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CRIMINAL SENTENCING OF JUVENILE OFFENDERS IN ADULT COURT

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EXECUTIVE SUMMARY

In a series of decisions issued over the last decade and a half, the U.S. Supreme Court has held that juveniles are constitutionally different from adults for the purposes of sentencing and that imposing certain severe punishments on juveniles violates the Eighth Amendment to the U.S. Constitution. These decisions articulated three ways juvenile offenders are inherently different than adult offenders. According to the Court: (1) juveniles are less mature than adults and have an underdeveloped sense of responsibility; (2) juveniles are more vulnerable or susceptible to negative influences and outside pressures; and (3) the character of a juvenile is not as well formed as that of an adult.

The Court's decisions in these cases specifically prohibit states from sentencing a juvenile to death for any crime and to life imprisonment without parole or release for a nonhomicide crime. They also prohibit a state from applying laws to juveniles that mandate a judge impose a sentence of life imprisonment without parole or release. A number of states have subsequently enacted legislation related to the sentencing of juvenile offenders.

To date, no court has invalidated a Wisconsin law as violating the U.S. Supreme Court's recent decisions regarding the sentencing of juvenile offenders. Various organizations and advocates, however, have encouraged legislatures, including the Wisconsin Legislature, to modify various laws as they apply to juveniles to comport with the Supreme Court's recognition that there are inherent and constitutionally significant differences between juveniles and adults. The Joint Legislative Council co-chairs directed Legislative Council staff to prepare this report to review issues related to sentencing Wisconsin juvenile offenders in adult court, with a specific focus on sentences to life imprisonment.

- **Part I** explains current law regarding when juveniles may be subject to an adult criminal court's jurisdiction in Wisconsin.
- **Part II** describes Wisconsin law regarding sentencing and highlights provisions related to life sentences.
- **Part III** contains statistics on Wisconsin juveniles serving life sentences.
- **Part IV** summarizes case law from the U.S. Supreme Court and Wisconsin courts addressing constitutional limitations on sentencing juvenile offenders.
- **Part V** provides an overview of legislation enacted by other states related to sentencing juvenile offenders.
- **Part VI** outlines the options for legislation that were submitted by various stakeholders.

The report appendices list the agencies, organizations, and individuals who were contacted in connection with preparing this report and provide a compilation of the submitted letters.

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PART I
BACKGROUND: JUVENILES IN ADULT COURT

MEANING OF "JUVENILE" FOR CRIMINAL PROSECUTION

The term "juvenile" is generally understood to mean a person 17 years old or younger, and the term "adult" to mean a person 18 years or older. These terms do not have these meanings, however, for the purposes of criminal prosecution in Wisconsin. Under Wisconsin law, all 17-year-olds are treated as adults for the purposes of criminal law and are prosecuted and sentenced in adult criminal courts.[1] A person may be subject to the juvenile justice system, rather than the adult criminal system, only if he or she is 16 years old or younger. A juvenile who is 16 years old or younger may still be prosecuted and sentenced in adult criminal court, however, under certain circumstances. This part describes these circumstances.

ADULT COURT JURISDICTION OVER JUVENILES

A juvenile who is 16 or younger may be prosecuted in adult criminal court under two scenarios. A juvenile's case may begin in adult court when the court has "original jurisdiction" over the juvenile. Alternatively, a case may begin in juvenile court and be transferred to adult court because the juvenile court waived its jurisdiction to hear the case. When this happens, the juvenile is "waived" into adult court.

Original Jurisdiction – Juveniles Whose Cases Begin in Adult Court

A juvenile case begins in adult court when the juvenile meets certain criteria relating to offense or prior record. The following types of juveniles have their cases addressed in adult court based on the court's original jurisdiction:

- **Juveniles with a prior adjudication who commit a corrections-related battery**. A juvenile who was previously adjudicated delinquent and is either: (a) alleged to have committed battery or assault while placed in a secured correctional facility, secured detention facility, or secured residential care center for children and youth; or (b) alleged to have committed battery to a probation and parole agent or aftercare agent.[2]

[1] The Juvenile Justice Code defines "juvenile," when used without further qualification, to mean "a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, 'juvenile' does not include a person who has attained 17 years of age." [s. 938.02 (10m), Stats.]

[2] An adult court has original jurisdiction over a juvenile who has been adjudicated delinquent and who is alleged to have violated s. 940.20 (1), Stats., *Battery by Prisoners*, or s. 946.43, Stats., *Assaults by Prisoners*, while placed in a juvenile correctional facility, a juvenile detention facility, or a secured residential care center for children and youth. Additionally, a court has original jurisdiction over a juvenile who has been adjudicated delinquent and is alleged to

- **Juveniles aged 10 or older who commit homicide**. A juvenile who is alleged to have done one of the following on or after the juvenile's 10th birthday: (a) attempted or committed first-degree intentional homicide; (b) committed first-degree reckless homicide; or (c) committed second-degree intentional homicide.[3]
- **Juveniles with a prior adult court case**. A juvenile who is alleged to have committed a crime and who was previously convicted in adult court or has a case pending in adult court.[4]

Reverse Waiver – Juveniles Who Begin in Adult Court but are Transferred to Juvenile Court

A juvenile whose case begins in adult court may have his or her case "reverse waived" to the juvenile court. This happens when the adult court waives its original jurisdiction to hear the case and transfers the case to juvenile court. Although it is not unusual for juvenile defendants to file reverse waiver motions, these motions are rarely successful.

Before a court may reverse waive the juvenile's case, a juvenile must prove the following by a preponderance of the evidence: (a) that the juvenile could not receive adequate treatment in the criminal justice system; (b) that transferring the juvenile would not depreciate the seriousness of the offense; and (c) that it is not necessary to keep the case in adult court in order to deter juveniles from committing a similar violation.[5]

Waiver of Juveniles to Adult Court – Juveniles Whose Cases Begin in Juvenile Court

A juvenile case may begin in juvenile court and then be waived into adult court if the juvenile meets certain conditions. The prosecutor, the juvenile, or the court itself may initiate a petition for waiver to adult court.[6] The following are circumstances under which a court may waive a juvenile case to adult court:

- **Commission of any crime after age 15**. The juvenile is alleged to have violated any state criminal law on or after the juvenile's 15th birthday.[7]

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have committed a violation of s. 940.20 (2m), Stats., *Battery to Probation, Extended Supervision and Parole Agents, Community Supervision Agents, and Aftercare Agents*. [s. 938.183 (1) (a), Stats.]

[3] s. 938.183 (1) (am), Stats.

[4] An adult court has original jurisdiction over a juvenile previously "waived" from juvenile court into adult court, as well as a juvenile over whom an adult court previously had original jurisdiction. [s. 938.183 (1) (b) and (c), Stats.]

[5] s. 970.032 (2), Stats. A juvenile may also make a motion before trial to transfer jurisdiction to the juvenile court if the following apply: (a) the juvenile is currently facing a misdemeanor action; and (b) the juvenile is in adult court because of a previous adult court conviction or pending adult court case (rather than because of the immediate offense). A juvenile who makes this motion before trial must prove that he or she does not qualify for adult court jurisdiction, or that he or she meets the three criteria already noted in the section. [s. 971.31 (13), Stats.]

[6] s. 938.18 (2), Stats. If the court initiates a waiver petition, the judge must disqualify himself or herself from further proceedings on the case.

[7] s. 938.18 (1) (c), Stats.

