating reward and punishment,⁴³ behavioral inhibition,⁴⁴ impulse control,⁴⁵ deception,⁴⁶ responses to positive and negative feedback,⁴⁷ and making moral judgments.⁴⁸

The frontal lobe modulates synaptic transmissions from the amygdala⁴⁹ to which it is strongly connected.⁵⁰ A still-

42. See Antoine Bechara *et al.*, *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 *BRAIN* 2189 (2000).

43. See J. O'Doherty *et al.*, *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 *NATURE NEUROSCIENCE* 95 (2001); Robert D. Rogers *et al.*, *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 *J. NEUROSCIENCE* 9029 (1999).

44. See R. Dias *et al.*, *Dissociable Forms of Inhibitory Control Within Prefrontal Cortex with an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence From "On-Line" Processing*, 17 *J. NEUROSCIENCE* 9285 (1997); Durston, *supra* note 26, at 1016.

45. See Bechara (2000), *supra* note 42, at 2198-99.

46. See D.D. Langleben *et al.*, *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 *NEUROIMAGE* 727 (2002).

47. See R. Elliott *et al.*, *Differential Neural Response to Positive and Negative Feedback in Planning and Guessing Tasks*, 35 *NEUROPSYCHOLOGIA* 1395 (1997).

48. See Jorge Moll *et al.*, *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 *ARQ NEUROPSIQUIATR* 657 (2001); Steve W. Anderson *et al.*, *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 *NATURE NEUROSCIENCE* 1032 (1999).

49. See Mario Beauregard, *et al.*, *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 *J. NEUROSCIENCE* 165RC (2001);
(Cont'd)

maturing frontal lobe exerts less control over the amygdala and has less influence over behavior and emotions than a fully mature frontal lobe.⁵¹ In other words, if the frontal lobe is immature or underdeveloped, there is less of a check on the amygdala.

New research suggests that the limbic system is more active in adolescent brains than adult brains, particularly in the region of the amygdala⁵² and that the frontal lobes of the adolescent brain are less active.⁵³ More generally, as teenagers grow into adults, they increasingly shift the overall focus of brain activity to the frontal lobes.⁵⁴

(Cont'd)

Ahmad Hariri, *et al.*, *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43 (2000).

50. Ralph Adolphs, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125, 125-26 (1999); *see also* Joseph LeDoux, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* at 303 (1996).

51. *See* Gargi Talukder, *Decision-Making Is Still a Work in Progress for Teenagers*, Report dated July 2000 at www.brainconnection.com; *see also* Spear, *supra* note 1, at 440 (reporting Dr. Yurgelun-Todd's research); *see also* Adolphs (1995), *supra* note 34, at 5889.

52. *See* Deborah Yurgelun-Todd, *Inside the Teen Brain*, Frontline (2002) (interview); *see also* K. Rubia, *et al.*, *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 13 (2000).

53. *See* Yurgelun-Todd, *supra* note 52; *See also* Rubia, *supra* note 52, at 18.

54. *See* K. Rubia, *supra* note 52, at 18; *see also* Spear, *supra* note 1, at 440; Yurgelun-Todd (2002), *supra* note 52.

b. Adolescent brains are not fully developed in regions related to reasoning, risk taking, and impulse control.

Even more groundbreaking than the evidence of brain activity is the recent revelation, confirmed through brain imaging studies, that the brain's frontal lobes are still structurally immature well into late adolescence.⁵⁵ The prefrontal cortex (which, as noted above, is most associated with impulse control, risk assessment, and moral reasoning) is "one of the last brain regions to mature."⁵⁶ This, in turn, means that "response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood."⁵⁷ As one prominent neurophysiologist put it, "[s]tructural maturation of individual brain regions and their connecting pathways is a condition *sine qua non* for the successful development of cognitive . . . functions."⁵⁸

55. See Gogtay, *supra* note 27, at 8174 (subjects of study aged 4 to 21 years); Giedd, *supra* note 31, at 861 (subjects of study aged 4.2 to 21.6 years); Sowell (1999), *supra* note 31, at 860-61 (subjects of study aged 12 to 16 and 23 to 30 years); see also Sowell (2001), *supra* note 30, at 8026 (noting pronounced brain maturational processes continuing into post-adolescence; subjects of study aged 7 to 30 years); Sowell (2003), *supra* note 32, at 309 (subjects of study aged 7 to 87 years).

56. Casey, *supra* note 39, at 243; see also Gogtay, *supra* note 27, at 8175.

57. Sowell (1999), *supra* note 31, at 860; see also Kenneth E. Towbin & John E. Schowalter, *Adolescent Development*, PSYCHIATRY at 145, 151-52 (Allan Tasman ed., 2d ed. 2003). This paper recognizes the link between "improvement during adolescence in specific cognitive skills such as organizing information, conceptualization, perspective taking, and social perception, to structural changes in frontal cortical and sub-cortical structures." *Id.* at 152.

58. Tomas Paus *et al.*, *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCI. 1908 (1999) (subjects of study aged 4 to 17 years).

The adolescent's frontal lobes are underdeveloped in two distinct ways, each of which directly affects brain functioning. First, myelination is incomplete. Second, pruning is incomplete. We discuss each in turn.

Myelination. An important measure of brain maturity is myelination.⁵⁹ Myelination is the process by which the brain's axons are coated with a fatty white substance called myelin. Myelin surrounds the axons, which are neural fibers that use electrical impulses to carry information across long distances, and insulates the pathway, speeding the neural signal along the pathway.⁶⁰ "The presence of myelin makes communication between different parts of the brain faster and more reliable."⁶¹ Myelination of "white matter"⁶² continues through adolescence and into adulthood.⁶³

59. See Goldberg, *supra* note 34, at 144; see also Sowell (2001), *supra* note 30, at 8819; Sowell (2003), *supra* note 32, at 311.

60. See Gazzaniga, *supra* note 26, at 31, 48-49; Eric R. Kandel, *et al.*, *PRINCIPLES OF NEURAL SCI.* at 22, 85 (4th ed. 2000).

61. Goldberg, *supra* note 34, at 144.

62. White matter is the tissue that composes the pathways between brain regions that permits communication and interaction within the brain and between the brain and the body. See Gazzaniga, *supra* note 26, at 70, 72. For example, the corpus callosum, a critical white matter structure, bridges the two halves of the frontal lobes, permitting and regulating communication between the two halves of the brain. See Paus, *supra* note 58, at 1908.

63. See Durston, *supra* note 26, at 1014; Sowell (1999), *supra* note 31, at 860; Adolf Pfefferbaum *et al.*, *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 *ARCHIVES OF NEUROLOGY* 874, 885 (1994) (after age 20 white matter volume did not fluctuate until about age 70; subjects of study aged 3 months to 70 years).

As measured by myelination, different parts of the brain mature at different rates.⁶⁴ The new brain imaging data, supported by data gathered through the older autopsy technique,⁶⁵ provides credible evidence that the frontal lobes, which are still developing well into adolescence and beyond, are among the last portions of the brain to mature.⁶⁶ In other words, the region of the brain associated with impulse control, risk assessment, and moral reasoning is the last to form, and is not complete until late adolescence or beyond.

Pruning. Gray matter, which comprises the outer surfaces, or cortices, of the brain, is composed of the brain cells (or neurons)⁶⁷ that perform the brain's tasks, such as the cognition and higher functions that are carried out in the frontal lobes.⁶⁸ Like myelination, changes in gray matter are important indications of brain maturity. As the brain matures, gray matter *decreases*⁶⁹ through a process called pruning. Just as the pruning of a rose bush strengthens the remaining branches, the pruning of gray matter improves the functioning of the brain's reasoning centers.⁷⁰ Brain cells that are not used shrivel off,⁷¹ thereby increasing the efficiency of the

64. See Sowell (2003), *supra* note 32, at 311; Sowell (2002), *supra* note 30, at 4; Towbin & Schowalter, *supra* note 57, at 151.

65. See Paus, *supra* note 58, at 1908.

66. See Sowell (1999), *supra* note 31, at 859; Rubia, *supra* note 52, at 13 (subjects of study aged 12 to 19 and 22 to 40 years).

67. See Gazzaniga, *supra* note 26, at 64-65.

68. See E. Kandel, *supra* note 60, at 9.

69. See Durston, *supra* note 26, at 1014.

70. See Robert F. McGivern *et al.*, *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 *BRAIN & COGNITION* 73 (2002) (subjects of study aged 10 to 22 years).

71. See Siegel, *supra* note 33, at 13-14.

neural system.⁷² Thus, pruning establishes some pathways and extinguishes others, enhancing brain functioning.

Scientists have known about pruning for over 20 years,⁷³ but modern brain imaging technology has provided insights into the process of pruning.⁷⁴ Until MRI technology emerged, the common wisdom was that the volume of gray matter spurted only once, shortly after birth, and then declined gradually over time. Brain scans have revealed a more complicated reality: In particular regions of the brain, gray matter blossoms once again later in childhood.⁷⁵ The frontal

72. See Casey, *supra* note 39, at 241 (“findings are consistent with the view that increasing cognitive capacity during childhood coincides with a gradual loss rather than formation of new synapses and presumably a strengthening of remaining synaptic connections.”).

73. See generally Peter R. Huttenlocher, *Synaptic Density in Human Frontal Cortex: Developmental Changes and Effects of Aging*, 163 *BRAIN RESEARCH* 195 (1979).

74. See, e.g., Sowell (2002), *supra* note 30, at 4.

75. See McGivern, *supra* note 70, at 85; see also David N. Kennedy *et al.*, *Basic Principles of MRI and Morphometry Studies of Human Brain Development*, 5 *DEVELOPMENTAL SCI.* 268, 274 (2002)

Studies showed linear increases in white matter in the age range of 4-20 years. They were also able to demonstrate nonlinear changes in cortical gray matter, summarized as a preadolescent increase followed by a postadolescent decrease. Further localization of these changes indicated that the frontal and parietal lobe peaked at about age 12, the temporal lobe at about age 16, and the occipital lobe continued its increase through age 20, although the confidence intervals on these observations are large.

Giedd, *supra* note 31, at 861.

lobe is one of the places where gray matter increases — before adolescence — and then gets pruned over time, beyond adolescence.⁷⁶ As is true of myelination, the frontal lobes are the last regions where pruning is complete.⁷⁷ That means pruning is occurring last in the areas related to impulse control, risk-taking, and self-control. One of the last areas of the brain to reach full maturity, as measured by pruning, is the part associated with regulating behavior, stifling impulses, assessing risks, and moral reasoning.⁷⁸

B. To the Extent That Adolescents Who Commit Capital Offenses Suffer From Serious Psychological Disturbances That Substantially Exacerbate the Already Existing Vulnerabilities of Youth, They Can Be Expected to Function at Sub-Standard Levels.

The evidence summarized to this point, based upon studies of normal adolescents, leads to the conclusion that normal adolescents cannot be expected to operate with the level of maturity, judgment, risk aversion, or impulse control of an adult. Adolescents cannot be expected to transcend their own psychological or biological capacities. However, an adolescent who has suffered brain trauma, a dysfunctional family life, violence, or abuse cannot be presumed to operate even at standard levels for adolescents.

76. See Giedd, *supra* note 31, at 861; McGivern, *supra* note 70, at 85.

77. A very recent article published by the National Academy of Sciences measured gray matter density in individuals longitudinally from childhood to early adulthood and concluded that “the [gray matter] maturation ultimately involves the dorsolateral prefrontal cortex, which loses [gray matter] only at the end of adolescence.” Gogtay, *supra* note 27, at 8175.

78. See *id.* at 8177 (“Later to mature were areas involved in executive function, attention, and motor coordination (frontal lobes).”).

There is good reason to believe that the population of adolescents who end up on death row are more likely to have suffered any or all of these disturbances.⁷⁹ To the extent that this is true, the population of adolescent offenders on death row is likely to be exceptionally immature as a matter of cognitive development, psychosocial development, anatomical development, or all three.

C. Executing Adolescents Does Not Serve the Recognized Purposes of the Death Penalty.

This Court has never required mountains of data to appreciate that “youth is more than a chronological fact. . . . It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)). The foregoing data do, however, show that older adolescents are not simply miniature adults, with less experience or wisdom. They are also not as equipped as adults to engage in moral reasoning and adjust their conduct accordingly.

These neurological, physiological, and psychological deficits are exactly the characteristics that this Court has identified as warranting a categorical exemption from the death penalty.

If offenders with mental retardation are less culpable because their underdeveloped brains leave them with “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to

79. See, e.g., Chris Mallet, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 CRIM. L. BULL. 445, 457-60 (2003); *Thompson*, 487 U.S. at 835 note 42 (plurality) (citing Dorothy Otnow Lewis, et al., *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988)).

control impulses, and to understand the reactions of others,” *Atkins*, 536 U.S. at 318, then the same must also be true of older adolescents. So too, if younger adolescents are less culpable because of their inexperience, emotionality, susceptibility to peer pressure, and impulsivity, *Thompson*, 487 U.S. at 834, the same must again be true of older adolescents. They, too, are limited by the capacities of their “equipment” as are mentally retarded offenders. The greater predilection for high-risk behavior, the emotional volatility that clouds judgment, and the underdeveloped impulse control are pervasive among adolescents, just as they are among mentally retarded individuals.

The difference is that youth is temporary. Adolescents, with immature brains, emergent coping skills, and diminished judgment capacity, eventually become adults who can and should be held fully accountable for their actions. In the meantime, however, to execute 16- and 17-year-old offenders is to presume full adult responsibility and to hold them accountable not just for their acts, but also for the immaturity of their neural anatomy and psychological development.

This Court has held that executing a mentally retarded offender is unlikely to “affect the ‘cold calculus that precedes the decision’ of other potential murderers.” *Atkins*, 536 U.S. at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)). The same is true of older adolescents whose “calculus” weighs inputs—particularly, future consequences—differently from adults, and far differently from the cold-blooded adult murderer for whom the death penalty is reserved. *Id.* at 320; *see id.* at 319.

As long as this Court adheres to the view that an underdeveloped brain combined with heightened emotionality, an immature ability to anticipate long-term consequences, and susceptibility to peer pressure, justifies categorically excluding younger adolescents and mentally

retarded offenders from the death penalty, the medical evidence should lead the Court to accord the same treatment to adolescents at the age of 16 or 17.

CONCLUSION

Sixteen- and 17-year-old offenders possess the same characteristics that warranted excluding offenders under 16 and mentally retarded persons from the reach of the death penalty, and on that basis they should also be excluded.

Respectfully submitted,

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IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

COMMONWEALTH,
Respondent

v.