- **Commission of particular serious crimes after age 14.** The juvenile is alleged to have committed one of the following on or after the juvenile's 14th birthday:[8]
  - Felony murder.
  - Second-degree reckless homicide.
  - First-degree sexual assault.
  - Second-degree sexual assault.
  - Taking hostages.
  - Kidnapping.
  - Armed burglary.
  - Armed robbery.
  - Robbery of a financial institution.
  - Manufacture, delivery, or distribution of a controlled substance.
- **Commission of a gang-related felony after age 14**. The juvenile is alleged to have committed a felony under the Criminal Code or the Uniform Controlled Substances Act, for a criminal gang, on or after the juvenile's 14th birthday.[9]

Waiver of juvenile court jurisdiction is a two-step process. First, the court must determine whether the matter has prosecutive merit, meaning the record establishes to a reasonable probability that the alleged violation was committed and that the juvenile committed it.[10]

Second, the juvenile court must decide whether to waive its jurisdiction. A court determines whether to waive a juvenile into adult court based on the following statutory criteria:[11]

- **Personality of the juvenile**. This includes whether the juvenile has a mental illness or developmental disability, the juvenile's physical and mental maturity, and the juvenile's pattern of living, prior treatment history, and apparent potential for responding to future treatment.
- **Prior record of the juvenile**. This includes whether the juvenile was previously waived into adult court, previously convicted following a waiver of the court's jurisdiction, or previously found delinquent, whether such conviction or delinquency involved infliction of serious bodily injury, the juvenile's motives and attitudes, and the juvenile's prior offenses.
- **Type and seriousness of offense**. This includes whether the offense was against persons or property or committed in a violent, aggressive, premeditated, or willful manner.

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[8] A court may waive a juvenile for allegedly violating ss. 940.03, 940.06, 940.225 (1) or (2), 940.305, 940.31, 943.10 (2) 943.32 (2), 943.87, or 961.41, on or after the juvenile's 14th birthday. [s. 938.18 (1) (a), Stats.]

[9] A court may waive a juvenile for allegedly committing a violation at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9), Stats., that would constitute a felony under chs. 939 to 948 (Criminal Code) or 961 (Uniform Controlled Substances Act) if committed by an adult. [s. 938.18 (1) (b), Stats.]

[10] s. 938.18 (4), Stats. *In the Interest of T.R.B.*, 109 Wis. 2d 179, 192 (1982).

[11] s. 938.18 (5), Stats.

- **Availability of treatment and services**. This includes the adequacy and suitability of facilities, services and procedures within the juvenile justice system or mental health system for treatment of the juvenile and protection of the public, and suitability of the juvenile for placement in the serious juvenile offender program or the adult intensive sanctions program.
- **Efficiency of handling multiple offenses in one court**. The desirability of trial and disposition of the entire offense in one court, if the juvenile was allegedly associated in the offense with persons who will be charged in adult criminal jurisdiction.

The court must state its findings regarding the criteria on the record. The court must also determine that there is clear and convincing evidence that hearing the case in juvenile court is contrary to the best interests of the juvenile or the public. If it does so, the court enters an order waiving jurisdiction and referring the case to the district attorney for proceedings in the adult criminal court.[12]

CONSEQUENCES FOR A JUVENILE

A juvenile who remains under juvenile court jurisdiction is adjudicated delinquent and receives a disposition. A disposition differs from an adult sentence in the variety of potential consequences that a juvenile court may impose. Among other options, potential dispositions include supervision by a suitable adult, electronic monitoring, placement in a relative's home, restrictions on driving privileges, counseling, and vocational training.[13]

A juvenile prosecuted in adult criminal court is convicted of a crime and receives a sentence, similar to any other adult offender. State law establishes a statutory framework for sentencing and release consideration that applies to all offenders convicted in adult court, regardless of age. This sentencing scheme is described in the following part.

[12] s. 938.18 (6), Stats.
[13] The full list of available juvenile dispositions can be found at s. 938.34, Stats.

PART II
BACKGROUND: SENTENCING

When a person is convicted of a crime, the court may impose a sentence consisting of a term of imprisonment, a fine, or both. Although a sentencing court may consider an offender's age as one factor relevant to its decision,[14] a juvenile who is prosecuted in adult court is subject to the same sentencing framework that applies to adult offenders.

An offender's eligibility for release depends on when he or she committed the crime. An offender who committed crimes prior to December 31, 1999, is sentenced under an "indeterminate" sentencing framework in which eligibility for release is governed by a parole system. Under this system, the Wisconsin Parole Commission makes a discretionary decision about whether to release an offender who has reached a certain point in his or her sentence.

The Legislature replaced this indeterminate sentencing structure, in the late 1990s, with a "determinate" sentencing structure, so called because the actual length of time the person will serve in confinement is determined at the time of sentencing. The new sentencing system is commonly known as "truth in sentencing."

SENTENCING GENERALLY

The parameters for criminal sentences are prescribed by statute. With respect to felonies, these parameters are generally provided by reference to the specific felony class to which the crime is assigned. Under current law, there are nine classes of felonies in Wisconsin. Each class corresponds with one of the first nine letters of the alphabet, with Class A constituting the felonies with the most severe punishment and Class I constituting the felonies with the least.

[14] *State v. Barnes*, 203 Wis. 2d 132, 145-146 (Ct. App. 1996).

Maximum Penalties by Felony Class

The penalty range for a felony depends on whether the felony was committed prior to December 31, 1999; on December 31, 1999, but before February 1, 2003; or on February 1, 2003, or after.[15] The classes of felonies and their maximum sentences are shown below:

Maximum Sentence for Felonies[16]
(Confinement in Prison Plus Parole or Extended Supervision)

Crimes Committed 2/1/03 and After		Crimes Committed 12/31/99 to 1/31/03		Crimes Committed Before 12/31/99	
Class	**Sentence**	**Class**	**Sentence**	**Class**	**Sentence**
Class A	Life	Class A	Life	Class A	Life
Class B	60 years	Class B	60 years	Class B	40 years
Class C	40 years	Class BC	30 years	Class BC	20 years
Class D	25 years	Class C	15 years	Class C	10 years
Class E	15 years	Class D	10 years	Class D	5 years
Class F	12.5 years	Class E	5 years	Class E	2 years
Class G	10 years				
Class H	6 years				
Class I	3.5 years				

Sentencing Factors

While the statutes establish parameters for criminal sentences, the sentencing judge has discretion to determine the sentence an offender actually receives, unless a mandatory minimum applies. A judge's sentencing discretion, however, is not unlimited. "An exercise of discretion contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards."[17]

To that end, a court must consider certain statutory factors when making a sentencing decision and state the reasons for its sentencing decision in open court and on the record.[18] The statutory factors a court must consider under current law are:

- The protection of the public.
- The gravity of the offense.
- The rehabilitative needs of the defendant.

[15] The Legislature made changes to the felony classifications in connection with enacting "truth in sentencing."
[16] s. 939.50, Stats.; and s. 939.50, 1997 and 2001, Stats.
[17] *State v. Gayton*, 2016 WI 58 ¶ 19 (Internal punctuation and citations omitted).
[18] ss. 973.017 (2) and (10) (m), Stats. If the court determines that it is not in the interest of the defendant for it to state the reasons for its sentencing decision in the defendant's presence, the court shall state the reasons for its sentencing in writing and include the written statement in the record.

- Any applicable mitigating factors and any applicable aggravating factors, including the aggravating factors specified by statute.

Case law has established that courts may also consider various other nonstatutory factors, including the defendant's age.[19] While a court must consider certain factors and may consider others, the "significance of each factor ... in the total sentencing process lies solely within the sentencing court's discretion as demonstrated by the record."[20]

TYPES OF SENTENCES

An offender sentenced to imprisonment in the Wisconsin state prisons for a felony committed on or after December 31, 1999, is sentenced to a determinate sentence that consists of a term of confinement in prison followed by a term of extended supervision. An offender sentenced to imprisonment in the Wisconsin state prisons for a felony committed before that date is sentenced to an "indeterminate" sentence, and if eligible for parole, is released under the parole system.