GUTHRIE G., A JUVENILE
Appellant

**ON FURTHER APPELLATE REVIEW FROM THE APPEALS
COURT OF THE COMMONWEALTH OF MASSACHUSETTS**

**Brief of the Juvenile Law Center, Children and Family Justice
Center, Center for Children's Law and Policy, Children's Law
Center of Massachusetts, Children's Law Center of Minnesota,
Juvenile Justice Project of Louisiana, Juvenile Rights Advocacy
Project, National Center for Youth Law, New England Juvenile
Defender Center, Inc., Northeast Regional Juvenile Defender
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<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983)	18
<i>May v. Anderson</i> , 345 U.S. 528 (1953)	7

<i>McKeiver v Pennsylvania</i> , 403 U.S. 528 (1971)	11
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	23
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985)	12, 13
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979)	15
<i>Planned Parenthood v. Danforth</i> , 428 U.S. 52 (1976)	15
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	16, 17
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	7, 18, 19
<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000)	17, 18
<i>Schall v. Martin</i> , 467 U.S. 253 (1984)	13
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973)	22
<i>In re Stanford</i> , 537 U.S. 968, 123 S.Ct. 472 (2002)	41
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980)	22
<i>Vernonia School District v. Acton</i> , 515 U.S. 646 (1995)	12, 13
<i>Yarborough v. Alvarado</i> , 124 S.Ct. 2140 (2004)	10

MASSACHUSETTS CASES

<i>Com. v. Aguiar</i> , 370 Mass. 490 (1976)	22
<i>Com. v. Berry</i> , 410 Mass. 31 (1991)	23
<i>Com. v. A Juvenile</i> , 389 Mass. 128 (1983)	23, 24, 36
<i>Com. v. Krisco Corp.</i> , 421 Mass. 37 (1995)	31
<i>Com. v. MacNeill</i> , 399 Mass. 71 (1987)	24
<i>Com. v. Magee</i> , 423 Mass. 381 (1996)	23
<i>Com. v. McCra</i> , 427 Mass. 564 (1998)	23
<i>Com. v. Phillips</i> , 413 Mass. 50 (1992)	22
<i>Com. v. Rogers</i> , 444 Mass. 234 (2005)	22
<i>Com. v. Voisine</i> , 414 Mass. 772 (1993)	22

ACADEMIC JOURNALS AND CHAPTERS IN BOOKS

- David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14.1 Stan. L. & Pol'y Rev. 13 (2003) . . . 40
- Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 27 (Summer 2000) . 29, 30
- Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16 (Summer 1999) 27, 30
- Elizabeth Cauffman and Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325 (2002) 26
- David Elkind, *Egocentrism in Adolescence*, 38 Child. Dev. 1025 (1967) 28
- Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463 (2004) 36, 37
- Kurt W. Fischer *et al.*, *The Development of Abstractions in Adolescence and Adulthood*, in BEYOND FORMAL OPERATIONS: LATE ADOLESCENT AND ADULT COGNITIVE DEVELOPMENT 43 (Michael L. Commons *et al.* Eds., 1984) 28, 29
- Lita Furby and Ruth Beyth-Marion, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1 (1992) 27, 29
- Nitin Gogtay *et al.*, *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174 (2004) 39, 40

Stanley I. Greenspan & John F. Curry, <i>Extending Piaget's Approach to Intellectual Functioning</i> , in COMPREHENSIVE BOOK OF PSYCHIATRY 402 (Harold I. Kaplan & Benjamin J Sadock eds. 7 th ed. 2000)	25
Thomas Grisso <i>et al.</i> , <i>Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants</i> , 27 LAW & HUM. BEHAV. 333 (2003)	34, 35, 36, 37, 38, 39
Thomas Grisso, <i>Juveniles Capacities to Waive Miranda Rights: An Empirical Analysis</i> , 68 CAL. L. REV. 1134 (1980)	36
Howard Lerner, <i>Psychodynamic Models</i> in HANDBOOK OF ADOLESCENT PSYCHOLOGY 53 (Vincent Hasselt & Michael Hersen eds., 1987)	30
Marsel Mesulam, <i>Behavioral Neuroanatomy</i> in PRINCIPLES OF BEHAVIORAL AND COGNITIVE NEUROLOGY 1 (Marsel Mesulam ed., 2d. ed. 2000)	40
National Institute of Mental Health, <i>Teenage Brain: A Work in Progress</i> (NIH Publication No. 01-4929) (January 2001) ..	41
Lourdes Rosado, ed., KIDS ARE DIFFERENT: HOW KNOWLEDGE OF ADOLESCENT DEVELOPMENT CAN AID DECISION MAKING IN COURT (2000)	25, 26, 27, 28, 29, 32
Elizabeth S. Scott and Laurence Steinberg, <i>Blaming Youth</i> , 81 TEX.L.REV. 799 (2003)	40
Elizabeth S. Scott <i>et al.</i> , <i>Evaluating Adolescent Decision Making in Legal Contexts</i> , 19 Law & Hum. Behav. 221 (1995)	26, 27, 29, 30
Elizabeth S. Scott, <i>The Legal Construction of Adolescence</i> , 29 HOFSTRA L.REV. 547 (2000)	27, 33

- Elizabeth S. Scott and Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997) 25, 26, 27, 29
- Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417 (2000) 29, 40
- Laurence Steinberg and Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003) 19, 27
- Laurence Steinberg and Robert Schwartz, *Developmental Psychology Goes to Court* in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9 (Thomas Grisso & Robert Schwartz, eds.)(2000) 11, 25, 29, 32, 33
- Laurence Steinberg, *Juveniles on Trial*, 18 CRIM. JUST. 20 (Fall 2003) 26
- Laurence Steinberg and Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making*, 20 LAW & HUM. BEHAV. 249 (1996) 26, 27
- Laurence Steinberg *et al.*, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Development 841(1986) 32

BOOKS

- Peter Blos, THE ADOLESCENT PASSAGE: DEVELOPMENTAL ISSUES
(1979) 30
- Committee on Child Psychiatry, Group for the Advancement of
Psychiatry, *How Old is Old Enough? The Ages of Rights and
Responsibilities* (1989) 25, 26, 28, 29
- Barry C. Feld, BAD KIDS: RACE AND THE TRANSFORMATION OF THE
JUVENILE COURT (1999) 11
- Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES AND
THE CIVILIZED MINDS (2001) 40
- Thomas Grisso, JUVENILES' WAIVER OF RIGHTS: LEGAL AND
PSYCHOLOGICAL COMPETENCE (1981) 36
- Laurence Kohlberg, THE PSYCHOLOGY OF MORAL DEVELOPMENT:
THE NATURE AND VALIDITY OF MORAL STAGES (1984) ... 32
- Nat'l Res. Council & Inst. of Med., JUVENILE CRIME, JUVENILE
JUSTICE (Joan McCord *et al.* eds., 2001) 40
- Robert L. Selman, THE GROWTH OF INTERPERSONAL
UNDERSTANDING: DEVELOPMENTAL AND CLINICAL ANALYSES
(1980) 30
- R. Murray Thomas, COMPARING THEORIES OF CHILD DEVELOPMENT
(3d ed. 1992) 25

OTHER RESOURCES

- MacArthur Foundation Research Network on Adolescent
Development and Juvenile Justice, *Issue Brief 1: Adolescent
Competence in Court*, available at www.adjj.org. 34, 38

INTEREST OF THE *AMICI*¹

The organizations and individuals submitting this brief work with and on behalf of adolescents in a variety of settings. Some provide direct representation to minors who become involved in the juvenile justice and child welfare systems. Some work to create laws and policies that promote the fair treatment and well-being of youth in these systems. Others are psychologists, psychiatrists, and law professors with expertise in adolescent development and its relevance to the law. They join in this brief to assert that given what we now know about adolescent development and decision-making, the Commonwealth in this case did not sustain its heavy burden of proving that that Guthrie voluntarily consented to the search of his home, which revealed a gun, or that he voluntary and knowingly waived his right to remain silent prior to giving statements at the police station

¹ *Amici* file this brief conditionally and accompanied by a motion pursuant to Mass. R. App. Proc. 17 respectfully requesting leave of this court to file the brief.

IDENTITY OF THE *AMICI*²

Juvenile Law Center; Children and Family Justice Center; Center for Children's Law and Policy; Children's Law Center of Massachusetts; Children's Law Center of Minnesota; Juvenile Justice Project of Louisiana; Juvenile Rights Advocacy Project; National Center for Youth Law; New England Juvenile Defender Center, Inc.; Northeast Regional Juvenile Defender Center; Office of the Juvenile Defender; Pacific Juvenile Defender Center; San Francisco Public Defender's Office; Southern Juvenile Defender Center; and Professor Barry Feld.

² A brief description of each of the organizations and individuals listed herein appears at Appendix A.

STATEMENT OF ISSUES PRESENTED

Amici adopt the statement of issues presented as articulated in the main brief of Appellant, Guthrie G.³

STATEMENT OF FACTS

Amici adopt the statement of the case as articulated in the brief of Guthrie G.

³ Guthrie G. is a pseudonym that was assigned to the Appellant by the Appeals Court.

SUMMARY OF ARGUMENT

The trial court in the instant case correctly ruled that the Commonwealth did not sustain its heavy burden of proving that Guthrie voluntarily consented to the search of his home or that he voluntary and knowingly waived his right to remain silent prior to giving statements at the police station. The trial court's ruling is consistent with a long line of United States Supreme Court cases that recognizes the developmental differences between minors and adults in articulating and defining the scope of their constitutional rights. *See Part I, infra.* In the Fifth Amendment context, this Court's requirement that special precautions and procedures adhere when minors are interrogated is based squarely on its findings that minors are generally less mature, more submissive in the face of police authority, and lack critical knowledge and experience, as compared to adults. Under the Fourth Amendment, minors' rights have been diminished as this Court has pronounced that minors are "always in some form of custody" and they lack the right to come and go at will.

Indeed, this honorable court has also cited to the distinct

developmental status of youth in defining their rights in situations of search, seizure and interrogation. This honorable court, recognizing that they are less mature than adults and generally lack the capacity to appreciate the consequences of their actions, has enacted safeguards to protect youth from the possible outcomes of their immaturity and cautions that judges must take extra care when assessing whether a youth voluntarily consented to a search, or whether a youth made a voluntary, knowing and intelligent waiver of his right to remain. *See* Part II, *infra*. The trial court's ruling in the instant case fits squarely within this jurisprudential framework.

Social science and biomedical research on adolescent development confirms the developmental and social differences upon which these longstanding legal distinctions are made. This scholarship tells us that a number of "psychosocial factors" impact adolescent perceptions, judgment and decision-making and limit their capacity for autonomous choice. These psychosocial factors include present-oriented thinking, egocentrism, less experience and greater vulnerability to stress and fear than adults, and greater conformity to authority figures. More recent research into the structure and

function of the adolescent brain further supports these findings.

Together, the psychological and neurological research support the trial court's ruling in this case.

**I. UNITED STATES SUPREME COURT JURISPRUDENCE
CONSISTENTLY TAKES ACCOUNT OF THE
DEVELOPMENTAL DIFFERENCES BETWEEN
MINORS AND ADULTS IN DETERMINING MINORS’
CONSTITUTIONAL RIGHTS**

That minors are “different” is a principle that permeates our law. As Justice Frankfurter so aptly articulated, “[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state’s duty towards children.” *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, the United States Supreme Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors’ constitutional rights for the last sixty years, as most recently demonstrated in the Court’s decision in *Roper v. Simmons*, 543 U.S. 551 (2005). The trial court’s ruling in the instant case – that the Commonwealth did not fulfill its burdens of proving that Guthrie voluntarily consented to the search of his home, which revealed a gun, or that he voluntary and knowingly waived his right to remain silent prior to giving statements at the police station – falls squarely within this jurisprudential

framework.

For example, the United States Supreme Court has demarcated a legal distinction between minors and adults for the purpose of determining the voluntariness of juvenile confessions during custodial interrogation. Thus, the Court has recognized that minors are generally less mature than adults and, therefore, are more vulnerable to coercive interrogation tactics. As the Court first recognized in *Haley v. Ohio*, 332 U.S. 596 (1948), in suppressing the statement of a fifteen-year old defendant taken outside of the presence of his parents, a teenager

cannot be judged by the more exacting standards of maturity. *That which would leave a man cold and unimpressed can overawe and overwhelm a lad...* [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

Haley at 599-600 (emphasis added).

The Court also has noted that minors generally lack critical knowledge and experience, and have a lesser capacity to understand,

much less exercise, their rights when they are “made accessible only to the police.” *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (finding statement taken from a 14 year-old boy outside of his parent’s presence to be involuntary.) And in *In re Gault*, 387 U. S. 1, 55 (1967), where the Court extended many key constitutional rights to minors subject to delinquency proceedings in juvenile court, the Court reiterated its earlier concerns about youth’s special vulnerability: “The greatest care must be taken to assure that [a minor’s] confession was voluntary, in the sense that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.”

In the Court’s *per curiam* decision in *Kaupp v. Texas*, 538 U.S. 626, where it held a 17-year-old’s confession must be suppressed following an illegal arrest (absent undisclosed intervening evidence in the record) under the Fourth and Fourteenth Amendments, this Court applied earlier precedents in considering the defendant’s status as a 17-year-old in its analysis:

A 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers, one of

whom stated “we need to go and talk.” [The boy’s] ‘Okay’ in response to Pinkins’s statement is no showing of consent under the circumstances. *Pinkins offered [the boy] no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words ‘we need to go and talk’ presents no option but ‘to go.’* There is no reason to think [the boy’s] answer was anything more than ‘a mere submission to a claim of lawful authority.’

538 U.S. at 631 (emphasis added)(citations omitted).⁴

The Court’s holdings in the above-cited cases that minors, in comparison with adults, are generally less mature, more submissive in the face of police authority, and lack critical knowledge and experience, presage the trial court’s conclusion in the instant case that the prosecution did not sustain its burden of showing that Guthrie voluntarily consented to the search of his home or that Guthrie made a

⁴ *Yarborough v. Alvarado*, 124 S.Ct. 2140 (2004) is not to the contrary. There, the Court held only that youth was not a vital consideration when determining whether an individual is in custody for purposes of triggering *Miranda* warnings prior to interrogation. But *Alvarado* did not disturb this Court’s prior precedents that youth is an important factor in assessing the voluntariness of a confession under the due process clause. Moreover, *Alvarado* reached the Court by way of a habeas petition; and pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Court, therefore, only analyzed whether the state court’s interpretation of the law in *Alvarado* was reasonable, not whether it was correct. 124 S.Ct. at 2149.

voluntary and knowing waiver of his right to remain silent once at the police station.

The Court's more protective stance toward youth in confession cases parallels its stance with respect to other juvenile justice issues. For example, the Court has emphasized the juvenile court's core principles of individualized rehabilitation and treatment, noting that youth, because they are still malleable and in development, are more amenable to such rehabilitative interventions than adults. *See McKeiver v Pennsylvania*, 403 U.S. 528, 539-40 (1971); *Gault*, 387 U.S. at 15-16.⁵

Elsewhere in criminal procedure, the Court's recognition of the differences between youth and adults has led it to uphold practices

⁵ *See also* Barry C. Feld, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 92 (1999) (noting that the malleability of youth is central to the rehabilitative model of the juvenile court). The Court's premises with respect to malleability finds ample support in the developmental literature. *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 9, 23 (Thomas Grisso and Robert Schwartz eds., 2000) (noting that adolescence is a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment.") [hereinafter Steinberg and Schwartz, *Developmental Psychology*].

directed at youth that it would not countenance if directed at adults. For instance, the Court has repeatedly held that the Fourth Amendment strictures may be relaxed when dealing with youth in public schools because youth as a class are in need of adult guidance and control. Accordingly, the Court has upheld the constitutionality of warrantless searches by school officials of students' belongings upon reasonable suspicion that a student has violated school rules or the law, *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985); upheld random, suspicionless drug testing of student athletes, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 664-65 (1995); and upheld random, suspicionless drug testing of students engaged in extracurricular activities, *Board of Ed. of Ind. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 838 (2002).

In support of these Fourth Amendment rulings, the Court has noted, “[t]raditionally at common law, and still today, *unemancipated minors lack some of the most fundamental rights of self-determination* – including even the right of liberty in its narrow sense, *i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.*”

Vernonia, 515 U.S. at 654 (emphasis added) (citation omitted). This echoes the Court's earlier declaration in *Schall v. Martin*, 467 U.S. 253, 265 (1984), in explaining the rejection of a constitutional challenge to the preventive detention of juveniles charged with delinquent acts, that "*juveniles, unlike adults, are always in some form of custody*. Children, by definition, are not assumed to have the capacity to care for themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*..." (emphasis added) (citations omitted). *Cf. Vernonia*, 515 U.S. at 655 (when parents place their children in school they delegate custodial power to the latter, permitting the school a degree of supervision and control over their children that could not be exercised over free adults); *T.L.O.*, 469 U.S. at 339 (same).