Determinate Sentences – "Truth in Sentencing" System

As noted above, an offender who commits an offense on or after December 31, 1999, is sentenced under the determinate sentencing structure known as "truth in sentencing." When a person is sentenced to a determinate sentence, the sentence is bifurcated between a period of confinement and a period of extended supervision (ES), unless the person is sentenced for a felony that is punishable by life imprisonment. The total length of the sentence is the period of confinement plus the period of ES. A person who has been released to ES is subject to revocation of ES and may be returned to prison for a period of time that does not exceed the time remaining on the bifurcated sentence if he or she violates a condition of supervision.[21]

The portion of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year and is subject to any minimum sentence prescribed for the felony. The maximum length of confinement for each felony class is shown in the following table.

[19] The Wisconsin Supreme Court has observed that its cases have detailed various factors courts may consider when sentencing a defendant including: "(1) past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character, and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background, and employment record; (9) defendant's remorse, repentance, and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention." *State v. Gayton*, ¶ 22.

[20] *State v. Barnes*, 203 Wis. 2d 132, 145 (Ct. App. 1996).

[21] s. 302.113 (9), Stats.

Maximum Term of Confinement in Prison[22]

Felony Class	Release to ES for Crimes Committed 2/1/03 and After	Felony Class	Release to ES for Crimes Committed 12/31/99 to 1/31/03
Class A	ES eligibility date set by sentencing court*	Class A	ES eligibility date set by sentencing court*
Class B	40 years	Class B	40 years
Class C	25 years	Class BC	20 years
Class D	15 years	Class C	10 years
Class E	10 years	Class D	5 years
Class F	7.5 years	Class E	2 years
Class G	5 years		
Class H	3 years		
Class I	1.5 years		

** The person must serve at least 20 years in prison. The court may also order that the person is not eligible for release on ES.*

A term of extended supervision follows the person's term of imprisonment. A person who has been released to extended supervision remains in the legal custody of the Department of Corrections (DOC). The portion of the sentence that imposes a term of extended supervision may not be less than 25 percent of the length of the term of confinement in prison imposed, and is subject to the following maximum terms:

Maximum Term of Extended Supervision[23]

Felony Class	Maximum Term of Extended Release
Class B	20 years
Class C	15 years
Class D	10 years
Class E	5 years
Class F	5 years
Class G	5 years
Class H	3 years
Class I	2 years

[22] s. 973.01, Stats.
[23] s. 973.01, Stats.

Indeterminate Sentence – "Parole System"

A person who committed an offense prior to December 31, 1999, receives an indeterminate sentence from the court. An indeterminate sentence is so called because it is unknown at the time of sentencing how much of the offender's sentence he or she will actually serve in prison before being released. The specific time at which the offender will be released from imprisonment is governed by the parole system. Parole is release of an inmate prior to the end of the inmate's full sentence.

Other than those persons serving a sentence of life in prison, a person serving an indeterminate sentence in a state prison is usually released from confinement in one of the following ways:

- **Discretionary parole after parole eligibility date**. An offender is generally eligible for parole after serving 25 percent of the court-imposed sentence or six months, whichever is greater. The Parole Commission determines whether the offender is released on discretionary parole. After release, an offender is placed on parole supervision for the remainder of his or her sentence.[24]
- **Mandatory release**. Unless subject to additional time for misconduct, and subject to the exceptions described below, an offender is required to be released after serving two-thirds of his or her sentence. This is termed the offender's mandatory release, or MR, date. After release, an offender is placed on parole supervision.[25]

For indeterminate sentences, eligibility for parole and MR are as follows if a person is sentenced to the maximum term of imprisonment:

Felony Class	Eligible for Parole	Mandatory Release
Class A	Set by sentencing court	N/A
Class B	10 years	26.6 years
Class BC	5 years	13.3 years
Class C	2.5 years	6.6 years
Class D	1.25 years	3.3 years
Class E	0.5 years	1.3 years

An offender who has committed a serious felony[26] may be subject to different parole eligibility provisions than are outlined above. A person who has committed a serious felony may have his or her parole eligibility date changed in the following ways:

- **Later discretionary parole date.** If a serious felony offender has one or more prior convictions for a serious felony, a judge may set a discretionary parole eligibility date for the offender that

[24] s. 304.06, Stats.
[25] s. 302.11, Stats.
[26] Serious felonies include certain drug offenses that are punishable by a maximum prison term of 30 years or more; first- or second-degree intentional homicide; first-degree reckless homicide; felony murder; homicide by intoxicated use of a vehicle; performing partial-birth abortion; substantial battery; substantial battery to an unborn child;

is later than 25 percent of the sentence or six months, but that is not later than the MR date of two-thirds of the sentence.[27]

- **No automatic release on MR date.** Certain felony offenders need not be automatically released when they reach their MR dates. Instead, the Parole Commission may deny MR to such an offender in order to protect the public or because the offender refused to participate in counseling or treatment.[28]

Parole Hearings

A parole commissioner conducts the first release consideration of an inmate the month before his or her initial parole eligibility date. The commissioner generally conducts a recorded interview with the inmate at the correctional institution where the inmate is held.[29] At the interview, the inmate has the opportunity to provide relevant information and material and to comment on perceived errors in the record. The parole interview is not open to the public, but a victim is permitted to attend and provide input. An offender is not allowed to be represented by legal counsel at the interview.[30]

A commissioner then makes a release decision based on available information, including material in the file, applicable victim statements, and any other relevant information. The commissioner must allow any person or office to submit a written statement for consideration as part of the decision-making process.[31] A commissioner, or the commission if the commissioner refers the case to the full commission, may either recommend release or deny release and defer consideration of parole for a specific period of time. A commissioner may recommend release only after considering certain criteria prescribed by rule.[32]

LIFE SENTENCES

A sentence of life imprisonment corresponds to felonies classified as Class A felonies. There are currently seven Class A felonies under Wisconsin law.[33] They are:

- First-degree intentional homicide.
- Intentionally performing a partial-birth abortion.

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mayhem; first- or second-degree sexual assault; taking hostages; kidnapping; causing death by tampering with a household product; arson; armed burglary; carjacking; armed robbery; assault by a prisoner; first- or second-degree sexual assault of a child; substantial physical abuse of a child; sexual exploitation of a child; incest; child enticement; soliciting a child for prostitution; child abduction; soliciting a child to commit a Class A or B felony; use of a child to commit a Class A felony; or solicitation, conspiracy, or attempt to commit a Class A felony. [s. 973.0135 (1) (b), Stats.]

[27] s. 973.0135, Stats.

[28] s. 302.11 (1g), Stats.

[29] Release consideration can happen without the inmate being present under certain circumstances, including that the inmate is in segregation or the inmate had an interview within the past 12 months. [s. PAC 1.06 (11), Wis. Adm. Code.]

[30] s. PAC 1.06 (4), (5), (10), (13), (15), and (17), Wis. Adm. Code.

[31] s. PAC 1.06 (8) and (18), Wis. Adm. Code.

[32] s. PAC 1.06 (16), Wis. Adm. Code.

[33] ss. 940.01, 940.16, 946.01, 946.50 (1), 948.02 (1) (am), 948.025 (1) (a), and 948.03 (5) (a) 1., Stats.

- Treason.
- Absconding after being adjudicated delinquent for a Class A felony.
- Sexual contact or intercourse with a person under 13 years of age if the sexual contact or intercourse resulted in great bodily harm to the person.
- Engaging in repeated sexual contact or intercourse with a person under 13 years of age if at least three of the offenses resulted in great bodily harm to the person.
- Engaging in repeated acts of physical abuse of the same child if at least one violation caused the death of the child.