Decisions regarding constitutional provisions other than the Fourth and Fifth Amendments likewise demonstrate the United States Supreme Court's persistent view that children are simply different than adults under the United States Constitution. Thus, for example, in a series of cases involving state restrictions on minors' abortion

rights, the Court has also made legal distinctions between minors and adults, and found that "during the formative years of childhood and adolescence, *minors often lack . . . experience, perspective, and judgment*," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (emphasis added), as well as "the ability to make fully informed choices that take account of both immediate and long-range consequences." *Id.* at 640; *see also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose *immaturity, inexperience, and lack of judgment* may sometimes impair their ability to exercise their rights wisely.") (emphasis added). For this reason, the Court has held that states may choose to require that minors consult with their parents before obtaining an abortion. *See Hodgson*, 497 U.S. at 458 (O'Connor, J., concurring in part) (noting that liberty interest of minor deciding to bear child can be limited by parental notice requirement, given that immature minors often lack ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (noting that because minors often lack capacity to make fully informed choices, the state may reasonably

determine that parental consent is desirable).⁶

The Court also has curtailed the liberty interests of minors in other settings. Particularly illustrative is *Parham v. J.R.*, 442 U.S. 584 (1979), where the Court rejected a constitutional challenge to Georgia's civil commitment scheme that authorized parents and other third parties to involuntarily commit children under the age of eighteen. In curtailing children's liberty interests in this context, the Court noted that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions...." *Id.* at 603.

⁶ The Court has held, however, that state legislatures may not enact statutes giving parents an absolute veto power over a minor's decision to obtain an abortion. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (invalidating state statute requiring that unmarried minors obtain parental consent for abortions). A state statutory scheme also must provide an alternative procedure which allows the juvenile to procure authorization for the abortion from the State without complying with the parental-notification and/or consent requirements, upon a showing that she is mature and informed enough to make the decision regarding the abortion independently from and without the consent of her parents. *Bellotti*, 443 U.S. at 642-44. Alternatively, the court may find that the abortion is in the minor's best interest even if she is not able to make an independent decision. *Id.*

The United States Supreme Court also has distinguished children from adults under the First Amendment. In *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), the Court recognized that protecting minors from harmful images on the Internet, due to their immaturity, is a compelling government interest. *Id.* at 661; *id.* at 683 (Breyer, J., dissenting).⁷ And in *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), the Court upheld a state statute restricting the sale of obscene material to minors. Such a restriction was permissible for youth, as compared to adults, because “*a child – like someone in a captive audience – is not possessed of that full capacity for individual choice* which is the presupposition of First Amendment guarantees.” *Id.* at 649-50 (Stewart, J., concurring) (footnotes omitted) (emphasis added). See also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). Similarly, the Court has upheld a state’s right to restrict when a minor can work, on

⁷ The Court split only on whether the Child Online Protection Act used the least restrictive means, consistent with adults’ First Amendment freedoms, for achieving that end. *Id.* at 673; *id.* at 675 (Stevens, J., concurring); *id.* at 676 (Scalia, J., dissenting); *id.* at 677 (Breyer, J., dissenting).

the premise that “[t]he state’s authority over children’s activities is broader than over the actions of adults.” *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

These themes are echoed in the Court’s public school prayer decisions. In holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, the Court in *Lee v. Weisman*, 505 U.S. 577 (1992), placed great emphasis on the “public pressure, as well as peer pressure,” that such state-sanctioned religious practices impose on impressionable students. *Id.* at 593. The Court admonished that “[f]inding no violation under these circumstances would place objectors in the dilemma of participating [in the prayer], with all that implies, or protesting.” *Id.* Of particular relevance to this case, the Court stated it was not addressing whether the government could put citizens to such a choice when those “affected . . . are mature adults,” rather than “primary and secondary school children,” who are “often susceptible to pressure from their peers towards conformity . . . in matters of social convention.” *Id.* Similarly, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Court held that prayers

authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The Court stressed “the immense social pressure” on students “to be involved in the extracurricular event that is American high school football.” *Id.* at 311. As the Court described it, “the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one,” *id.* at 312, and, in the high school setting, “the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.” *Id.* By contrast, the Court has upheld against an Establishment Clause challenge the delivery of prayers at the start of legislative sessions, where the audience that is present invariably is made up almost exclusively of adults who would not be subject to the same pressures to conform as would youth. *Marsh v. Chambers*, 463 U.S. 783 (1983). *See Lee*, 505 U.S. at 597 (distinguishing between “atmosphere” at legislative sessions and public high schools).

Most recently, in the United States Supreme Court’s landmark decision in *Roper v. Simmons*, 543 U.S. 551, 569-72 (2005), the

Court relied in part on social science research on the developmental differences of adolescents to hold that imposition of the death penalty on those who committed their offenses when under the age of 18 constitutes cruel and unusual punishment. Specifically, the Court noted that studies confirm that “a lack of maturity and an underdeveloped sense of responsibility are found in youth more than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Additionally, the Court noted that youth have less control over their own environment. *Id.* at 569 (citing Laurence Steinberg and Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) [hereinafter Steinberg & Scott, *Developmental Immaturity*]).

In sum, in an unbroken line of decisions extending more than half a century, the United States Supreme Court has distinguished minors from adults under the law, noting that minors are, *inter alia*, (1) always in someone’s custody and not at liberty to come and go at

will; (2) less mature; (3) deficient in judgment and perspective; (4) more susceptible to the appearance or assertion of authority; (5) less able to think rationally in stressful situations; (6) less experienced and thus less knowledgeable; and (7) more malleable.

The Court's findings with respect to the developmental differences of teenagers in the critical realms of decision-making and judgment, in turn, are well-supported by a wide body of social science and medical research, as discussed in detail in Part II, *infra*. This same research supports the trial court's suppression of the tangible evidence and statements in this case.

II. SOCIAL SCIENCE RESEARCH SUPPORTS THE TRIAL COURT'S RULING THAT THE PROSECUTION DID NOT PROVE THAT GUTHRIE VOLUNTARILY CONSENTED TO THE SEARCH OF HIS BEDROOM OR MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT AGAINST SELF-INCRIMINATION

In the instant case, Guthrie, who was home alone, opened his front door to find three uniformed police officers standing in the doorway. Guthrie didn't ask the police why they were there or what they wanted and, instead, simply let them in. Once inside the living

room/kitchen area, Guthrie immediately responded to one officer's questions about a gun. Guthrie denied knowledge of a gun but said he had a BB gun. After the officer asked to see the gun, Guthrie promptly went to his bedroom to retrieve it. Without obtaining Guthrie's consent, and certainly without informing Guthrie that he did not have to comply with the officer's wishes, the officer followed Guthrie into his bedroom and a second officer positioned himself at the threshold of the room; the third officer remained in the living room/kitchen area. At the behest of police, Guthrie recovered a gun from his bedroom. The police additionally seized gun parts from a trash basket in the bedroom and from under a bed. Consequently, the police took Guthrie to the police station. When Guthrie's father later arrived at the station, the police read Guthrie and his father the *Miranda* rights. Guthrie's father did not talk to his son nor ask the police any questions before he, and not Guthrie, promptly signed a form waiving Guthrie's rights. After witnessing his father give up his right to remain silent and consult with counsel, Guthrie told police that he had found the gun two days before on the side of the road and that he did not know it had been stolen. *Trial Ct. Op.*, dated October

29, 2003, at 2-3.

Because the police did not have a warrant to search Guthrie's home, the Commonwealth bears the burden of proving under the totality of the circumstances that Guthrie voluntarily consented to the search. *United States v. Mendenhall*, 446 U.S. 544, 557 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *Commonwealth v. Phillips*, 413 Mass. 50, 55 (1992); *Com. v. Aguiar*, 370 Mass. 490, 496 (1976). "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). *See also Com. v. Voisine*, 414 Mass. 772, 783 (1993). And "[i]n meeting its burden of establishing voluntary consent to enter, the Commonwealth must provide [the court] with more than an ambiguous set of facts that leaves [the court] guessing about the meaning of [the] interaction and, ultimately, the occupant's words or actions." *Com. v. Rogers*, 444 Mass. 234, 238 (2005).

With respect to the statements he made at the police station, the Commonwealth also bears the burden of demonstrating that Guthrie made a knowing, intelligent and voluntary waiver of his right to

remain silent. *Com. v. Magee*, 423 Mass. 381, 386 (1996). In determining whether the Commonwealth has carried its burden with respect to the *Miranda* waiver, *see Miranda v. Arizona*, 384 U.S. 436 (1966), the court must take into account, *inter alia*, whether Guthrie was given the opportunity to *meaningfully* consult with a parent or interested adult who was informed of and understood those rights prior to Guthrie waiving them. *Com. v. McCra*, 427 Mass. 564, 567 (1998); *Com. v. Berry*, 410 Mass. 31, 34 (1991). Where there was no meaningful opportunity for consultation, a youth's statement should be suppressed unless the circumstances demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile. *Com. v. A Juvenile*, 389 Mass. 128, 134 (1983). As this honorable court has noted,

These added protections are consistent with our legal system's traditional policy which affords minors a unique and protected status. The law presumes different levels of responsibility for juveniles and adults and, realizing that juveniles frequently lack the capacity to appreciate the consequences of their actions, seeks to protect them from the possible consequences of their immaturity. Moreover, by providing the juvenile with the opportunity for meaningful consultation with an informed adult, these procedures prevent the warnings from becoming merely a ritualistic recitation wherein the

effect of the actual comprehension by the juvenile is ignored.

Com. v. A Juvenile, 389 Mass. at 132 (citation omitted). “The ultimate question is whether the juvenile has understood his rights and the potential consequences of waiving them before talking to police.” *Com. v. MacNeill*, 399 Mass. 71, 79 (1987).

Amici respectfully submit that the trial court’s ruling in the instant case — that the Commonwealth failed in its heavy burden to demonstrate that Guthrie voluntarily consented to a search of his bedroom, and that he voluntarily, knowingly and intelligently waived his *Miranda* rights prior to his statements at the police station — is consistent with settled research that children and adolescents are developmentally distinct from adults in critical areas pertinent to these inquiries.

Developmental psychologists have long recognized that adolescence is a period of major development across many domains, including the realm of cognition. During the teenage years, youth begin to develop the abilities to abstract, to think of the possible (including alternative possibilities) and not just the real, and to form

and test hypotheses about the world around them. Stanley I. Greenspan & John F. Curry, *Extending Piaget's Approach to Intellectual Functioning*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 402, 406-07 (Harold I. Kaplan & Benjamin J. Sadock eds., 7th ed. 2000) (providing an overview of Jean Piaget's cognitive development model, which remains an important theoretical work in the child development field).⁸ These cognitive capacities progressively become part of an adolescent's repertoire; however, this development rarely follows a straight line during adolescence, as periods of progress alternate with periods of regression. Steinberg & Schwartz, *Developmental Psychology* at 24.

Developmental psychologists also recognize that adolescents do not utilize these developing cognitive capacities consistently over

⁸ See also KIDS ARE DIFFERENT: HOW KNOWLEDGE OF ADOLESCENT DEVELOPMENT THEORY CAN AID DECISION-MAKING IN COURT 7 (L. Rosado ed., 2000) [hereinafter KIDS ARE DIFFERENT]; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 157 (1997) [hereinafter Scott & Grisso, *The Evolution of Adolescence*]; R. Murray Thomas, COMPARING THEORIES OF CHILD DEVELOPMENT 273-318 (3d ed. 1992); Committee on Child Psychiatry, Group for the Advancement of Psychiatry, *How Old is Old Enough? The Ages of Rights and Responsibilities* 20-35 (1989) [hereinafter GAP].

time or across a variety of situations. Other non-cognitive, “psychosocial factors,” including the external environment, impact adolescent perceptions, judgment and decision-making and limit their capacity for autonomous choice. Elizabeth Cauffman and Laurence Steinberg, *Researching Adolescents’ Judgment and Culpability*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325, 327-29 (Thomas Grisso & Robert G. Schwartz eds., 2000).⁹ As one developmental psychologist has observed, “During the time these processes are developing, it doesn’t make sense to ask the average adolescent to think or act like the average adult, because he or she can’t – any more than a six-year-old child can learn calculus.” Laurence Steinberg, *Juveniles on Trial*, 18 CRIM. JUST. 20, 22 (Fall 2003). These psychosocial factors, described in more detail below, explain why Guthrie’s actions, and inactions, in his dealings

⁹ See also KIDS ARE DIFFERENT at 8-10; Scott & Grisso, *The Evolution of Adolescence* at 157, 161-64; Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making*, 20 LAW & HUM. BEHAV. 249, 250 (1996) [hereinafter Steinberg & Cauffman, *Maturity of Judgment*]; Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 222-23 (1995) [hereinafter Scott, *Evaluating Adolescent Decision Making*]; GAP at 28.

with the police were a mere acquiescence to police authority and not the result of voluntary and informed choices.

To begin, adolescents have a different perception of time as compared to adults. Adolescents exhibit present-oriented thinking and have difficulty thinking beyond the present. Generally, they seem unable to think about the future or they discount it. Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16, 17 (Summer 1999) [hereinafter Beyer, *Recognizing the Child*].¹⁰ They focus more on the short-term results, and less on the future consequences, of any given action as compared to adults. Scott, *Evaluating Adolescent Decision Making* at 233; Steinberg & Cauffman, *Maturity of Judgment* at 759. Youth as compared to adults are weaker at accurately weighing the risks and benefits of their choices. Lita Furby & Ruth Beyth-Maron, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 17 (1992); Steinberg & Scott, *Developmental Immaturity* at 1012. Another aspect of adolescent thinking is egocentrism, which

¹⁰ See also KIDS ARE DIFFERENT at 9; Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 591-92 (2000); Scott & Grisso, *The Evolution of Adolescence* at 164.

is an intense self-consciousness that leads teenagers to believe that others are constantly watching and evaluating them. David Elkind, *Egocentrism in Adolescence*, 38 CHILD. DEV. 1025, 1029-30 (1967); KIDS ARE DIFFERENT at 9. Egocentrism interacts with an adolescent's present-oriented thinking to lead an adolescent to only see the difficult circumstances which s/he is currently facing and not see beyond into the future. KIDS ARE DIFFERENT at 9. Consequently, a youth in Guthrie G.'s shoes, alone with three uniformed police officers in his home, would likely feel the scrutiny of the police officers more intensely than an adult, and put more value on ending the situation as quickly as possible rather than thinking of the possible long-term outcome of complying with the police, i.e., that he would be charged with possession of a stolen gun.

Moreover, it cannot be emphasized enough that the utilization of cognitive skills is context-specific during adolescence. Kurt W. Fischer *et al.*, *The Development of Abstractions in Adolescence and Adulthood*, in BEYOND FORMAL OPERATIONS: LATE ADOLESCENT AND ADULT COGNITIVE DEVELOPMENT 43, 57 (Michael L. Commons *et al.* eds., 1984); *GAP* at 34. For example, stress and fear greatly

impact adolescent cognition; in stressful situations, adolescents often will not use the highest level of cognitive reasoning of which they may be capable in non-stressful scenarios. Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417, 423 (2000); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 27, 27 (Summer 2000) [hereinafter Beyer, *Immaturity*]; Furby & Beyth-Marion at 22.¹¹ Youth simply have less experience, including interpersonal experience, to draw on than adults, and so on average they have a lesser capacity to respond and react in new and stressful situations. Steinberg & Schwartz, *Developmental Psychology* at 26.¹² Adolescents also generally process information less effectively than adults and instead exhibit “either-or” thinking, again particularly when under stress. Adolescents will typically perceive only one option when adults in similar situations would see multiple possibilities. Beyer, *Immaturity*

¹¹ See also *Kids are Different* at 10; Fischer at 70.

¹² See also Scott & Grisso, *The Evolution of Adolescence* at 164; Scott, *Evaluating Adolescent Decision Making* at 224-27; GAP at 30.

at 27; Beyer, *Recognizing the Child* at 17-18.

This tendency to engage in either-or thinking also affects adolescents' interactions with others. An important developmental "task" of adolescence is "negotiating about power and control in the context of changing relationships with peers and parents." Scott, *Evaluating Adolescent Decision Making* at 230 (citations omitted). But in the process of forming more complex relationships with adults, adolescents regress; teenagers will "polarize" their characterization of adults, or overgeneralize or stereotype a trait in a particular person, instead of seeing people as having mixed motives or agendas.

Howard Lerner, *Psychodynamic Models* in HANDBOOK OF ADOLESCENT PSYCHOLOGY 53, 66 (Vincent B. Van Hasselt & Michel Hersen eds., 1987) (citation omitted); Robert L. Selman, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL ANALYSES 134 (1980); Peter Blos, THE ADOLESCENT PASSAGE: DEVELOPMENTAL ISSUES 152, 156 (1979). Thus, a 14 year-old alone in his house with three uniformed police officers who never asked permission to search his home, nor told him that he had the right to refuse his consent for the search and demand that they obtain

a warrant, would likely view those officers in “polarized terms,” i.e., as authority figures who have the power to search his home and direct his actions. In this stressful situation and given a lack of experience and critical knowledge, a youth like Guthrie is more likely to see only one option – submitting to the police’s authority – instead of conceiving of other possibilities, i.e., that he does not have to comply with the police’s directions. This court has held in adult search cases that while the fact that the suspect was not informed that he could demand that police obtain a warrant is not determinative, “it is relevant with regard to the voluntariness of the consent.” *Com. v. Krisco Corp.*, 421 Mass. 37, 46 (1995) (citations omitted). *Amici* respectfully submit that, given what we know about how adolescents think and react, the fact that police did not give that information to a 14 year-old is *even more* relevant to assessing whether the youth voluntarily gave consent for a search.

Scholarship on moral development in adolescence also explains why a juvenile would be more inclined than an adult to acquiesce to a police officer’s demands. Adolescence is marked by “conventional morality” – “conforming to and upholding the rules and expectations

and conventions of society or authority just because they are society's rules, expectations, or conventions." Lawrence Kohlberg, *THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES* 172-73 (1984). Most people who reach the "postconventional level of morality" – where they grapple with the moral principles underlying these rules before deciding to accept them as their own values – only do so in their twenties. *Id.* at 172-73. The conformity characteristic of adolescence means that teenagers in general are more compliant when confronted by authority figures.

Adolescence is a time when the gradual transition to becoming a self-governing, autonomous individual begins. *KIDS ARE DIFFERENT* at 16. But adolescents remain emotionally dependent on other people, specifically their parents and peers, throughout this development process; they are thus less capable of independent, self-directed action than adults who have achieved a greater sense of identity and autonomy. They are vulnerable to influences from both peers and parents. *Id.* at 16-17.¹³ "[A]dolescents are not fully

¹³ See also Laurence Steinberg *et al.*, *The Vicissitudes of Autonomy in Early Adolescence*, 57 *CHILD DEVELOPMENT* 841, 848 (1986); Steinberg & Schwartz, *Developmental Psychology* at 23 (noting that

formed persons in many regards; they continue to be dependent on their parents and on society...” Scott, *Legal Construction of Adolescence* at 555. In the instant case, Guthrie witnessed his father do exactly what he did earlier when he was alone with the three uniformed officers in his home – submit to the police’s show of authority. Guthrie’s father did not question the police or try to pause any of the proceedings and instead immediately waived Guthrie’s rights to remain silent. Guthrie saw that his father, another authority figure, did not challenge the police in any way, thus reinforcing Guthrie’s belief that he had no choice but to answer the police’s questions about the gun.

Most recently, an unprecedented study on the competence of juveniles as trial defendants made several findings that are directly relevant to the issues before this court, namely whether the prosecution proved that Guthrie voluntarily consented to the search of his bedroom, as opposed to merely acquiescing to a show of police authority, and whether Guthrie made a voluntary and knowing waiver

adolescence is a period of “tremendous malleability” and “tremendous plasticity in response to features of the environment.”)

of his *Miranda* rights prior to making admissions at the police station. The study, conducted by social scientists under the auspices of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice [hereinafter the Research Network], used measures of both trial-related abilities and developmental maturity to assess the adjudicative competence of 927 adolescents ages 11-17 from detention facilities and communities in four locations across the United States, as compared to 466 young adults ages 18-24 in jails and in the community. Thomas Grisso *et al.*, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 337-38 (2003) [hereinafter Grisso, *Juveniles' Competence*]. See also MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Issue Brief 1: Adolescent Competence in Court* [hereinafter *Adolescent Competence Issue Brief*] available at www.adjj.org.

By using the MacArthur Competence Assessment Tool-Criminal Adjudication, the researchers first gauged the three specific functional abilities that undergird the legal concept of competence:

(1) basic comprehension of the purpose and nature of the trial process (understanding); (2) the capacity to provide relevant information to counsel and process information (reasoning); and (3) the ability to apply information to one's situation in a non-distorted, rational manner (appreciation). Grisso, *Juveniles' Competence* at 335-36. Researchers found that on the scales that measure understanding and reasoning that nearly one-third of 11-13 year-olds and one-fifth of 14-15 year olds had deficits that seriously call into question their ability to proceed as trial defendants. *Id.* at 344. Moreover, the researchers confirmed earlier findings that youth in the justice system score lower on intelligence tests, and found that two-thirds of the detained youth in the study aged 15 and younger had IQ scores associated with a significant risk of being incompetent to stand trial because of impaired understanding and/or reasoning abilities. *Id.* at 349-50.

The Research Network's findings with respect to functional capacity are also consistent with the results of earlier studies on youths' capacities in other legal contexts. Notably, "in a study of youths' abilities to understand and appreciate *Miranda* warnings,

[Thomas] Grisso found that ‘understanding...was significantly poorer among juveniles who were 14 years of age or younger than among 15-16 year-old juveniles or adult offenders,’ and that those deficits were even more pronounced among youths with low IQ scores, including youths who were 15 and 16 years of age.” *Id.* at 356 (citing and quoting Thomas Grisso, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 192 (1981)). Indeed, this honorable court, in holding that courts must exercise extra caution in evaluating a juvenile’s waiver of his constitutional rights, has cited to the Grisso study because it demonstrates that “most juveniles do not understand the significance and protection of these rights....” *Com. v. A Juvenile*, 389 Mass. at 131 (citing Thomas Grisso, *Juveniles Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980)). See also Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 526-527(2004) (noting that youths’ lower social status *vis-a-vis* their adult interrogators, societal expectations that they respect authority, and their naivete, also may make them more likely to comply with the

demands of their interrogators).

The Research Network did not end their inquiry at measuring youths' basic understanding and reasoning capabilities, because the Network recognized that youths'

“‘decisional competence’ may be significant in cases in which defendants must make important decisions about the waiver of constitutional rights. A potentially important difference between adolescents and adults in this regard involves maturity of judgment. Differences between adolescents and adults not only are cognitive, but also involve aspects of psychosocial maturation that include progress toward greater future orientation, better risk perception, and less susceptibility to peer influence.”

Grisso, *Juveniles' Competence* at 335 (emphasis added) (citations omitted). Thus, to examine the potential relationship between immaturity and the choices that youth make in the course of a criminal or delinquency case, researchers developed the MacArthur Judgment Evaluation tool. *Id.* at 336. This instrument uses three vignettes – responding to police interrogation, disclosing information to one's defense counsel, and responding to a deal for a plea agreement whereby consequences are lessened in exchange for a guilty plea and testifying against others – and structured interviewing

to examine certain psychosocial factors that influence the choices that youth make. *Id.* at 340. Specifically, the researchers assessed different aspects of decisional maturity: risk appraisal, future orientation, peer influence and conformity to authority figures. *Adolescent Competence Issue Brief* at 2.

Significant age differences were found in the interrogation and plea bargaining scenarios. The proportion of individuals choosing confession decreased from about one half of the 11-13 year olds and 40% of 14-15 year olds, to one fifth of the young adults 18-24. Grisso, *Juveniles' Competence* at 351-52. Similarly, the percentage of individuals accepting the plea agreement declined from 74% among 11-13 year olds and 70% of 14-15 year olds to 50% of young adults. *Id.* at 351-52.

Particularly relevant to the case at hand are the Research Network's findings with respect to youths' compliance with authorities, and the assessment of risk likelihood and risk impact. In each vignette, one decision choice represented compliance with authority, and researchers found significant differences by age. Specifically, the 11-13 year olds and 14-15 year olds were similarly

more compliant with authority than the older individuals. *Id.* at 353-54. With respect to risk appraisal, the young adults ages 18-24 reported a significantly higher likelihood of risk than the youth under age 18, and youth 11-15 scored lower on assessing risk impact than those 16 and older. *Id.* at 354. These empirical findings of youth's decisional competence demonstrate that for a court to find that Guthrie voluntarily consented to a search of his home and waived his *Miranda* rights would require evidence more extensive and definitive than was presented in the instant case.

Finally, new research into the structure and function of the teenage brain also suggests that immature brain development among adolescents may disadvantage them when dealing with the police. This research, made possible by new technologies such as magnetic resonance imaging (MRI) that allow scientists to study images of the brain, suggest that the teenage brain does not fully develop until the early 20's. Most importantly, the research suggests that the last areas of the brain to develop are the frontal lobes, specifically the pre-frontal cortex, which govern decision-making, judgment, and impulse control. See Nitin Gogtay *et al.*, *Dynamic Mapping of Human*

Cortical Development During Childhood Through Early Adulthood, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004); Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MINDS 23-24 (2001); Marsel Mesulam, *Behavioral Neuroanatomy* in PRINCIPLES OF BEHAVIORAL AND COGNITIVE NEUROLOGY 1, 47 (Marsel Mesulam ed., 2d. Ed. 2000). As this area of the brain develops, young adults become more reflective and deliberate decision makers, the very skills which they would need in confronting and dealing with police in search and interrogation situations. See David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14.1 STAN. L. & POL'Y REV. 13, 15 (2003) (citing NAT'L RES. COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 16 (Joan McCord *et al.* eds., 2001)); Elizabeth S. Scott and Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003) (citing Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 417, 421-23 (2000)); National Institute of Mental Health, *Teenage Brain: A Work in Progress* (NIH Publication No. 01-4929, January 2001)

(available at <http://www.nimh.nih.gov/publicat/teenbrain.pdf>). See also *In re Stanford*, 537 U.S. 968, ___, 123 S.Ct. 472, 474 (2002) (Stevens, J., dissenting) (noting that “[n]euroscientific evidence of the last few years has revealed that adolescent brains are not fully developed” and “use of magnetic resonance imaging – MRI scans – have provided valuable data that serve to make the case even stronger that adolescents are more vulnerable, more impulsive, and less self-disciplined than adults”) (internal quotations omitted) (citations omitted). While still in its infancy, this research shows that there may well be a biological underpinning to what social science tells us about adolescents.

Thus, based on the record, and given what we know about adolescent development, the trial court had no choice but to find that the Commonwealth had not borne its heavy burden of showing that Guthrie’s actions and inactions at the house and at the police station were more than just a mere acquiescence or resignation to the perceived authority of uniformed police officers.

CONCLUSION

Wherefore, for the foregoing reasons, and any others that may appear to this honorable court, *Amici Curiae* Juvenile Law Center *et al.* respectfully request that this court reverse the ruling of the intermediate appellate court and reinstate the trial court's order that suppressed admission of the tangible evidence seized from Guthrie's home as well as Guthrie's statements.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO MASS. R. APP. PROC. 16(K)**

I, Lourdes M. Rosado, Esq., do hereby certify this 10th day of October, 2006, that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Lourdes M. Rosado, Esq.

DATED: October 10, 2006

CERTIFICATE OF SERVICE

I, Lourdes M. Rosado, Esq., do hereby certify under the penalties of perjury that on this the 10th day of October, 2006, I served this brief on the persons below via first class mail.

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**AFFIDAVIT OF FILING PURSUANT TO
MASS. R. APP. PROC. 13**

I, Lourdes M. Rosado, Esq., do hereby attest and affirm that the
that the day of mailing of this brief was within the time fixed for
filing.

Lourdes M. Rosado, Esq.

APPENDIX A
IDENTITY OF AMICI CURIAE

Organizations

Juvenile Law Center (JLC) is one of the oldest legal service firms for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. We believe the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care. JLC is a non-profit public interest firm. Legal services are provided at no cost to our clients.

The **Northwestern University School of Law's Bluhm Legal Clinic** has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center (CFJC)** was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Center for Children's Law and Policy (CCLP)** is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk

children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP capitalizes on its Washington, DC location by working on juvenile justice and education reform efforts in DC, Maryland, and Virginia; partnering with other Washington-based system reform and advocacy organizations such as the Justice Policy Institute, National Juvenile Defender Center, and Campaign 4 Youth Justice; engaging in legislative advocacy with Congress; and associating with major Washington law firms which provide assistance on a pro bono basis. CCLP also works in other states and on national initiatives such as MacArthur Foundation's Models for Change initiative, where it is responsible for efforts to reduce Disproportionate Minority Contact (DMC) with the justice system, and the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative, which aims to reduce the use of locked detention and ensure safe and humane conditions of confinement for children. Much of CCLP's work involves reviewing policies and procedures around the arrests of minors, therefore CCLP

has a particular interest in this case.

Founded in 1977, the **Children's Law Center of Massachusetts** (CLCM) is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare and education matters. CLCM attorneys regularly participate as faculty in MCLE and other continuing legal education seminars and have filed *amicus curiae* briefs in juvenile justice and child welfare matters in the past. The CLCM has a vital interest in ensuring that the rights and interests of children in the Commonwealth are protected in delinquency matters. This case presents questions of significance both to the children who are involved in the court system and to the attorneys who represent them. The *amici* hope their views will add to the Court's consideration of the issues raised in this appeal.

Children's Law Center of Minnesota (CLC) opened for operation in 1995 and is the only legal center for children in Minnesota. CLC is a nonprofit organization whose mission is to

promote the rights and interests of all children – especially children of color and children with disabilities – in the judicial, child welfare, health care and education systems. CLC carries out its mission by providing direct representation for children and by advocating and participating in statewide efforts to reform and improve the child protection and juvenile justice systems. CLC participates in statewide committees such as the Children in Need of Protection or Services Public Defender Workgroup that examined and made recommendations for the state-wide representation of children and parents in abuse and neglect proceedings and the Children's Justice Initiative that recommends system change to change the lives of children in foster care. CLC also participates nationally in the American Bar Association Section of Litigation Children's Rights Litigation Committee Working Group and the National Children's Law Network that is forging a national agenda for the well being of children in foster care and delinquency proceedings.

Children have rights and legal protections, but they are not self-supporting; they need someone, first, to help them understand how their lives can be better and, second, to speak effectively on their

behalf and promote their important interests. The services that CLC provides center on the rights of children to have a voice in their own future and to be secure in their person and environment. CLC represents children who have been physically or sexually abused or neglected and are in the foster care system. A large number of these children are also brought into detention as status offenders because of running away and truancy. Often, when police question children because of allegations of wrongdoing, the children do not understand their rights including their right not to talk to the police officer with dire consequences for the children. CLC joins this brief because of the critical public policy issue at stake for the children it serves.

Founded in 1997, the **Juvenile Justice Project of Louisiana** (JJPL) has established itself as a partner in efforts to reform Louisiana's juvenile justice system. We have dedicated ourselves to advocating not only for more effective, less expensive alternatives to incarceration, but also for the zealous and effective representation of children in the juvenile and criminal justice systems. JJPL was founded on the recognition that children and adolescents are

fundamentally different from adults and, as such, require developmentally appropriate interventions and advocacy. The manner in which the judicial system responds to young people in crisis has been a central focus of JJPL. We believe that children must be afforded essential due process protections and that such protections necessarily include a consideration of their developmental capacities and limitations. This is particularly the case where a child is likely to feel intimidated by authority figures. Given the ways in which young people are especially susceptible to police questioning and interrogations, a juvenile must have meaningful access to counsel to ensure his rights are protected. JJPL is committed to ensuring that children and youth accused of wrongdoing receive the appropriate protections of the law.

The Juvenile Rights Advocacy Project (JRAP) is based at Boston College Law School and is staffed by a director, supervising attorneys, and second third year law students. The JRAP represents youth (with a focus on girls) who are in the delinquency system, comprehensively, across systems, and until they reach majority.