Life Sentences Under Determinate "Truth-in-Sentencing" Structure

When a court sentences a person to life imprisonment for a crime committed on or after December 31, 1999, the court specifies whether the offender will be eligible for extended supervision and when. The court may either specify the person is eligible for release to extended supervision after serving 20 years, or the person is eligible for release on a date set by the court. When the court sets a date the person is eligible for release, the date set must be after the person has served at least 20 years. The court may also specify the person is not eligible for release to extended supervision.

Life Sentences under the Parole System

No person serving a sentence of life in prison for an act committed before December 31, 1999, is entitled to MR. Instead, a person serving a life sentence usually must serve 20 years in confinement, less time calculated under the MR formula, before the person is eligible for release on parole. A person's eligibility may, however, be extended due to violation of prison rules, or if the court sets the parole eligibility date later than the usual parole eligibility. Alternatively, a sentencing court may declare a person ineligible for parole.[34]

Mandatory Sentences of Life Without Release

Wisconsin law provides a mandatory sentence of life imprisonment without the possibility of parole or extended supervision for convictions of certain serious felonies if the offender is a "persistent repeater," as defined by statute. For these purposes, "persistent repeater" means:

- The actor has been convicted of a serious felony on two or more separate occasions at any time preceding the serious felony for which he or she presently is being sentenced under ch. 973, which convictions remain of record and unreversed and, of the two or more previous convictions at least one conviction occurred before the date of violation of at least one of the other felonies for which the actor was previously convicted.

[34] s. 973.014 (1), Stats.

- The actor has been convicted of a serious child sex offense on at least one occasion at any time preceding the date of violation of the serious sex offense for which he or she presently is being sentenced under ch. 973, which conviction remains of record and unreversed.[35]

Wisconsin law also provides a mandatory sentence of life imprisonment the possibility of parole or release if the person is convicted of first-degree intentional sexual assault and has a previous conviction of first-degree sexual assault.[36]

[35] s. 939.62 (2m) (b) 1. and 2., Stats.
[36] s. 939.618 (2) (b), Stats.

PART III
STATISTICS ON WISCONSIN JUVENILES SERVING LIFE SENTENCES

Wisconsin law allows a criminal court to impose a life sentence on a juvenile, and also allows a court to impose that life sentence with no possibility for release. The following section provides statistics on individuals currently in a Wisconsin prison serving a life sentence for an offense committed before the age of 18. The Wisconsin DOC provided the figures, which are current as of October 31, 2020.

The tables include offenders who committed an offense at age 17 because these individuals are commonly understood to be "juveniles," though Wisconsin law automatically treats them as adults for purposes of criminal prosecution.

POSSIBILITY FOR RELEASE

There are 115 individuals currently serving life sentences in Wisconsin prisons for offenses committed as juveniles. Of these, six will never be eligible for release. The remaining 109 will become eligible for release at some point, though it may be beyond the person's life expectancy.

AGE OF OFFENSE

The youngest age of offense for any individual serving a life sentence is 13, and the youngest age for an individual serving life with no possibility for release is 14. The number of life sentences increases as the age of the juvenile increases. There are only five life sentences for offenses committed at 13, while there are 52 life sentences for those committed at 17.

Individuals in Prison Serving a Life Sentence for Offense Committed Under the Age of 18 *

Offense Age	Release Eligibility?		Total
	Yes	*No*	
13	5	0	**5**
14	2	1	**3**
15	15	1	**16**
16	39	0	**39**
17	48	4	**52**
Total	**109**	**6**	**115**

** Data reported 10/31/2020*

RACE OF OFFENDERS

The race of offenders receiving life sentences for offenses committed before age 18 does not proportionately reflect the population as a whole. Black offenders are serving three of the six life sentences with no chance of release (50%), and 53 of the 115 total life sentences (46.1%). According to the U.S. Census Bureau population estimates, the population of Wisconsin is 6.7 percent Black or African American.[37]

American Indian offenders are serving one of the six life sentences with no chance of release (16.7%), and nine of the 115 total life sentences (7.8%). According to U.S. Census Bureau population estimates, the population of Wisconsin is 1.2 percent American Indian and Alaska Native.

Individuals in Prison Serving a Life Sentence for Offense Committed Under the Age of 18 by Race *

Offense Age	Release Eligibility?								Total			
	Yes				*No*							
	American Indian/ Alaskan Native	Asian or Pacific Islander	Black	White	American Indian/ Alaskan Native	Asian or Pacific Islander	Black	White	American Indian/ Alaskan Native	Asian or Pacific Islander	Black	White
13	1	0	1	3	0	0	0	0	1	0	1	3
14	0	0	0	2	1	0	0	0	1	0	0	2
15	2	1	6	6	0	0	0	1	2	1	6	7
16	3	0	18	18	0	0	0	0	3	0	18	18
17	2	0	25	21	0	0	3	1	2	0	28	22
Total	**8**	**1**	**50**	**50**	**1**	**0**	**3**	**2**	**9**	**1**	**53**	**52**

**** Data reported 10/31/2020***

ETHNICITY OF OFFENDERS

The ethnicity of offenders receiving life sentences for offenses committed before age 18 does not proportionately reflect the population as a whole. Hispanic or Latino offenders are serving one of the four life sentences with no chance of release by offenders whose ethnicity is known (25%), and nine of 83 total life sentences served by offenders whose ethnicity is known (10.8%). According to U.S. Census Bureau population estimates, the population of Wisconsin is 7.1 percent Hispanic or Latino.

[37] All Wisconsin population figures are estimates as of July 1, 2019, and can be found on the U.S. Census Bureau QuickFacts for the state of Wisconsin.

*Individuals in Prison Serving a Life Sentence for Offense Committed Under the Age of 18 by Ethnicity **

Offense Age	Release Eligibility?						Total		
	Yes			*No*					
	Hispanic or Latino	Not Hispanic or Latino	Unknown	Hispanic or Latino	Not Hispanic or Latino	Unknown	Hispanic or Latino	Not Hispanic or Latino	Unknown
13	0	2	3	0	0	0	0	2	3
14	0	2	0	0	0	1	0	2	1
15	3	8	4	1	0	0	4	8	4
16	2	26	11	0	0	0	2	26	11
17	3	33	12	0	3	1	3	36	13
Total	**8**	**71**	**30**	**1**	**3**	**2**	**9**	**74**	**32**

** Data reported 10/31/2020*

APPLICABLE SENTENCING SCHEME

The majority of offenders receiving life sentences for offenses committed before age 18 were sentenced under the prior parole system, meaning that the underlying crime was committed prior to December 31, 1999. This is true for life sentences both with and without the possibility for release. Only two of the six offenders ineligible for release (33%) and 29 of the 115 total juvenile offenders serving life sentences (25.2%) are subject to the "truth-in-sentencing" scheme.

*Individuals in Prison Serving a Life Sentence for Offense Committed Under the Age of 18 **

Offense Age	*Eligible for Release*		*Not Eligible for Release*		Total	
	TIS	*Non-TIS*	*TIS*	*Non-TIS*	*TIS*	*Non-TIS*
13	3	2	0	0	3	2
14	2	0	0	1	2	1
15	5	10	0	1	5	11
16	7	32	0	0	7	32
17	10	38	2	2	12	40
Total	**27**	**82**	**2**	**4**	**29**	**86**

** Data reported 10/31/2020*

PART IV
FEDERAL CASE LAW, STATE CASE LAW, AND ONGOING LITIGATION

Courts resolve legal challenges to criminal sentences arising under federal and state constitutions and their decisions impact the type and length of sentence that is constitutionally permissible. The circumstances under which a court may impose a life sentence on a juvenile is a developing area of constitutional law. The following section describes significant court decisions affecting life sentences for juveniles, as well as pending litigation that may impact them further.

U.S. SUPREME COURT DECISIONS

The Eighth Amendment to the U.S. Constitution limits the sentences that can be imposed on a criminal offender by prohibiting "cruel and unusual punishments." The U.S. Supreme Court has interpreted this to prohibit the death penalty for certain categories of offenders, including juveniles. In recent years, the Supreme Court has further refined the constitutional boundaries for life sentences imposed on juveniles, holding that the Eighth Amendment prohibits life without parole sentences for juveniles who committed nonhomicide offenses and prohibits mandatory life without parole sentences for juveniles even if they do commit homicide.

Roper v. Simmons (2005)

In *Roper v. Simmons,* 543 U.S. 551 (2005), the U.S. Supreme Court held that the Eighth Amendment forbids imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

Facts of the Case

The defendant, Christopher Simmons, was charged as an adult with committing burglary, kidnaping, stealing, and murder in the first degree when he was 17-years-old. Following a trial, he was convicted and sentenced to death. Simmons filed a variety of postconviction motions, all of which were unsuccessful. After the conclusion of these proceedings, the U.S. Supreme Court decided *Atkins v. Virginia*,[38] which held that the Eight and Fourteenth Amendments prohibit the execution of a person with a mental disability. Simmons filed another motion for postconviction relief, this time arguing that, under the Court's reasoning in *Atkins*, executing a juvenile who was under 18 when the crime was committed is unconstitutional.[39] The Missouri Supreme Court agreed, observing that "a national consensus, has developed against the execution of juvenile offenders" in the years since the U.S. Supreme Court had last considered whether the Eighth Amendment prohibited sentencing.

[38] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[39] *Roper v. Simmons*, 543 U.S. 551, 559 (2005).

Court Holding

On appeal, the U.S. Supreme Court also agreed that a national consensus against the death penalty for juveniles had developed since 1989, when it last considered the issue in *Stanford v. Kentucky*.[40] As it had in *Stanford*, the Court in *Roper* looked to "enactments of legislatures that have addressed the question" as the beginning point in a "review of objective indicia of consensus."[41] The Court was persuaded that the "rejection of the juvenile death penalty in the majority of states; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice provide sufficient evidence that today our society views juveniles ... as 'categorically less culpable than the average criminal.'"[42] Emphasizing that capital punishment must be limited to the most serious category of offenders,[43] and relying on scientific and sociological evidence submitted in briefings, the Court articulated "three general differences between juveniles under the age of 18 and adult offenders [that] demonstrate juvenile offenders cannot with reliability be classified among the worst offenders."[44]

First, the Court observed that "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[45] The second area of difference the Court noted "is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." The Court stated that "[t]his is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[46] Finally, the Court described the third broad difference as being "that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[47]

These general differences, the Court explained, inform an analysis of the culpability of juvenile offenders. For example, the Court observed that "the susceptibility of juveniles to immature and irresponsible behavior means their 'irresponsible conduct is not as morally reprehensible as that of an adult'" and that "[t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[48]

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[40] In *Stanford v. Kentucky*, the Court held that the Eighth Amendment did not prohibit executing a juvenile who was over the age of 15 at the time the crime was committed. The Court drew heavily on its observation that "a majority of states that permit capital punishment authorize it for crimes committed at age 16 or above" to conclude there was not sufficient evidence of a national consensus against the death penalty for juveniles under the age of 18. In the term prior to the one in which *Stanford* was decided, the Court held that the Eighth Amendment prohibited application of the death penalty to juveniles who were under the age of 16 at the time of committing the crime.

[41] *Roper* at 564.

[42] *Id.* at 567.

[43] *Id.* at 568. ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"

[44] *Id.* at 569.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 570.

[48] *Id.*

The Court then explained that this diminished culpability, in turn, makes "evident that the penological justifications for the death penalty [retribution and deterrence] apply to [juveniles] with lesser force than to adults."[49] The Court observed that "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[50] The Court also questioned the efficacy of the death penalty as a deterrent to juveniles, opining that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles."[51]

Graham v. Florida (2010)

The U.S. Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010), held that imposing a sentence of life without parole on a juvenile for a nonhomicide offense violates the Eighth Amendment.

Facts of the Case

The juvenile defendant in *Graham v. Florida* was 16-years-old when he committed an attempted robbery of a restaurant with several other juveniles. Graham was charged as an adult and pled guilty to armed burglary with assault or battery, which carries a maximum sentence of life imprisonment without the possibility of parole, and attempted armed robbery, which carries a maximum sentence of 15 years. The Court withheld an adjudication of guilt, and instead, sentenced Graham to concurrent three-year terms of probation with the initial 12 months served in county jail. At the age of 17, Graham was allegedly involved in a home invasion robbery. He was apprehended later in the evening, after fleeing from an officer, and firearms were found in his vehicle.

Graham admitted violating conditions of his probation by fleeing the officer, though he denied involvement in the home invasion robbery. The trial court found that Graham violated his probation by committing the robbery, possessing a firearm, and associating with individuals engaged in criminal activity. The Court found Graham guilty of the original armed burglary and attempted armed robbery charges and sentenced him to life imprisonment on the first offense and 15 years on the second. Because Florida no longer has a parole system, Graham faced a life sentence with no possibility for parole release.

Court Holding

In *Graham*, the U.S. Supreme Court held that the U.S. Constitution prohibits a life without parole sentence for a juvenile who did not commit homicide. In reaching its conclusion, the Court first noted a national consensus against imposing life without parole on juveniles for nonhomicide offenses. The Court acknowledged that the majority of states and the federal governmental theoretically allowed for such sentences for juveniles, but emphasized that few jurisdictions actually imposed them.[52]

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[49] *Id.* at 571.
[50] *Id.*
[51] *Id.*
[52] The decision acknowledged that 37 states and the District of Columbia permit life without parole sentences for juveniles committing nonhomicide offenses in some circumstances, and that federal law allows for life without parole

The Court reiterated the statements it first made in *Roper* that the "lessened culpability" of juveniles make them "less deserving of the most severe punishments" and pointed to a juvenile's lack of maturity, underdeveloped sense of responsibility, susceptibility to influence, and characters that are not yet well-formed.[53] The Court next drew a distinction between nonhomicide and homicide offenses, and noted the particularly harsh nature of a life sentence without parole for a juvenile, given the greater number of years he or she will serve than adult offenders.[54] Finally, the Court determined that none of the legitimate goals of penal sanctions – retribution, deterrence, incapacitation, and rehabilitation – provide adequate justification for imposing life without parole on a juvenile who committed a nonhomicide offense.[55] The Court relied upon the lack of penological justification, the limited culpability of juvenile nonhomicide offenders, and the severity of life without parole sentences to conclude that "the sentencing practice under consideration is cruel and unusual."[56]

The *Graham* decision prohibits life sentences without parole for nonhomicide juvenile offenders, but does not require that every juvenile offender ultimately be released. A juvenile must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," but is not guaranteed eventual freedom.[57] Thus, under *Graham*, the Eighth Amendment requires only that a juvenile be given a chance at release.[58]

Miller v. Alabama (2012)

In *Miller v. Alabama*, 567 U.S. 460 (2012), the U.S. Supreme Court held that mandatory sentences of life imprisonment without parole for individuals under the age of 18 at the time they committed their crimes violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Facts of the Cases

The underlying facts in the *Miller* decision come from two separate cases, one from Arkansas and another from Arizona, the Court consolidated and decided together. Each of these cases involved a 14-year-old offender who was sentenced to life imprisonment without the possibility of parole under a sentencing scheme that mandated that sentence.

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for offenders as young as 13. [*Graham*, 560 U.S. at 62.] However, the Court also noted "only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite statutory authorization." [*Id.* at 64.]

[53] *Id.* at 68.

[54] *Id.* at 69.

[55] *Id.* at 71.

[56] *Id.* at 74.

[57] Id. at 75.

[58] The Court disavows any constitutional guarantee of release, stating: "It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society." [*Id.* at 75.]