JRAP representation uses the legal system to access social and community services and hold systems accountable, reducing the use of incarceration and supporting girls in their communities. In addition to individual representation, the JRAP is involved in ongoing research and policy advocacy aimed at reducing incarceration and supporting youth in their communities. Within its policy agenda, the JRAP seeks to develop and model programs for delinquent youth that provide access for youth to a range of social services and promote collaboration across systems.

The National Center for Youth Law (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL

supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance. NCYL has participated in litigation that has improved the quality of foster care in numerous states, expanded access to children's health and mental health care, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. As part of the organization's juvenile justice agenda, NCYL works to ensure that youth in trouble with the law are treated as adolescents and not adults, in a manner that is consistent with their developmental stage and capacity to change.

The New England Juvenile Defender Center, Inc. was created in 2000 to ensure excellence in juvenile defense and promote justice for children in the juvenile justice systems of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. The Center focuses primarily on supporting defenders to provide the best possible services to court-involved children and to ensure that the juvenile justice systems in New England treat children like

children and provide them with real opportunities for care and treatment where appropriate. The Center has also created a Juvenile Impact Litigation Fund to support solo practitioners and organized groups of attorneys to challenge conditions of confinement in the region. The NEJDC is a non-profit public interest organization.

The Northeast Regional Juvenile Defender Center (NRJDC) is dedicated to increasing access to justice for and the quality of representation afforded to children caught up in the juvenile and criminal justice systems. Housed jointly at Rutgers Law School - Newark and the Defender Association of Philadelphia, the NRJDC provides training, support, and technical assistance to juvenile defenders in Pennsylvania, New Jersey, New York, and Delaware. The NRJDC also works to promote effective and rational public policy in the areas of juvenile detention and incarceration reform, disproportionate confinement of minority children, juvenile competency and mental health, and the special needs of girls in the juvenile justice system.

The **Office of the Juvenile Defender** (OJD) in Vermont is an office within the Office of the Defender General. The Office of the Defender General is responsible for providing public defender representation to qualified Vermont citizens. The OJD was established to provide ongoing post-dispositional legal representation to those children and youth who were the subject of abuse, neglect or delinquency petitions in Family Court, were represented by public defenders statewide, and, as a result of those proceedings, were placed in the custody of the Commissioner of the Department for Families and Children (DCF), Vermont's child welfare agency. The OJD provides legal representation to its clients at caseplan review meetings, various administrative hearings and when they are placed at the Woodside Juvenile Rehabilitation Center, which houses Vermont's sole juvenile detention center. The OJD pays particular attention to those children who are placed at the juvenile detention center and endeavors to ensure that their Constitutional rights are protected and that they are treated fairly by DCF and receive appropriate services.

The **Pacific Juvenile Defender Center (PJDC)** is a regional affiliate of the National Juvenile Defender Center. PJDC is a collaborative effort of the San Francisco Office of the Public Defender and the Center on Juvenile and Criminal Justice. The PJDC is housed at Legal Services for Children. The Defender Center provides support, training and technical assistance for juvenile defenders throughout California and Hawaii. It is the mission of the Defender Center to improve the quality of juvenile defense in our region and ensure that juveniles are provided with holistic representation that meets their needs.

The **San Francisco Public Defender's Office** provides legal representation per year to approximately 1,400 juveniles, aged 10-18, who are arrested and charged with delinquent offenses. The majority of the juvenile clients represented by the office come from difficult family circumstances and live in dangerous and poverty stricken neighborhoods and are in need of legal and social services. Our juvenile clients are a very vulnerable population with needs that are substantial and involve multi-systems collaborations such as with

special education, mental health, dependency and immigration. The goal of the juvenile justice system is very different from the adult system. We recognize the need to treat children going through adolescence very differently than adults.

The **Southern Juvenile Defender Center (SJDC)** works to ensure excellence in juvenile defense and secure justice for children in delinquency and criminal proceedings in the southeastern United States. SJDC provides training and resources to juvenile defenders, and advocates for systemic reforms designed to give children the greatest opportunities to grow and thrive. Through public education and advocacy, SJDC encourages attorneys and judges to rely upon scientific research concerning adolescent brain development in cases involving youthful defendants. SJDC is based at the Southern Poverty Law Center (“SPLC”) in Montgomery, Alabama. Founded in 1971, SPLC has litigated numerous civil rights cases on behalf of incarcerated children and other vulnerable populations.

Individual

Barry Feld is Centennial Professor of Law, University of Minnesota Law School. He has written eight books and about seventy law review and criminology articles and book chapters on juvenile justice with a special emphasis on serious young offenders, procedural justice in juvenile court, adolescents' competence to exercise and waive Miranda rights and counsel, youth sentencing policy, and race. His most recent books include: *Bad Kids: Race and the Transformation of the Juvenile Court* (Oxford 1999), which received the Outstanding Book Award from the Academy of Criminal Justice Sciences and the Michael Hindelang Outstanding Book Award from the American Society of Criminology; *Cases and Materials on Juvenile Justice Administration* (West 2000; 2nd Ed. 2005); and *Juvenile Justice Administration in a NUTSHELL* (West 2002). Additionally, Feld has conducted and published (one in November, 2006, another in January, 2007), the first empirical studies of how police actually interrogate juveniles, based on Minnesota interrogation tapes. Feld has testified before state legislatures and the U. S. Senate, spoken on various aspects of juvenile justice

administration to legal, judicial, and academic audiences in the United States and internationally. He worked as a prosecutor in the Hennepin County (Minneapolis) Attorney's Office and served on the Minnesota Juvenile Justice Task Force (1992 -1994), whose recommendations the 1994 legislature enacted in its revisions of the Minnesota juvenile code. Between 1994 and 1997, Feld served as Co-Reporter of the Minnesota Supreme Court's Juvenile Court Rules of Procedure Advisory Committee.

DRAFT (2/08)

Please email comments to: martbeyer@aol.com

AFFIDAVIT OF DR. MARTY BEYER

Dr. Marty Beyer, being first duly sworn, hereby deposes and says:

1. My name is Marty Beyer. I am a clinical psychologist licensed in the District of Columbia, Virginia, Washington and Alaska.

2. I have a Ph.D. in clinical/community psychology from Yale University. I am an independent child welfare and juvenile justice consultant. My expertise is adolescent development: how a young person's cognitive, moral and identity development, trauma and disabilities affected the offense and should be the basis for designing rehabilitative services. I have assessed more than 100 juveniles accused of serious offenses. I have been involved in improving services for delinquents in several states and assisted in federal Department of Justice investigations of juvenile facilities. I have also been involved in reform in foster care practices in several states and serve as a clinical consultant to child welfare workers and supervisors making decisions about children who have been physically and sexually abused. I frequently provide training on child and adolescent development for judges, lawyers, and staff in child welfare and juvenile justice.

3. I have testified more than 30 times as an expert witness assessing the factors articulated by the United States Supreme Court in juvenile transfer / waiver cases, including maturity and prospects for protecting the public and rehabilitating the young person (*Kent v. United States*, 383 U.S. 541 (1966); *Stanford v. Kentucky*, 492 U.S. 361 (1989)). I have provided expert testimony concerning adolescent development research on which the United States Supreme Court relied in striking down the death penalty for juveniles (*Roper v. Simmons*, 543 U.S. 551 (2005)).

4. My publications include "Immaturity, Culpability and Competency in Juveniles" (2000), "What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel" (2001), Best Practices in Juvenile Accountability (U.S. Department of Justice, 2003), "Health Services for Youth in Juvenile Justice Programs" (co-authored with Michael Cohen, M.D. and Larry Burd, Ph.D., in Clinical Practice in Correctional Medicine, 2006), and "Fifty Delinquents in Juvenile and Adult Court" (2006).

5. This affidavit is based on my clinical experience in working with delinquents and families, my training, and articles and books I have read.

6. In the early 1990s, concern about violent crime caused a dramatic change in the jurisdiction of Juvenile Courts across the country. Although juvenile violent crime arrests dropped 46% from 1994 to 2005, lawmakers mandated adult prison sentences for younger and younger teenagers. In 1980, two juveniles in the U.S. were sentenced to life without parole, but by 1996, 152 young people were sent to prison for life for crimes they had committed before they were 18 years old. There are now about 2,500 juveniles serving life without parole in adult prisons in 38 states (Pennsylvania, Louisiana, Michigan, Florida and California account for two-thirds of these youth).¹ Over half of juveniles sentenced to life without parole are first-time offenders, and African-American juveniles are ten times more likely to be given a life without

¹ Human Rights Watch and Amnesty International, "The Rest of Their Lives: Life without Parole for Child Offenders in the United States." 2005.

parole sentence.² In addition, each year about 200,000 defendants under 18 are sent to the adult criminal system (there was a 208 percent increase in the number of offenders under 18 in adult jails between 1990 and 2004); South Carolina, North Carolina, Mississippi and Wisconsin have the highest rates of youth ages 10 to 17 admitted to adult prisons.³ Thousands of young people are serving long adult sentences for crimes they committed before they were 18 years old, a disproportionately large percentage of whom are youth of color.⁴ Most are sent to adult criminal court automatically at arrest or by prosecutorial discretion, without a judge having a hearing to consider whether the juvenile would be amenable to rehabilitative services.

7. Much of the delinquent behavior of adolescents can be explained by the continuing development of their brains and their characteristically immature thinking. Some teenagers also have disabilities, developmental delays or suffer emotional problems from trauma. Whether it is normal behavior, such as skateboarding, not preparing for an exam, or reacting to an unfair call in sports, or more serious behavior such as drinking at a party or having unprotected sex, or even more troubling behavior such as carrying a gun or committing another delinquent act, a teenager's behavior can only be understood in the context of his/her unique combination of immaturity, disabilities and trauma. For this reason, it is essential for courts to review each young person's unique development when determining the services that would rehabilitate that young person or deciding whether to transfer him/her to adult court. Presumptive certification statutes that limit the court's ability to take all of these factors into account for each young person cannot be developmentally-sound because they ignore well-accepted research that has consistently found that teenagers think and behave differently from adults and are less culpable. Four noteworthy examples of this research are described below.

8. AMA Brief. In an *amici curiae* brief in *Roper v. Simmons* (the United States Supreme Court 2005 opinion ruling the juvenile death penalty unconstitutional), the American Medical Association and the American Academy of Child and Adolescent Psychiatry (with other organizations) distinguished the brain development and maturity of 17 and 18 year olds from adults, based on numerous studies cited in the brief:

“Older adolescents behave differently than adults because their minds operate differently, their emotions are more volatile and their brains are anatomically immature...These behavioral differences are pervasive and scientifically documented...Their judgments, thought patterns, and emotions are different from adults, and their brains are physiologically underdeveloped in the areas that control impulses, foresee consequences, and temper emotions. They handle information processing and the management of emotions differently from adults.

Adolescents are inherently more prone to risk-taking behavior and less capable of resisting impulses...Adolescents as a group are risk takers [and] ... exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking...it is statistically aberrant to refrain from such [risk-taking] behavior during adolescence. In short, teenagers are prone to making bad judgments.

Cognitive experts have shown that the difference between teenage and adult behavior is not the adolescent's inability to distinguish right from wrong...Rather, the difference lies in what scientists have characterized as deficiencies in the way adolescents think, an

² University of San Francisco's Center for Law and Global Justice (2007) "Sentencing Children to Die in Prison" reported that the U.S. is only one of two countries in the world sentencing juveniles to life without parole (Israel has 7 juveniles serving life without parole and has not issued such a sentence since 2004).

³ January 2007 report by the National Council on Crime and Delinquency

⁴ Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, 2007.

inability to perceive and weigh risks and benefits accurately... psychosocial maturity is incomplete until age 19, at which point it plateaus. Adolescents score lower on measures of self-reliance and other aspects of personal responsibility, they have more difficulty seeing things in long-term perspective, they are less likely to look at things from the perspective of others, and they have more difficulty restraining their aggressive impulses. Researchers have found that the deficiencies in the adolescent mind and emotional and social development are especially pronounced when other factors—such as stress, emotions and peer pressure—enter the equation. These factors affect everyone's cognitive functioning, but they operate on the adolescent differently and with special force...

Normal adolescents cannot be expected to operate with the level of maturity, judgment, risk aversion or impulse control of an adult... an adolescent who has suffered brain trauma, a dysfunctional family life, violence, or abuse cannot be presumed to operate even at standard levels for adolescents.”⁵

9. Teen Brain Research. Even intelligent adolescents are not capable of adult decision-making in part because their brains continue to develop beyond age 18.

“Brain studies establish an anatomical basis for adolescent behavior. Adolescents’ behavioral immaturity mirrors the anatomical immaturity of their brains. To a degree never before understood, scientists can now demonstrate that adolescents are immature, not only to the observer’s naked eyes, but in the very fibers of their brains...First, adolescents rely for certain tasks, more than adults, on the amygdala, the area of the brain associated with primitive impulses of aggression, anger, and fear. Adults, on the other hand, tend to process similar information through the frontal cortex, a cerebral area associated with impulse control and good judgment. Second, the regions of the brain associated with impulse control, risk assessment, and moral reasoning develop last, after late adolescence...as teenagers grow into adults, they increasingly shift the overall focus of brain activity to the frontal lobes...[responsible for] decision making, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control...and making moral judgments.”⁶

10. As one expert, Dr. Ruben Gur, has summarized: "The cortical regions [are involved] in the control of aggression and other impulses, the process of abstraction and mental flexibility, and aspects of memory. If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes.”⁷

Before states began reconsidering sending so many teenagers into the adult criminal system, insurance companies had relied on teen brain research to persuade legislatures all over the country to raise the age for getting a license to drive because 16 year olds have such poor judgment and high accident rates.

⁵ American Medical Association (2005), *Amici curiae* brief, *Roper v. Simmons*, United States Supreme Court, pp. 4-20.

⁶ *Ibid.*

⁷ Declaration of Ruben C. Gur, Ph.D., *Patterson v. Texas*. Petition for Writ of *Certiorari* to US Supreme Court (www.abanet.org/crimjust/juvjus/patterson.html). See also Gruber, S.A. and Yurgelum-Todd, D. (2006), *Neurobiology and the Law: A Role in Juvenile Justice?* OHIO STATE JOURNAL OF CRIMINAL LAW, 3, 321. For a description of adolescent brain development, see Claudia Wallis, *What Makes Teens Tick*, TIME, 5/10/04.

11. Research on the Development of Girls. There has been considerable attention to the increase in arrests for violent crime by girls. Experts disagree how much this is a change in girls' behavior as opposed to an increase in arrests of girls for domestic violence (for family problems long typical of girls). Girls charged with serious offenses are often first time offenders who are coerced by their older boyfriends. Developmental research has identified stressors on girls that make them more vulnerable, especially during physical maturation and school transitions, and may contribute to an enduring sense of unworthiness affecting their involvement in delinquent acts:

- Girls are more upset by stressful life events, are prone to see themselves as helpless, fear abandonment by others, and express a greater need for closeness and nurturing than boys do.
- When mothers have been unable to overcome substance abuse or relationship problems, their daughters show similar powerlessness.
- Girls report significantly lower levels of self-worth and satisfaction with their physical appearance and social, academic and athletic achievement than boys.
- Half of all high school girls are depressed and more girls than boys attempt suicide.
- Many 11- and 12-year old girls who previously seemed resilient appear to lose their self-confidence, and some girls who had been good at academics, sports and the arts stop excelling to avoid competition or rejection.
- Connection with others is the central organizing feature of development in girls, and their relationship focus creates worries about abandonment and loss of closeness that dominate girls' thinking from elementary through high school.⁸

12. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. Evidence suggests that even if a youngster perceived a situation as risky or morally wrong, his/her ability to act on that perception—and thus his/her culpability—are different from an adult. Recent studies by the MacArthur Foundation concluded that adolescents do not put facts together and draw conclusions the way adults do. The researchers recommended that juveniles be treated differently by the courts than adults because they have limited cognitive and emotional capacities and their development follows a generally predictable course to maturity.⁹

⁸ See American Bar Association and National Bar Association (2001). JUSTICE BY GENDER. Washington, D.C. Beyer, M., Blair, G., Katz, S., Simkins, S. and Steinberg, A. (2003), A Better Way to Spend \$500,000: How the Juvenile Justice System Fails Girls. WISCONSIN WOMEN'S LAW JOURNAL, XVIII, 1. Brown, L. and Gilligan, C. (1992). MEETING AT THE CROSSROADS. Ballantine: New York. Chamberlain, P. and Moore, K. (2002). Chaos and trauma in the lives of adolescent females with antisocial behavior and delinquency. JOURNAL OF AGGRESSION, MALTREATMENT AND TRAUMA, 6(1), 79-108. Hennessey, M., Ford, J.D., Mahoney, K., Ko, S., and Siegfried, C. (2004), TRAUMA AMONG GIRLS IN THE JUVENILE JUSTICE SYSTEM. National Child Traumatic Stress Network, Juvenile Justice Working Group in M. Putallas, and K Bierman (Eds.) AGGRESSION, ANTISOCIAL BEHAVIOR AND VIOLENCE AMONG GIRLS. New York: Guilford Press. Wangby, M., Bergman, L., and Magnusson, D. (1999). Development of Adjustment Problems in Girls. CHILD DEVELOPMENT, 70. Wood, J., Foy, D., Goguen, C., Pynoos, R., James, C.B. (2002). Violence exposure and PTSD among delinquent girls. JOURNAL OF AGGRESSION, MALTREATMENT AND TRAUMA, 6 (1), 109-126.