The Arkansas Case

The defendant in the Arkansas case, Kuntrell Jackson, was sentenced to life imprisonment without the possibility of parole for his role in the murder of a video store clerk. Jackson was charged as an adult with capital felony murder and aggravated murder. He was convicted of both crimes and sentenced to life imprisonment without parole under an Arkansas law that provided that a "defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole." After the U.S. Supreme Court decided *Roper*, Jackson filed a state petition for *habeas corpus*, arguing that a mandatory sentence of life without imprisonment violates the Eighth Amendment.

The Alabama Case

The defendant in the Alabama case, Evan Miller, was charged, as an adult, and convicted of murder in the course of arson after beating an adult neighbor with a baseball bat during a night of drinking and smoking marijuana with the neighbor and then lighting a fire to conceal the evidence of the crime. Miller was subsequently sentenced to life without the possibility of parole, which was the mandatory minimum sentence for this crime in Alabama.

Court's Decision

The Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[59] This conclusion, the Court explained, flows from "the confluence of ... two lines of precedent," the first of which establish limits on the punishments that may be applied to juveniles based on their lesser culpability, and the second of which prohibits any law that mandates that a judge sentence a defendant to death.[60]

Graham, in particular, was central to the Court's connection of these two lines of precedence, in *Miller*, because *Graham* "liken[ed] life without parole sentences imposed on juveniles to the death penalty itself." This equation of juvenile life sentences to capital punishment, the Court reasoned, is what connects the cases establishing limits on punishment that may be applied to juveniles to the cases requiring individualized sentencing when imposing the death penalty. In the death penalty cases, the Court emphasized the importance, when imposing this most severe penalty, of the need to consider "the character and record of the individual offender," the "circumstances of the offense," and "the possibility of compassionate or mitigating factors."[61] In particular, the Court pointed to its insistence in death penalty cases that "a sentencer have the ability to consider the 'mitigating qualities of youth.'"[62]

The Court then extended that rationale to life without parole sentences for juveniles, concluding that a mandatory sentencing scheme that prohibits a sentencing court from making an

[59] *Id.* at 465.
[60] *Id.* at 470.
[61] *Id.* at 475.
[62] *Id.* at 476.

individualized sentencing determination for a juvenile subject to life without parole is similarly defective. The Court explained:

> Mandatory life without parole for a juvenile precludes consideration of his hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[63]

Montgomery v. Louisiana (2016)

The U.S. Supreme Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), held that the Court's decision in *Miller* that mandatory life without parole sentences are unconstitutional applies retroactively. The Court clarified that any mandatory life without parole sentence imposed on a juvenile violates the Eighth Amendment, regardless of whether the sentence was imposed prior to its 2012 decision in *Miller*.

Facts of the Case

Montgomery v. Louisiana involved a 17-year-old convicted of killing a deputy sheriff in 1963. The jury found him "guilty without capital punishment," a verdict requiring a sentence of life without parole under Louisiana law. The sentence was automatic so Montgomery did not present any mitigating evidence at a sentencing hearing.

Montgomery had been imprisoned for nearly 50 years when the U.S. Supreme Court decided *Miller*. Montgomery sought collateral review of his sentence in Louisiana state court by filing a motion to correct an illegal sentence. The Louisiana trial court denied Montgomery's motion on the basis that *Miller* is not retroactive on collateral review. The Louisiana Supreme Court then denied Montgomery's application for supervisory writ based on an earlier decision it issued holding that *Miller* was not retroactive on state collateral review.

Court Holding

The U.S. Supreme Court in *Montgomery* held that its prior finding that mandatory life without parole sentences are unconstitutional for juveniles is retroactive in cases on state collateral review. The Court also concluded that it had jurisdiction to decide the question relating to state collateral review proceedings.

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[63] *Id.* at 477-78.

The Court began by noting that lower courts had reached different conclusions on whether its *Miller* decision was retroactive to juvenile offenders whose convictions and sentences were final prior to issuance of *Miller* in 2012. It then resolved the question by first announcing that *Miller* had established a new substantive rule of constitutional law, and then concluding that the U.S. Constitution requires state collateral review courts to give retroactive effect to such a rule.[64] The *Montgomery* decision reasoned that substantive rules are retroactive because they explain constitutional prohibitions against certain punishments, making that punishment "by definition, unlawful."[65] The Court goes on to state unequivocally that "*Miller* announced a substantive rule that is retroactive in cases on collateral review."[66]

The Court did not declare life without parole sentences unconstitutional for all juveniles. Instead, the decision states that a life without parole sentence may be imposed for "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[67] The Court makes it clear, however, that such a scenario will be extremely uncommon and reaffirms that "children who commit even heinous crimes are capable of change."[68]

The decision holds that *Miller* applies retroactively, but does not require states to re-sentence every juvenile who has a sentence of life without parole. *Montgomery* notes that states may, as an alternative to resentencing, provide offenders convicted as juveniles with parole consideration. Parole eligibility will allow such offenders the opportunity to demonstrate reform. An offender must have the chance to make his or her case for parole release, though release is not guaranteed.[69] *Montgomery* requires that juveniles sentenced to mandatory life without parole, at any point in the past, must "be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."[70]

WISCONSIN COURT DECISIONS

Article I, section 6, of the Wisconsin Constitution is identical to the Eighth Amendment to the U.S. Constitution. Both constitutional provisions limit the criminal sanctions that can be imposed on offenders by prohibiting "cruel and unusual punishments." Wisconsin courts are bound by federal court interpretations of the U.S. Constitution. Additionally, Wisconsin case law instructs state courts that interpretation of Wis. Const., art. I, s. 6, is guided by federal Eighth Amendment case law. The Wisconsin Supreme Court has applied both the Eighth Amendment and Wis. Const., art. I, s. 6, to life sentences for juveniles. These decisions are summarized below.

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[64] The decision distinguished between new substantive rules of constitutional law, which do apply retroactively to convictions that were final when the new rule was announced, and new procedural rules of constitutional law, which generally do not apply retroactively. [*Montgomery*, 136 S. Ct. at 728-29.]
[65] *Id.* at 729-30.
[66] *Id.* at 732.
[67] *Id.* at 734.
[68] Id. at 736.
[69] The Court emphasizes that a chance for release remedies the constitutional violation, noting: "Those prisoners who have shown an inability to reform will continue to serve life sentences." *Id.*
[70] *Id.* at 736-37.

State v. Ninham (2011)

In *State v. Ninham*, 2011 WI 33, the Wisconsin Supreme Court held that sentencing a14-year-old to life imprisonment without parole for committing intentional homicide is not categorically unconstitutional.

Facts of the Case

Omar Ninham was convicted of first-degree intentional homicide and physical abuse of a child for killing 13-year-old Zong Vang when Ninham was 14-years-old. The homicide occurred when Ninham, accompanied by four other boys, encountered Vang while he was bicycling home from the grocery store in Green Bay. Ninham and another boy first verbally taunted him, then physically attacked him and pursued him when he fled to a nearby parking ramp. They then threw Vang off the fifth floor of the ramp to the ground below and fled without checking on Vang, who died from craniocerebral trauma.

Ninham was convicted of first-degree intentional homicide and physical abuse of a child. The Court sentenced him to life imprisonment without the possibility of parole for the first-degree intentional homicide count and to five years imprisonment, consecutive to the life sentence, for the physical abuse of a child count. Following the U.S. Supreme Court's decision in *Roper*, Ninham filed a postconviction for sentencing relief, arguing that his sentence is unconstitutional. The circuit court denied his motion and the circuit court affirmed the denial. Ninham petitioned the Wisconsin Supreme Court for review; that Court granted the petition for review following the U.S. Supreme Court's decision in *Graham*.

Court's Holding

The Wisconsin Supreme Court held that sentencing a 14-year-old to life imprisonment without the possibility of parole for committing intentional homicide is not categorically unconstitutional. The Court's holding was informed by its interpretation of the U.S. Supreme Court's analysis of Eighth Amendment challenges to punishing juvenile offenders in *Roper* and *Graham*. The Wisconsin Supreme Court described this as a "two-step approach" that involves determining first whether "objective indicia of society's standards, as expressed in legislative enactments and state practices" demonstrate a national consensus against the sentencing practice; and second, whether—notwithstanding this evidence—the Court, in its own judgment, determines the punishment violates the Constitution.

With respect to the first step of this test, the Court concluded Ninham failed to demonstrate that there is a national consensus against sentencing a 14-year-old to life imprisonment without the possibility of parole for committing intentional homicide. Among other evidence, the Court noted that 44 states plus the District of Columbia permit life sentences without parole for juvenile offenders, and of these states, 36 permit life sentences without parole for offenders who were 14years-old or younger at the time of the offense.[71]

[71] *State v. Ninham*, 2011 WI 33, ¶ 55. Subsequent to the Wisconsin Supreme Court's decision in Ninham, a number of states prohibited sentences of life without parole. This is discussed in Part V of this report.

With respect to the second step, the Court, quoting *Graham*, explained that "the judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with severity of the punishment in question," and that the "Supreme Court considers whether the challenged sentencing practice serves legitimate penological goals."[72] Addressing culpability, the Court observed that although it did not disagree that "typically, juvenile offenders are less culpable than adult offenders and are therefore generally less deserving of the most severe punishments," as *Roper* and *Graham* articulated, it did not agree with the defendant that these cases "lead to the conclusion that 14-year-olds who commit intentional homicide are categorically less deserving of life imprisonment without parole." Addressing whether sentencing a juvenile to life imprisonment for homicide serves the legitimate penological goals of retribution, deterrence, and incapacitation the Court concluded it does.

State v. Barbeau (2016)

The Wisconsin Court of Appeals decision in *State v. Barbeau*, 2016 WI App 51, upheld a sentence of life imprisonment with eligibility for release to extended supervision after 35 years for a juvenile convicted of intentional homicide. The court upheld several provisions of Wisconsin sentencing laws relevant to life imprisonment for juveniles as constitutional.

Facts of the Case

State v. Barbeau involved a 13-year-old convicted of killing his great-grandmother with a hatchet in 2012. Barbeau and another 13-year-old friend used the hatchet and a hammer to strike the woman 27 times before stealing her purse, money, and jewelry and leaving in her car. Barbeau pled no contest and was convicted of first-degree intentional homicide, which carried a mandatory minimum sentence of 20 years with a maximum of life in prison.

The court sentenced Barbeau to life imprisonment and imposed a parole eligibility date of November 24, 2048, making him eligible for parole after 35 years of imprisonment. However, DOC pointed out to the court that Barbeau was actually eligible for release to extended supervision and not parole. The state moved for a hearing to correct the sentence and the court proposed to amend the judgment without a hearing, to which defense counsel did not object. Despite this, the court did not amend the judgment.

Barbeau moved for resentencing a year later asking the court to amend his judgment to make him eligible for extended supervision after 20 years, rather than eligibility for parole after 35 years. The circuit court ultimately granted the motion, in part, but did not modify Barbeau's sentence to make him eligible for release consideration at an earlier date. Instead, the court merely amended the judgement to make Barbeau eligible for extended supervision on November 24, 2048, rather than eligible for parole on that date.

Court Holding

The Wisconsin Court of Appeals upheld the sentence of life imprisonment with eligibility for extended supervision after 35 years. The court also held that the circuit court's error in naming a

[72] *Id.* at ¶ 59 (citing *Graham*).

date for parole eligibility on the judgment, rather than extended supervision eligibility, did not justify a sentence modification.

The court addressed three constitutional challenges to provisions of the Wisconsin statutory sentencing scheme: (a) that the statutory provision allowing a court to impose a life sentence without the option for extended supervision is unconstitutional as applied to a juvenile; (b) that the statutory provision imposing a mandatory minimum of 20 years imprisonment is unconstitutional as applied to juveniles; and (c) that the statutory scheme for release on extended supervision is unconstitutional because it does not allow a juvenile to demonstrate he or she deserves release based on maturity and rehabilitation. The court rejected each of these constitutional challenges.

First, the court upheld state law providing courts with the option to impose a life sentence without the possibility for release on a juvenile.[73] The court initially found that Barbeau had no standing to challenge the statutory provision because he was not found ineligible for release consideration, and was given a release consideration date after 35 years. However, the court addressed the merits of the constitutional challenge anyway.

The Court of Appeals pointed to the Wisconsin Supreme Court's decision in *Ninham* upholding a sentence of life-without the possibility for release for a juvenile. The court then noted that the U.S. Supreme Court's subsequent decision in *Miller* did not alter or undercut the Wisconsin Supreme Court's original analysis. This is because *Miller* did not categorically prohibit life sentences for juveniles, but instead, required sentencing courts to consider how children are different than adults when imposing sentence.[74] The Court of Appeals affirmed that "it is not unconstitutional to sentence a juvenile to life imprisonment without the possibility of supervised release for intentional homicide if the circumstances warrant it."[75] On this basis, the court concluded that the statutory option for courts to impose life imprisonment without the possibility of release on a juvenile is constitutional.

Second, the court upheld Wisconsin law mandating a 20-year mandatory minimum period of imprisonment for a juvenile who commits first-degree intentional homicide.[76] The court noted that Barbeau lacked standing to make the constitutional challenge, since his release eligibility date was set at 35 years, so he was not adversely affected by the mandatory minimum. Regardless, the court proceeded to address the constitutional challenge.

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[73] Barbeau specifically challenged a provision of s. 973.014 (1g) (a) 3., Stats., which applies to a sentence of life imprisonment imposed for a crime committed on or after December 31, 1999. When imposing such a life sentence, a court must choose one of three options related to an extended supervision eligibility date for the offender. Barbeau challenged the option provided to a court by s. 973.014 (1g) (a) 3., Stats., which allows a court to determine that: "The person is not eligible for release to extended supervision."

[74] *Barbeau*, 2016 WI App at ¶32.]

[75] *Id.*

[76] Barbeau specifically challenged s. 973.014 (1g) (a) 1., Stats., which is one of the three options available to a court for setting an extended supervision eligibility date for an offender who receives a sentence of life imprisonment. The statutory provision allows a court to make a person "eligible for release to extended supervision after serving 20 years." The provision functions as a mandatory minimum period of imprisonment because a court cannot set a release eligibility date sooner than 20 years. [See s. 973.014 (1g) (a) 2., Stats.]

The Court of Appeals concluded that a 20-year mandatory minimum before release consideration for a juvenile who commits homicide does not violate any national consensus against such a sentence. Instead, the court noted that the state of the law as to mandatory minimums in general is to the contrary.[77] Further, the court pointed to *Ninham* and the Wisconsin Supreme Court's conclusion that life imprisonment without the possibility of release for a juvenile who commits first-degree intentional homicide is not categorically unconstitutional. The Court of Appeals held that the Legislature is not required to select the least severe possible penalty in creating the statutory sentencing scheme, and that the court could "see nothing disproportionate on a constitutional level" in the 20-year mandatory minimum period of imprisonment.[78]

Finally, the court upheld Wisconsin law establishing the criteria for considering a release petition from a juvenile.[79] The Court of Appeals stated that the single, statutory criterion for release determination – whether a juvenile is a danger to the public – subsumes other inquiries such as whether the inmate has matured and been rehabilitated.[80] The court noted that Barbeau could seek to prove he is no longer a danger to the public by showing his criminal conduct was influenced by his youth and by showing he has been rehabilitated at some point in the future. The court determined that Barbeau "failed to show beyond a reasonable doubt that the criteria for release deprive him of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[81] Thus, the court concluded that Wisconsin law does not unconstitutionally deprive juveniles of a meaningful opportunity to obtain released based on demonstrating maturity and rehabilitation.