⁹ MacArthur Research Network on Adolescent Development and Juvenile Justice, National Conference on Juvenile Justice and Adolescent Development, September 21 and 22, 2006, Washington, D.C See also, Grisso, T. (1996), Society's retributive response to juvenile violence: A developmental perspective, LAW AND HUMAN

13. In addition to the research on how adolescents typically develop, the court must also consider the development of the particular juvenile standing before it. What developmental information about this young person explains his/her involvement in a delinquent act? How can this development framework be applied to assessing the young person's likely response to rehabilitative services?

Increasingly, the delinquent act alone has become the primary basis for determining which youth should go to adult prison, but behavior by itself tells us little about the individual. It is likely that two youth of the same age charged with the same offense would have unique characteristics, each of which has different effects on decision-making.¹⁰

The capacity of a juvenile to plan or to stop an action may be limited by a variety of disabilities, as well as trauma and immaturity. For each individual juvenile, it is important to assess the maturity of his/her judgment, risk assessment, and anticipation of consequences, as well as susceptibility to peer pressure and ability to handle stress. A teen could know it is wrong to do something (and could know that when another youth did the same thing, they got punished), but at the time of an offense their immaturity, disabilities or reaction to trauma got in the way of considering either. For example, a teenager could push a teacher because of a disability that caused them to misunderstand something the teacher said or did or because of past physical abuse making them think the teacher was being abusive or because of immaturity and an emotional reaction that overcame rational thought.

To understand an individual teenager's behavior and amenability to rehabilitative services requires a thorough assessment of the possible contribution of disabilities, trauma and immaturity unique to him/her.

14. Immaturity

Adolescent development is not a smooth linear progression--there are maturity differences between individuals of the same age and within the particular child. A 17-year old could have a job or drive a car and yet think irrationally under stress. A 16-year old could be a good student or athlete and have poor judgment around peers.

(a) Cognitive Development

Adolescents think differently from adults. Even late in their teens young people usually have immature thought processes, including:

1. Not anticipating

Adolescents often do not plan or do not follow their plan and get caught up in unanticipated events. They usually view as "accidental" the unintended consequences of actions that adults would predict could have a bad outcome. Carrying, and even using, a weapon does not mean that a teen pictured an injured victim and intended harm. Learning to have a long-term perspective develops slowly.

2. Fear interferes with the adolescent's ability to make choices.

Decision-making can be very immature when a teen is scared, particularly if they have been mistreated in the past. A common form of immature cognitive processes in adolescents is reacting to threat that adults might consider exaggerated. Their fear has to be evaluated from the teenager's perspective at the time.

3. Minimizing danger

BEHAVIOR, 20, 229-248.

¹⁰ Nowhere is this more troubling than the dramatic increase of youth charged for sexual behaviors. A 13-year old having sex with a 12-year old neighbor that both thought was consensual has little in common with a developmentally delayed 11-year old reenacting her own sexual abuse with the 4-year old she is babysitting, and entirely different treatment services would be necessary. Yet, both the 11-year old and 13-year old are likely to be charged with felony sex offenses and sent to sex offender programs modeled after programs for adult rapists and pedophiles (and in many states both could be put on a registry).

Risk-taking typical of adolescents reduces their use of mature cognitive strategies--they seldom consider the worst possible outcomes of their actions. Difficulty in managing impulses is a normal characteristic of teenagers. Drugs and alcohol lower inhibitions and reduce the young person's ability to use mature judgment and are a frequent contributor to delinquent acts.

4. Having only one choice

In situations where adults see several choices, adolescents may believe they have only one option. It is not unusual, even for intelligent adolescents, to imagine only one scenario. When things do not unfold as they imagined, because of their immaturity, they behave as if they are incapable of adapting with another reasonable choice. Adolescents only gradually develop the advanced cognitive ability to weigh alternative choices simultaneously.

(b) Identity Development

Adolescents gradually refine a stable definition of themselves. Becoming good at something is an essential aspect of identity development. Doing well in school, arts, sports, or a hobby is how adolescents define themselves and feel appreciated by others. Many youth have not experienced success, particularly in school, and still have an unformed identity, making them more vulnerable to involvement with delinquent peers.

Belonging to family is the framework for identity and remains powerful for teenagers. Identifying with peers is another important aspect of self-definition--group membership is necessary for a young person to feel valued. Lacking stable identities, young people need considerable approval from family and peers. Conflicting identifications, between two groups of peers or between family versus peer expectations, may cause unpredictable behavior in a teenager, especially under stress. "The typical adolescent is also more vulnerable to peer pressure than an adult... Adolescents spend twice as much time with peers as with adults. The pronounced importance of approval and acceptance by friends will make an already risk-prone or impulsive adolescent even more so. Adolescents not only are more susceptible to peer pressure, but they gravitate toward peers who reinforce their own predilections...an adolescent who spends time with risk-prone friends is more likely to engage in risky behavior."¹¹

(c) Moral Development

Adolescents are moralistic, insisting on what should be and intolerant of anything that seems unfair. They may become involved in an offense naively in order to right wrongs, often out of loyalty. They usually know right from wrong and are frustrated that they cannot explain why they used poor moral reasoning during the offense. As a result, they may not express an adult understanding of the effect of their offense on victims, despite the fact that their capacity for empathy with others may not be impaired.

Immaturity is typical of adolescents, although fortunately for most teenagers their risk-taking, being influenced by peers and poor moral reasoning under stress, do not result in serious delinquent acts.¹² For each individual juvenile, it is necessary for an expert to present how immature thinking, immature identity, and immature moral reasoning affected this young person's behavior and what services would be necessary to reduce the young person's risky behavior by increasing his/her maturity.

15. Disabilities

¹¹ American Medical Association (2005), *Amici curiae* brief, *Roper v. Simmons*, United States Supreme Court.

¹² Many youth who do not get arrested pay other high costs for their typical adolescent risk-taking: car accidents are the leading cause of death in adolescence; half of all new HIV infections and sexually transmitted diseases in the U.S. are teens, and a quarter of U.S. high school students report binge drinking.

About 17-53% of delinquents have learning disabilities, in comparison to 2-10% in the overall child population.¹³ Learning disabilities affect young people not only in school, but at home and in the community particularly in comprehending others and following directions. Learning disabilities include a variety of problems in listening, thinking, memory, reading, writing, spelling, doing calculations, prioritizing, and strategizing.

Delinquents "have higher rates of neuropsychological deficits as reflected in language, verbal intelligence, working memory, and reading. Of special interest are deficiencies in 'executive' functions that are served primarily by the frontal lobes of the brain...[including] abstract reasoning, goal setting, anticipating and planning, self-monitoring and self-awareness, inhibiting of impulsive behavior, and interrupting an ongoing sequence of behavior in order to initiate a more adaptive behavior."¹⁴

Attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD) are the most frequently diagnosed behavior disorders of childhood.¹⁵ About 19-46% of delinquents are diagnosed with attention deficit disorders, in comparison to 2-10% in the overall child population.¹⁶ Distractibility and impulsiveness are prominent characteristics of attention deficit disorders, making these young people less able to stop behaviors, which may contribute to delinquency (especially when they have immature cognitive processes and are unable to see alternative choices at the time of an offense). Social skill problems are also common among children with attention deficits.

By the time the learning disability is identified, many children are lacking in basic skills necessary to comprehend schoolwork. Often the child with disabilities gets into a negative cycle with self-dislike and attention-seeking, from feeling stupid, interfering with school participation.¹⁷ Truancy—due to feeling picked on by teachers and/or students and embarrassment for not being able to comprehend the material--can begin early in children with disabilities, and not attending school can lead to delinquency.

For each individual juvenile, it is necessary for an expert to present if and how disabilities affected this young person's behavior and what services would be necessary to build his/her compensatory skills in order to support school success and improve social skills and comprehension of others.

16. Trauma

Many youth arrested for delinquent acts have been traumatized. In a study of 50 delinquents, all but two had experienced trauma, including repeated abuse and/or parent death and/or abandonment (at least a third were physically abused and a quarter were sexually abused; more than

¹³ Kazdin, A. (2000), Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youth in T. Grisso and R. Schwartz (Eds.), YOUTH ON TRIAL. Chicago, University of Chicago Press. Estimates of prevalence are based on multiple sources and are likely to be underestimates of the significant impairment of disorders in delinquent youth.

¹⁴ Kazdin, op cit, p. 53. See also Pennington, B.F. and Ozonoff, S. (1996), Executive Functions and Developmental Psychopathology, J CHILD PSYCHOL PSYCHIATRY, 37:51-87.

¹⁵ Goldman, L.S., M Genel, R.J. Bezman, and P.J. Slanetz (1998), Diagnosis and treatment of Attention-deficit/Hyperactivity Disorder in Children and Adolescents, JAMA, 279:1100-7. Tannock, R. (1998), Attention-deficit/Hyperactivity Disorder: Advances in Cognitive, Neurobiological and Genetic Research, J CHILD PSYCHOL PSYCHIATRY, 39: 65-99.

¹⁶ Kazdin, op cit.

¹⁷ Some children's problem-solving skills are compromised by not accurately perceiving cues from peers and adults, typically attributing hostility to others and believing that aggressive acts will result in peer approval. Dodge, K.A. (2003). Do social information processing patterns mediate aggressive behavior? In B. Lahey, T. Moffitt, & A. Caspi (Eds.), CAUSES OF CONDUCT DISORDER AND JUVENILE DELINQUENCY (pp. 254-274). New York: Guilford Press.

half the girls had been physically or sexually abused).¹⁸ Trauma typically slows down development in children and, depending on the individual, can interfere with all aspects of the child's functioning. Teenagers who were physically or sexually abused or lost an important person in their lives may continue to be emotionally immature. Children and adolescents who have been exposed to violence often have trouble concentrating in school, are fearful, have nightmares and may seem emotionally detached and pessimistic about the future.¹⁹ Children who have been traumatized often blame themselves and have trouble trusting others. Children who are chronically picked on often have low self-esteem and depression which can continue into adulthood. Sometimes victimized children become bullies themselves, and they tend to have more emotional problems than those who are victims only.²⁰ Research has shown that children who are bullied have academic and peer difficulties in school, leading to more teasing and bullying.²¹ One study found that 32% of delinquents had Post Traumatic Stress Disorder, in comparison to 3% or fewer in the overall child population.²² Reactions to trauma may significantly interfere with the young person's life and put him/her at risk of delinquency, even those whose symptoms do not meet the criteria for Post Traumatic Stress Disorder.²³

Depression is a common reaction to trauma, but often is not diagnosed in delinquents: usually their problem behavior at school and home are the focus of professionals and parents rather than their underlying sadness. Depression is associated with irritability, self-dislike and distorted thinking in teenagers. Depressed children appear to have a greater dependence on peers, but being depressed is correlated with teacher and peer ratings of unpopularity.²⁴

¹⁸ Beyer, M. (2006), Fifty Delinquents in Juvenile and Adult Court. *AMER J ORTHOPSYCHIATRY*, 76,2, 206-214.

¹⁹ Pynoos, R., Steinberg, A., & Goenjian, A. (1996) Traumatic stress in childhood and adolescence in B. van der Kolk, A. McFarlane, & I. Weisaeth (Eds.), *TRAUMATIC STRESS*, New York: Guilford, pp. 331-58.

²⁰ Olweus, D. (1993). Victimization by peers: Antecedents and long-term outcomes. In K. H. Rubin & J. B. Asendorff (Eds.), *SOCIAL WITHDRAWAL, INHIBITION, AND SHYNESS* (pp. 315-341). Hillsdale, NJ: Erlbaum. See also Arseneault, L., Walsh, E., Trzesniewski, K., Newcombe, R., Caspi, A. and Moffitt, T.E. (2006) , Bullying victimization uniquely contributes to adjustment problems in young children. *PEDIATRICS*, 130(9), 118.

²¹ Horowitz, J.A., Vessey, J.A., Carlson, K.L., Bradley, J.F., Montoya, C., McCullough, B. and David, J. (2004). Teasing and Bullying Experiences of Middle School Students, *J AMERICAN PSYCHIATRIC NURSES ASSOCIATION*, 10(4), 165-172.

²² Steiner, H., I.G. Garcia and Z. Mathews (1997), Posttraumatic Stress Disorder in Incarcerated Delinquents, *J AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY*, 36: 3357-65. Giaconia, R. M., Reinherz, H. Z., Paradis, A. D., & Stashwick, C. K. (2003). Comorbidity of substance use disorders and posttraumatic stress disorder in adolescents in P. Ouimette & P. J. Brown (Eds.), *TRAUMA AND SUBSTANCE ABUSE* (pp. 227-242). Washington, DC: American Psychological Association. Prevalence in community sample reported in Kazdin, op cit.

²³ Widom, C.S. (1994), Child Victimization and Adolescent Problem Behavior in R.D. Ketterlinus and M.E. Lamb (Eds.), *ADOLESCENT PROBLEM BEHAVIOR: ISSUES AND RESEARCH* Hillsdale, N.J.: Erlbaum.

²⁴ While moodiness and self-doubt are viewed as typical in teenagers, depression can be a serious, impairing disorder in adolescents. Cicchetti, D. and Toth, S.L. (1998), The development of depression in children and adolescents. *AMERICAN PSYCHOLOGIST*, 53, 221-241. Garber, J. and Horowitz, J.L. (2002). Depression in children in I.H. Gotlib and C.L. Hammen (Eds.), *HANDBOOK OF DEPRESSION* (p. 510-540). New York: Guilford Press. An integrative model of adolescent depression incorporates the complex interplay among genetic, biological, cognitive, interpersonal, family and environmental factors and developmental challenges; family disruption contributes to negative self-image, poor relationships and maladaptive regulation of emotion and behavior. Hammen, C. and Rudolph, K.D. (2003), Childhood mood disorders in E.J. Mash and R.A. Barkley (Eds.). *CHILD PSYCHOPATHOLOGY* (pp. 233-278). New York: Guilford Press. Hammen, C. and Rudolph, K.D. (1996), Childhood Depression in E.J. Mash and R.A. Barkley (Eds.), *CHILD PSYCHOPATHOLOGY*. New York: Guilford. Peterson, A., Compas, B., Brooks-Gunn, J., Stemmler, M., Ey, S. and Grant, K. (1993), Depression in Adolescence, *AMERICAN PSYCHOLOGIST*, 48, 155-168.

Poor coping strategies learned in childhood re-emerge when traumatized adolescents face new stressors, particularly if feelings of helplessness reminiscent of the past are provoked. Adolescents with a history of trauma have been found to be at risk of alcohol and substance abuse; these youth rely on substances to escape sad feelings and bad memories.²⁵ Traumatized girls have higher levels of substance use, depression and suicide, and school alienation.

Aggression can be a defense against the helplessness common among traumatized children. Young people who have been abused often respond self-protectively like younger children when they feel threatened. Traumatized youth may manage their fears with combative self-preservation and see no alternative to aggression for resolving disagreement.

Trauma exposure plays a key role in the development of behavior problems in adolescents—the effects of trauma account for impulsivity and anger associated with school difficulties, substance abuse and gang involvement.²⁶ “We are beginning to move from the mere recognition that juvenile delinquents have often faced extreme adversity in their childhood, to the understanding that such adversity has had specific effects which contribute to the delinquency lifestyle.”²⁷

For each individual juvenile, it is necessary for an expert to present how trauma affected this young person’s behavior and what services would be necessary to help the young person recover from trauma and be less prone to depression, substance abuse, self-harming, over-reacting to threat, and aggression.

17. Immaturity, Disabilities and Trauma Affect Teenagers in the Police Station. Even intelligent teenagers cannot appreciate the consequences of waiving their *Miranda* rights. Most teenagers explain that although they were told they had a right to remain silent, they believed they could not refuse to answer police questions. Typically when they are asked what would happen if the judge heard afterwards that they would not talk to the police, they respond that they would be in even more trouble, that the judge would believe they were guilty or uncooperative. This belief demonstrates that they do not comprehend the meaning of the right to remain silent. Most teenagers do not understand why they were told they could talk to a lawyer at the time of their arrest because they did not know any lawyers and they did not think lawyers came to the police station. Many young people who have seen *Miranda* warnings given on television and movies consider them something a police officer is required to do that has no real meaning. Teens do not have the mature thinking necessary to appreciate rights or to make careful decisions in the context of future consequences, both of which are necessary to waive rights.

Dr. Thomas Grisso, who has studied juvenile competency and understanding of rights extensively, describes different abilities necessary for young people to knowingly waive their rights: the ability to *comprehend* the *Miranda* warnings, the ability to *grasp the significance of rights* in the context of the legal process, and the ability to *process information* in arriving at a decision about waiver.²⁸ He notes that the concept of legal right is understood differently by youth at various stages of development.²⁹ Another juvenile justice expert, Dr. Barry Feld,

²⁵ Ouimette, P. and Brown, P. (2003). *TRAUMA AND SUBSTANCE ABUSE*. Washington, D.C.: American Psychological Association.

²⁶ Wolfe, D., Rawana, J., & Chiodo, D. (2006), *Abuse and Trauma*, in D. Wolfe & E. Mash (Eds.), *BEHAVIORAL AND EMOTIONAL DISORDERS IN ADOLESCENTS*. New York: Guilford. Cohen, J., Mannarino, A. and Deblinger, E. (2006). *TREATING TRAUMA AND TRAUMATIC GRIEF IN CHILDREN AND ADOLESCENTS*. New York: Guilford Press.

²⁷ Greenwald, R. (2002). *TRAUMA AND JUVENILE DELINQUENCY*. Binghamton, N.Y.: Hayworth. Ford, J. (2002), *Traumatic Victimization in Childhood and Persistent Problems with Oppositional-Defiance* in Greenwald, R. (ed.), *TRAUMA AND JUVENILE DELINQUENCY*. N. Y.: Hayworth.

²⁸ Grisso, T. (198). *FORENSIC EVALUATION OF JUVENILES*, Sarasota, Florida: Professional Resource Press, p. 50.

²⁹ "Decisionmaking about rights requires not only cognitive capacity, but also judgment concerning the weights to be placed on the consequences of one's possible choices. Judgment may be influenced by factors that are related to psychosocial development: for example, time perspective that allows one to consider the

concluded that, "Oftentimes, delinquents waive *Miranda* rights without appreciating the legal significance of confession." He argues for special *Miranda* procedural safeguards to protect youth from "their own immaturity...inexperience and vulnerability to adult coercion."³⁰

Teenagers are also more vulnerable to psychological manipulation than adults. Police questioning of teenagers often utilizes coercive interrogation techniques that control "the alternatives a person considers by influencing how these alternatives are understood. The techniques interrogators use have been selected to limit a person's attention to certain issues, to manipulate his perceptions of his present situation and to bias his evaluation of the choices before him. The techniques used to accomplish these manipulations are so effective that if misused they can result in decisions to confess from the guilty and innocent alike."³¹ In the police station without a lawyer, young people give statements in response to questions that (1) reduce a juvenile's self-confidence by convincing him there is no way out of the predicament by (a) interrupting and ignoring his assertions of innocence, dismissing them as impossible to believe and/or (b) confronting him with convincing evidence of his guilt (exploiting his naive ignorance that police officers usually exaggerate evidence during interrogations) and/or (c) making him feel more hopeless because he is all alone, which is terrifying for a teenager and (2) offer the juvenile inducements that persuade him that he is better off by making the statement the police want him to make. Teenagers cannot withstand adult pressure and believe they will go home if they give a statement. They cannot foresee that they would be unable to take the statement back. They cannot imagine the importance a statement would later have in court. Juveniles are more likely than adults to confess to the police, regardless of guilt, rather than remaining silent, especially if they believe it will result in an immediate reward, such as going home.

Most adults would say that they would never confess to something they did not do, no matter how much pressure they were under, but teenagers respond differently than adults to interrogation because of their susceptibility to influence and poor ability to assess the consequences of their choices.³² Juveniles are more likely than adults to falsely confess because of their vulnerability to the interrogator's techniques: "Over and over again the investigator conveys the message that the suspect has no meaningful choice but to admit to some version of the crime because continued resistance--in light of the extensive and irrefutable evidence against him--is simply futile. These techniques are thus designed to persuade the suspect to perceive his situation, and thus his options, much differently than when he first entered the interrogation room."³³

longer-range future and attitudes toward risk taking and personal vulnerability. To the extent that these psychological characteristics are still developing in adolescence, youths are at greater risk than adults of making decisions based on incomplete development in their perspective on the consequences of their *Miranda* waiver decisions. How well youths are able to deploy their abilities after they are acquired may be dependent at any given time on their emotional states, such as moodiness, the influences of mental disorder, or stress associated with conditions under which the *Miranda* waiver decision is being made...there is considerable evidence that adolescents on average may have greater fluctuations in mood and emotion than adults and are therefore at greater risk of difficulties in understanding or decisionmaking as a result of current emotional states," page 55. Grisso, T., Steinberg, L., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N., and Schwartz, R. (2003), *Juveniles' Competence to Stand Trial*, LAW AND HUMAN BEHAVIOR, 27:4.

³⁰ Feld, B. (2000), *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel* in T. Grisso, and R. Schwartz (Eds.), *YOUTH ON TRIAL*, Chicago: University of Chicago Press, pp. 105; 120.

³¹ Ofshe, R. and Leo, R. (197), *Decision to Confess Falsely*, DENVER UNIVERSITY LAW REVIEW, 74, p. 985.

³² Studies by the MacArthur Foundation recently concluded that adolescents are more inclined to go along with authority figures; are less likely to recognize the risks inherent in the choices they face; and are less likely to consider the long-term consequences of their legal decisions. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, September 21 and 22, Washington, D.C

³³ Drizin, S. and Leo, R. (2004), *The Problem of False Confessions in the Post-DNA World*, NORTH CAROLINA LAW REVIEW, p. 914. □Interviewed for a New York Times article (April 19, 2004) entitled □"Study

18. Effectiveness of Juvenile Rehabilitation Services.

When a young person's involvement in an offense is linked to immature thought processes, emotional problems resulting from trauma, intoxication, and/or being led by an older criminal, prognosis for treatment may be good. Most young people's trauma, immaturity and disabilities can be effectively treated. The severity of the offense is not a determiner of whether a young person can be rehabilitated.

Researchers have identified the characteristics of juveniles who are unlikely to offend again. These are young people who will "age out" of juvenile delinquency because their behavior is the result of immature judgment rather than antisocial tendencies. Juveniles involved in "adolescent-limited delinquency" (in contrast to those likely to become adult offenders) have the following characteristics:

- First delinquency is in adolescence (not before age 13)
- Involved in positive behavior as well as delinquent act
- Delinquent act with others, in which juvenile plays a small part in relation to others
- Acts result from bad judgment leading to dangerous situations³⁴

Even for violent juveniles and those who use substances, intensive treatment in the community has been documented to dramatically reduce recidivism.³⁵ Juvenile rehabilitation programs—including secure facilities—across the country are training staff in Positive Youth Development, a treatment approach based on research about teens who are resilient despite poverty and significant family and other problems. The evidence indicates that what most contributes to the effective rehabilitation of a young person is a relationship with a caring adult and support for success in school and work—characteristics of most juvenile programs but typically not available to youth in adult prisons.³⁶ Rather than assuming that a juvenile facility will not be effective, an expert should describe the particular youth's needs and what services would meet them and indicate to the court what juvenile facility would offer those services.

A national poll, commissioned by the MacArthur Foundation and the Center for Children's Law and Policy found widespread public support for rehabilitating teens rather than locking them up. Most favored shifting some money states spend on incarcerating youth and

Suspects Thousands of False Convictions" by Adam Liptak, Steve Drizin described confessions by individuals vulnerable to suggestion and intimidation. "There are three groups of people most likely to confess...the mentally retarded, the mentally ill and juveniles." Drizin said false confessions were most common in murder cases. "Those are the cases where there is the greatest pressure to obtain confessions," he said, "and confessions are often the only way to solve those crimes." See also Kassir, S. and Gudjonsson, G. (2004), *The Psychology of Confessions: A Review of the Literature and Issues*, PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST:5.

³⁴ Moffitt, T. (1993), Adolescence-Limited and Life-Course-Persistent Antisocial Behavior, PSYCHOLOGICAL REVIEW, 100:674.

³⁵ Burns, B.J., & Hoagwood, K. (2002). COMMUNITY TREATMENT FOR YOUTH: EVIDENCE-BASED INTERVENTIONS FOR SEVERE EMOTIONAL AND BEHAVIORAL DISORDERS. New York, NY: Oxford University Press. See also Chamberlain, P., & Mihalic, S.F. (1998). Multidimensional treatment foster care in. D.S. Elliott (Ed.), BOOK EIGHT: BLUEPRINTS FOR VIOLENCE PREVENTION. Boulder, CO: University of Colorado. Henggeler, S.W., Schoenwald, S.K., Borduin, C.M., Rowland, M.D., & Cunningham, P.B. (1998). MULTISYSTEMIC TREATMENT OF ANTISOCIAL BEHAVIOR IN CHILDREN AND ADOLESCENTS. New York, NY: Guilford Press.

³⁶ Lerner, R., Taylor, C. & von Eye, A., Eds. (2002). PATHWAYS TO POSITIVE DEVELOPMENT AMONG DIVERSE YOUTH. Indianapolis: Wiley. See also Catalano, R., Berglund, M., Ryan, J., Lonczak, J. & Hawkins, J. (1998), RESEARCH FINDINGS ON EVALUATIONS OF POSITIVE YOUTH DEVELOPMENT PROGRAMS. U.S. Department of Health and Human Services.

using it for counseling, education and job training.³⁷ The MacArthur Foundation found that at least half the states are involved in juvenile justice reforms, including keeping youth out of the adult system and providing more mental health and community based-services.

19. Lack of Deterrence and Harm of Incarcerating Juveniles in Adult Prison.

In 2007 the Centers for Disease Control and Prevention found that "available evidence indicates that transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth."³⁸ Youth who have been tried as adults are, on average, 34% more likely to commit crimes than youth retained in the juvenile justice system. Sending youth to adult prison has not deterred other youth from committing crimes, nor have adult prisons rehabilitated youth sentenced to them. Youth placed in the adult system also experience elevated suicide rates while in adult facilities and more violence at the hands of adult prisoners. As a result, the CDC "recommends against laws or policies facilitating the transfer of juveniles to the adult criminal justice system for the purpose of reducing violence."³⁹

In adult prison, young people are unlikely to develop mature thinking, recover from trauma, and compensate for disabilities so they can become positive members of their communities. In adult prison, youth cannot get the mental health or educational services they need. Ultimately, with such significant unmet needs as teenagers, upon release from prison as adults they are not likely to be productive.⁴⁰ In adult corrections, youth are more at risk of physical harm and suicide and being influenced by adult criminals than in a juvenile facility.

(a) Likelihood of worsening mental health. Depressed juveniles are at greater risk for suicide in a facility where staff do not recognize that suicidal adolescents are different from suicidal adults. Surveillance is not sufficient to prevent suicide in adolescent inmates. Treatment, activity, and positive relationships between staff and youth, which are unlikely in an adult facility, are necessary aspects of adolescent suicide prevention. Facility and staff limitations in adult corrections result in children being held in isolation without supervision, which has been shown to increase the risk of suicide. The suicide rate of juveniles in adult corrections is much higher than in juvenile facilities.⁴¹

(b) Risk of physical harm. Teenagers are at risk in adult prison because they are emotionally needy, and they cannot get individual attention and treatment. The typical teenage desire to be liked makes them do things for acceptance that they are too naive to realize others retaliate for in an adult facility. Research has shown that juveniles in adult institutions are more likely to be sexually assaulted and physically harmed than those confined in juvenile facilities.⁴²

³⁷ MacArthur Research Network on Adolescent Development and Juvenile Justice, September 21 and 22, 2006, Washington, D.C

³⁸ McGowan et. al., Centers for Disease Control and Prevention, Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System (2007), AMERICAN J PREVENTIVE MEDICINE, 32, 4.

³⁹ *Ibid.*

⁴⁰ Redding, R. (2003), The Effects of Adjudicating and Sentencing Juveniles as Adults, YOUTH VIOLENCE AND JUVENILE JUSTICE, 1, 128-155 . Bishop, D. (2000), Juvenile offenders in the adult criminal justice system, CRIME AND JUSTICE, 17:81.

⁴¹ Youth have the highest suicide rates of all inmates in jails. They are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility, and 19 times more likely to commit suicide in an adult jail than youth in the general population. Campaign for Youth Justice, "Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America," 2007.

⁴² The Campaign for Youth Justice reported that when youth are placed with adults in adult jails, they are at risk of physical and sexual assault. In 2005, 21% of all substantiated victims of inmate-on-inmate sexual violence were under eighteen years old, even though youth make up less than 1% of the total jail

(c) Future offending. In adult corrections, unsophisticated juveniles get worse because they are exposed to criminal adults. In Florida, where thousands of juveniles are tried in adult courts, a study has shown that the youth in adult prisons had a higher recidivism rate than those who served time in juvenile facilities.⁴³ Similar results were found in a comparison of 15- and 16-year olds with identical charges in New York and New Jersey. The New Jersey teenagers were sentenced as juveniles and the New York teenagers were sentenced as adults, with the same average length of incarceration in both groups; after release, the youth who had been in adult facilities had a higher recidivism rate.⁴⁴

population. See also Fagan, et al., "Youth in prisons and training schools." JUVENILE AND FAMILY COURT JUDGES, 40, 1989.

⁴³ Bishop, D., et al. (1997), The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term, CRIME & DELINQUENCY, 43, 548.

⁴⁴ Singer, S., Fagan, J. and Liberman, A. (2000), The reproduction of juvenile justice in criminal court in J. Fagan and F. Zimring (Eds.), THE CHANGING BORDERS OF JUVENILE JUSTICE, Chicago: University of Chicago Press.

AFFIDAVIT OF DONNA M. BISHOP

I. Professional Background

I am a Professor in the College of Criminal Justice at Northeastern University, Boston, Massachusetts.

I hold a Ph.D. (with distinction) in criminal justice from the School of Criminal Justice at the State University of New York at Albany (1982).

I have been a full professor at Northeastern University since 1999. Prior to joining the faculty at Northeastern University, I taught for 18 years in the state university system in Florida, including 13 years at the University of Florida Center for Studies in Criminology and Law, and 5 years at the University of Central Florida Department of Criminal Justice and Legal Studies.

I have been the Principal Investigator or Co-Principal Investigator on approximately 20 externally funded research projects, supported by federal and state agencies, and private foundation. The total amount of funded support is \$1.3 million. I am a juvenile justice specialist and the bulk of my research has focused on the prosecution and punishment of youths in the adult criminal justice system.

I am the former editor of *Justice Quarterly*, one of the two leading peer-reviewed publications in the field of criminal justice (and the official journal of the Academy of Criminal Justice Sciences). I have served on the editorial boards of *Law and Society Review* and the *Journal of Crime and Justice*. I am an editorial reviewer for several

other publications, including *Criminology*, *Journal of Research in Crime and Delinquency*, *Crime & Delinquency*, and the *Journal of Criminal Law and Criminology*.

I am a member of the executive board of the American Society of Criminology (elected). This organization is an international association dedicated to the development of scholarly, scientific, and professional knowledge concerning the etiology, prevention, control and treatment of crime and delinquency. I have served this organization in numerous capacities (member and chair of various committees) since the early 1980s.

I am a current and former consultant to the National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention. I have also served as a consultant to the National Science Foundation; the Supreme Court of Minnesota; the Supreme Court of Florida; the National Academy of Sciences; the University of Baltimore; the National Council on Crime and Delinquency; the Ohio State University; the Annie E. Casey Foundation; and the John D. And Catherine T. MacArthur Foundation's Research Network on Juvenile Justice.

I am the author of more than fifty articles, book chapters, and books, including the following, which are most relevant to the issues in this case:

Bishop, Donna M., and Scott Decker.

(2006) "Juvenile Justice in the United States: A Review of Policies, Programs, and Trends." In Josine Junger-Tas, editor. **Juvenile Justice: An International View**. The Netherlands: Kluwer.

Lanza-Kaduce, Lonn, Jodi Lane, Donna M. Bishop, and Charles E. Frazier.

(2006). "Juvenile Offenders and Adult Felony Recidivism: The Impact of Transfer." **Journal of Crime and Justice**.

Bishop, Donna M.

(2005) "The Efficacy of Punishment for Juvenile Offenders." In Jeffrey Walker and Robert Bohm, editors. **Demystifying Crime and Criminal Justice**. Los Angeles: Roxbury.

Bishop, Donna M.

(2004) "Injustice and Irrationality in Contemporary Youth Policy." **Criminology and Public Policy** 3: 633-645.

Lane, Jodi, Lonn Lanza-Kaduce, Charles E. Frazier, and Donna M. Bishop

(2002) "Adult Versus Juvenile Sanctions: Voices of Incarcerated Youths." **Crime & Delinquency** 48:431-455.

Bishop, Donna M.

(2002). "‘Adult Crime, Adult Time:’ A Troublesome Policy for Troubled Kids." **Northeastern University College of Criminal Justice Newsletter**, Winter/Spring: 8-11.

Bishop, Donna M., Lonn Lanza-Kaduce, Charles E. Frazier, Jodi Lane, and Henry George White

(2001) "Juvenile Transfers to Criminal Court in Florida: The Initial Impact of the 1994 Reforms." **OJJDP Fact Sheet**. Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention.

Lanza-Kaduce, Lonn, Donna M. Bishop, Charles E. Frazier, Henry George White, and Jodi Lane

(2001) "Juvenile Transfers to Criminal Court in Florida: Local Policies and Local Decision-Making." **OJJDP Fact Sheet**. Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention.

Bishop, Donna M.

(2000) "Juvenile Offenders in the Criminal Justice System: An Examination of Trends and Consequences." In Michael Tonry, editor, **Crime and Justice: A Review of Research (Volume 23)**. Chicago: University of Chicago Press.

Frazier, Charles E., Donna M. Bishop, Lonn Lanza-Kaduce, and Amir Marvasti.

(2000) "Juveniles in Criminal Court: Past and Current Research From Florida." **Quinnipiac Law Review** 18: 501-522.

Bishop, Donna M., and Charles E. Frazier

(2000) "The Consequences of Transfer." In Jeffrey Fagan and Franklin Zimring, Editors, **The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court**. Chicago: University of Chicago Press.

Reprinted in David L. Parry (ed.) **Essential Readings in Juvenile Justice**. Upper saddle River, NJ: Prentice Hall. 2003.

Bishop, Donna M., Charles E. Frazier, Lonn Lanza-Kaduce, and Henry George White

(1999) "Juvenile Transfers to Criminal Court in Florida." **OJJDP Fact Sheet**. Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention.

Frazier, Charles E., Donna M. Bishop, and Lonn Lanza-Kaduce

(1999) "'Get Tough' Juvenile Justice Reforms: The Florida Experience." **Annals of the American Academy of Political and Social Science (Special Issue: "Will the Juvenile Court System Survive?")** 564: 167-184.

Lanza-Kaduce, Lonn, Charles E. Frazier, and Donna M. Bishop.

(1999) "Juvenile Transfers in Florida: The Worst of The Worst?" **University of Florida Journal of Law and Public Policy** 10: 277-312.

White, Henry George, Charles E. Frazier, Lon Lanza-Kaduce, and Donna M. Bishop.
(1999) "A Socio-Legal History of Florida's Juvenile Transfer Reforms." **University of Florida Journal of Law and Public Policy** 10: 249-276.

Donna M. Bishop, Charles E. Frazier, and Lon Lanza-Kaduce
(1999) "Juvenile Justice Under Attack: An Analysis of Causes and Impacts of Recent Reforms." **University of Florida Journal of Law and Public Policy** 10: 129-156.

Lanza-Kaduce, Lon, Donna M. Bishop, Charles E. Frazier and Lawrence Winner
(1997) "Changes in Juvenile Waiver and Transfer Provisions: Projecting the Impact in Florida." **Law and Policy** 18: 137-150.

Winner, Lawrence, Lon Lanza-Kaduce, Donna M. Bishop and Charles E. Frazier
(1997) "The Transfer of Juveniles to Criminal Court: Re-examining Recidivism Over the Long Term." **Crime & Delinquency** 43: 548-563.

Bishop, Donna M., Charles E. Frazier, Lon Lanza-Kaduce, and Lawrence Winner
(1996). "The Transfer of Juveniles to Criminal Court: Does It Make a Difference?" **Crime and Delinquency** 42: 171-191.

Bishop, Donna M., Lon Lanza-Kaduce, and Lawrence Winner
(1996) **A Study of Juvenile Case Processing in Florida: Issues of Timeliness and Consistency Across Jurisdictions**. Tallahassee, FL: Office of the Governor. (78 pp.)

Frazier, Charles E., Donna M. Bishop, Lon Lanza-Kaduce, and Lawrence Winner

(1995) Juvenile Justice Transfer Legislation in Florida: Assessing the Impact on the Criminal Justice and Corrections Systems. **Final Report: Task Force for the Review of the Criminal Justice and Corrections Systems**. Tallahassee, FL: Collins Center for Public Policy. (75 pp.)

Bishop, Donna M., and Charles E. Frazier

(1991)"Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver." **Notre Dame Journal of Law, Ethics, and Public Policy** 5: 501-522.

Frazier, Charles E., and Donna M. Bishop

(1990)"Jailing Juveniles in Florida: The Social Dynamics of Compliance With a Sluggish Federal Reform Initiative." **Crime and Delinquency** 36: 427-442.

Bishop, Donna M., and Charles E. Frazier

(1990) "A Study of Race and Justice Processing in Florida." in **Where the Injured Fly for Justice: Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission**. Tallahassee, FL: Office of the State Courts Administrator.

Bishop, Donna M., Charles E. Frazier, and John C. Henretta

(1989) Prosecutorial Waiver: Case Study of a Questionable Reform." **Crime and Delinquency** 35: 179-201.

Reprinted in Ronald Berger (ed.), **The Sociology of Juvenile Delinquency**, Second Edition. Nelson-Hall, 1996.

Reprinted in Barry C. Feld (ed.), **Readings in Juvenile Justice Administration**. New York: Oxford. 1999.

II. Research and Findings

Based on my research and my familiarity with the research of others, if called to testify I would swear to the truth of the following:

There have been five major studies to date on the consequences of transferring youth to the criminal courts for prosecution and punishment as adults. I was a Principal Investigator on three of them. Professor Jeffrey Fagan from Columbia Law School was the Principal Investigator on the other two.

There are two other studies on the same topic, one conducted by Professor Barry Feld at the University of Minnesota, the other conducted by Professor David Myers at Pennsylvania State University. These two studies are not as scientifically rigorous as the five mentioned in the previous paragraph. But their findings and conclusions are the same as those of the more rigorous studies.

In my initial study, I and my colleagues compared the recidivism of 2,378 youths who were transferred to the criminal courts in Florida, and a matched sample of 2,378 youths who were retained in Florida's juvenile justice system. (The breadth of Florida's prosecutorial waiver statute permitted the identification of "matched pairs" of youths who had been prosecuted in each system.) The 2,378 pairs were matched in terms of 1) the most serious transfer offense; 2) the number of counts; 3) the number of prior referrals to the courts; 4) the most serious prior offense; 5) age; 6) gender; and 7) race. Controlling for time at risk during a follow-up period of three years, we found that:

- \$ A significantly higher proportion of the transferred youth reoffended (31% versus 19% of youths retained in the juvenile system).
- \$ Those retained in the juvenile system took significantly longer to reoffend (227 days versus 137 days for those transferred).
- \$ The frequency of reoffending was higher among the transferred youth.
- \$ Among those who reoffended, transfers were significantly more likely to be arrested for a serious felony crime.

In the second study, we followed this same group of subjects for a follow-up period of seven years. Again, controlling for time at risk, we found that:

- \$ Transferred offenders were more likely to reoffend in 6 out of 7 offense categories.
- \$ The negative effects of transfer were especially pronounced for those who had been initially prosecuted for violent crimes.
- \$ Only for property offenders was the difference across groups not significant. However, even for property offenders, the frequency of reoffending was significantly higher among those who were transferred.
- \$ Time-to-reoffense was significantly shorter among the transferred youth. (Transferred youth reoffended more quickly than those retained in the juvenile system.)

In our third and final study, we responded to concerns expressed by prosecutors and judges, who suggested that perhaps we found higher recidivism among transferred youth because they were really more serious offenders to begin with. We had not been able to match the pairs on ALL the factors that go into the transfer decision. So we conducted interviews with prosecutors and judges around the state to find out what factors they DID consider beyond those for which we had already controlled. Then we went into the police and court records in four Florida circuits to find more precise matches. We matched transferred youth and youth retained in the juvenile system on

the following characteristics, in addition to the characteristics mentioned earlier: 1) arrest charge; 2) legal problems during processing (e.g., failure to appear); 3) gang involvement; 4) adult co-defendants; 5) amount of victim injury; 6) weapon use; 7) property damage or loss; 8) aggravating and mitigating factors (e.g., substance use, academic or school problems, learning disability). These were the additional factors on which judges and prosecutors said they based transfer decisions. Using this procedure, we generated 630 “best matches,” 315 transfers and 315 precisely matched youths who were retained in the juvenile system. We measured reoffending in terms of a felony arrest or a commitment to the Department of Corrections beginning at age 18.

We found that:

- \$ Transfers were more likely to reoffend (49%, versus 37% of those retained in the juvenile system).
- \$ Those transferred for violent offenses were especially likely to reoffend.
- \$ Where both the transferred youth and the youth retained in the juvenile system reoffended, the transferred youth was significantly more likely subsequently to commit a more serious violent felony crime.

I am also very familiar with two studies carried out by Professor Jeffrey Fagan at Columbia University. He conducted a “natural experiment” involving 15- and 16-year-old first degree robbers and first degree burglars in two counties in New York and two neighboring counties in New Jersey. On the New York side of the Hudson River, these youths were handled as adults under that state’s legislative exclusion statute. On the New Jersey side of the river, identical youths were processed in the juvenile courts. His sample consisted of 800 youths (200 robbers, 200 burglars, in each of the two states.) His follow-up period was sufficient to allow a significant portion of each group to complete their sentences and accumulate at least 4 years of “street time” at risk.

He found that:

- \$ Reoffense rates did not differ for the burglars.

- \$ Among the robbery offenders, those who were prosecuted in criminal court were much more likely to be rearrested (76%, versus 67% of those processed in juvenile court).
- \$ The differences were especially pronounced among robbers who were sentenced to adult incarceration (90% rearrested) compared to those sentenced to juvenile incarceration (73% rearrested).
- \$ Robbery offenders in criminal court had rearrest rates that were 50% higher than those for robbery offenders in juvenile courts (2.85 arrests per year, compared to 1.67 arrests per year).
- \$ Robbery offenders in criminal court reoffended more quickly than robbery offenders in juvenile court.
- \$ Rather than affording greater community protection, the higher recidivism among robbers adjudicated in criminal court suggests that public safety was compromised by criminal court processing.

More recently, Jeffrey Fagan and his colleagues have conducted a second study in New York and New Jersey, this time including robbers, burglars, and those charged with assault. They examined recidivism during a followup period that ranged from two years (for those incarcerated) to seven years (for those who received probation). As in all of the previous studies mentioned above, rates of recidivism were adjusted for time at risk. After controlling for prior record and other background variables, they found that:

- \$ Youths prosecuted in the adult system were twice as likely to be rearrested for a violent crime.
- \$ Processing in criminal court increased the risk of being arrested for a property crime by 67%.
- \$ Processing in criminal court increased the risk of being arrested for a weapons offense by nearly 80%.

\$ As before, youth in criminal court reoffended more quickly than those processed in juvenile court.

In sum, there have been five scientifically sound studies to date, using different research designs, different time periods, and different locations. Yet the results are consistent and unequivocal, which is quite unusual in social science research. All point to the conclusion that transfer increases the risk to public safety. The only exception applies to youth who are convicted of very serious offenses and who are incarcerated into middle age or later: For these youths, significant incapacitative gains can be realized. For youths incarcerated for shorter periods, however, the gains in public safety achieved during a period of incarceration are quickly offset by the higher rate of reoffending once the offender is released.

There are a number of reasons for these results, about which I will also be prepared to testify based on my own research, which involved interviewing young offenders in adult prisons and juvenile institutions.

1. Prisons are more dangerous places than juvenile institutions. Youths are exposed to an inmate social system that rewards violence and exploitation of others. The modeling of violence increases the risk of reoffending upon release.
2. Youth in adult prison are routinely exposed to more experienced, seasoned offenders, who frequently boast about their criminal expertise. Consequently, young offenders are much more likely to be exposed to “criminal socialization” in prison compared to youths who are confined in juvenile facilities. The comparatively large size of adult institutions (compared to juvenile ones) makes staff monitoring more difficult and facilitates negative inmate-inmate communication.
3. Compared to adult prisons, juvenile facilities tend to be more rehabilitative in practice and intent. Research shows that offenders benefit from cognitive-behavioral programs

designed to improve their social skills and to manage negative emotions. Such programs are rarely found in adult prisons, which tend to “warehouse” offenders until their release.

4. Line staff in juvenile correctional facilities typically communicate messages of hope to incarcerated offenders. Correctional officers in adult facilities are more negative in orientation. The “positive life scripts” so essential to “going straight” upon release are very difficult to develop in the face of staff opposition.

5. Youth leave the adult system with a criminal record which they must report on employment applications, and with the stigma of a criminal conviction. Consequently, it is more difficult for them to reintegrate into conventional society (e.g., to obtain jobs, to make “good” friends, to date stable and loving partners) than is the case with youth who have only a delinquency record.

6. My own research, and that of Forst, Fagan, and Vivona, reveals that young offenders exit the juvenile system with substantially more positive expectations for the future than do comparable young offenders held in the adult system.

III. Summary

Based upon my knowledge and experience as a professor, researcher, consultant, and author, it is my opinion that the empirical research to date supports the conclusion that transferring juvenile offenders to adult court increases juvenile violence and crime by increasing the likelihood that these juveniles will reoffend, and that these future crimes will be more serious violent felonies than those committed by similarly situated juveniles who were not transferred out of the juvenile system.

I am prepared to testify to the foregoing should I be called upon to do so.

Signed under the pains and penalties of perjury on April 3, 2006.

Donna M. Bishop