PENDING LITIGATION

Cases are currently pending in federal court that may impact the constitutionality of juvenile life sentences in Wisconsin. The U.S. Supreme Court is considering a case regarding juvenile life sentences and whether a court must make a prerequisite finding of incorrigibility of a juvenile before this sentence may be imposed. The case may also resolve the question of whether discretionary life sentences of life imprisonment for juveniles – like those available under Wisconsin law – are prohibited for most juveniles under the Court's *Miller* and *Montgomery* decisions.

Additionally, the U.S. District Court for the Western District of Wisconsin is addressing a class action lawsuit filed by offenders serving life sentences in Wisconsin for offenses committed as juveniles. The outcome in either case may affect release eligibility for some or all of the 115 such offenders currently in Wisconsin prisons.

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[77] *Barbeau*, 2016 WI App at ¶ 39.
[78] *Id.* at ¶43.
[79] Barbeau specifically challenged s. 302.114 (5) (cm), Stats., addressing what a court must evaluate when considering a petition for release to extended supervision for a felony offender serving a life sentence. The statutory provision prohibits a court from granting a petition for release unless the inmate proves by clear and convincing evidence that he or she "is not a danger to the public."
[80] *Barbeau*, 2016 WI App at ¶47.
[81] *Id.* at ¶48.

Jones v. Mississippi (U.S. Supreme Court)

The U.S. Supreme Court granted certiorari in *Jones v. Mississippi*, No. 1259 (U.S.), on March 9, 2020, and held oral arguments on November 3, 2020. The issue before the Court is whether the Eighth Amendment requires a judge to find that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

Lower courts have interpreted the U.S. Supreme Court's decision in *Montgomery* differently on this question. Some state supreme courts and federal appellate courts conclude that a finding of permanent incorrigibility is prerequisite to imposing life without parole on a juvenile, while others conclude that it is not.[82]

The Court granted certiorari in *Jones v. Mississippi* after dismissing another case regarding juvenile life sentences as moot. The U.S. Supreme Court previously granted cert in *Malvo v. Mathena*, No. 18-217 (U.S. Aug. 16, 2018), and heard oral arguments in the case on October 16, 2019.[83] The U.S. Supreme Court never issued a decision in *Malvo* and dismissed the case based on a stipulation from the parties, however, because Virginia changed its law to make juveniles eligible for parole consideration after 20 years, rendering the case moot.[84]

A U.S. Supreme Court decision in *Jones v. Mississippi* may impact offenders in Wisconsin serving sentences of life without the possibility for release for crimes committed as juveniles. If the Court decides a finding of incorrigibility is required before a juvenile may receive discretionary life without parole, then Wisconsin courts may have to resentence or give release consideration to the six juveniles currently serving such sentences in Wisconsin.

Heredia v. Tate (U.S. District Court in Wisconsin)

The U.S. District Court for the Western District of Wisconsin is currently addressing *Heredia v. Tate* (19-CV-338), a class action lawsuit brought by offenders convicted of crimes committed before the age of 18 and serving either life sentences or sentences of more than 470 months (approximately 39 years) who have the possibility for release at some point.[85] The suit raises constitutional challenges to practices by the Wisconsin Parole Commission and standards used in making release decisions.

First, the lawsuit alleges that the current statutory sentencing scheme violates the Eighth Amendment because it permits life sentences for juveniles who have not been found to be irreparably corrupt and fails to provide a realistic and meaningful opportunity for release upon demonstrated maturity and rehabilitation. Second, the lawsuit alleges that the parole consideration process violates the Due Process Clause of the Fourteenth Amendment because it

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[82] The differing interpretations are outlined in the brief in support of the petition for certiorari, found here.

[83] The *Malvo* case originated in Virginia and involved a 17-year-old involved in the 2002 killings known as the "D.C. sniper attacks."

[84] HB 35 was passed by the Virginia Legislature and approved by the governor in February 2020.

[85] The U.S. District Court stayed the case in November 2019, pending a U.S. Supreme Court decision in *Malvo v. Mathena*. After the Supreme Court dismissed *Malvo* and subsequently granted cert in *Jones v. Mississippi*, the defendants requested continuation of the stay. The U.S. District Court denied the motion and lifted the stay in May 2020, reasoning that the question at issue in *Jones* is sufficiently distinct such that a U.S. Supreme Court decision may not resolve the core questions in the Wisconsin case. The case is currently scheduled for trial in August 2021.

denies juveniles a sufficient opportunity to secure their liberty interest in parole release. Third, the lawsuit alleges that denial of parole based on facts not found by a jury (lack of a finding of permanent incorrigibility), violates the Sixth Amendment right to a jury trial and the Due Process Clause.

The plaintiffs seek a declaration that the current Wisconsin parole scheme denies them a meaningful and realistic opportunity for release upon a showing of rehabilitation and maturation, in violation of the U.S. Constitution. They also seek an injunction ordering the Wisconsin DOC and the Wisconsin Parole Commission to provide juveniles a meaningful opportunity to demonstrate maturity and rehabilitation. The plaintiffs request that the injunction order DOC and the Parole Commission to, for example, provide funds for inmates to present testimony from experts such as psychologists or social workers and allow the submission of evidence and arguments in support of a parole request.

A decision in *Heredia v. Tate* may impact offenders in Wisconsin serving life sentences or extremely long sentences for crimes committed as juveniles, particularly those sentenced under the old parole system who are or will be eligible for parole consideration.

PART V
LEGISLATION IN OTHER STATES

In recent years, a number of states have enacted legislation pertaining to the criminal sentencing of juvenile offenders. Many of these changes were made to address state laws that conflict with the U.S. Supreme Court's holding in *Miller* that applying a mandatory sentence of life imprisonment without the possibility of parole to a juvenile is unconstitutional. States have also enacted legislation that, while not directly compelled by the Court's decisions in *Roper*, *Graham*, *Miller*, and *Montgomery*, is broadly consistent with language in these decisions articulating reasons for treating juveniles differently than adults in the criminal justice system.

LEGISLATION TO RESPOND TO MILLER

At the time the U.S. Supreme Court decided *Miller*, 28 states, plus the federal government, had laws providing mandatory life sentences without an opportunity for parole for some juveniles convicted of murder in federal court.[86] Although legislation enacted in response to *Miller* differs from state to state, common features include eliminating mandatory life without parole sentences, eliminating life without parole sentences for juveniles, and establishing provisions related to parole eligibility or providing a process to review the sentences of individuals convicted for offenses committed as juveniles.

For example, a number of states enacted legislation that abolishes life without parole for juveniles and provides a date by which a juvenile must be eligible for parole. The parole eligibility dates, however, differ from state to state. For example, Oregon and West Virginia provide for parole eligibility after 15 years. Nevada provides for parole eligibility after 15 years for nonhomicide offenses, and 20 years for homicide offenses. North Dakota and Virginia provide for parole eligibility after 20 years. Arkansas and Massachusetts provide for parole eligibility after 20 to 30 years, depending on the offense. California, Utah, and Wyoming provide for parole eligibility after 25 years.[87]

Other jurisdictions have enacted legislation allowing a person convicted as a juvenile to petition for sentence modification after a certain period of time. For example, Delaware law allows a person convicted of an offense as a juvenile to petition the court for sentence modification after 20 or 30 years, depending on the offense, and every five years after if the petition is denied. Likewise, the District of Columbia allows all offenders who were convicted as juveniles to petition for sentence modification after 15 years.

[86] *Miller* at 426.

[87] The information in this paragraph is based on information provided to Legislative Council staff by The Campaign for the Fair Sentencing of Youth.

According to the National Conference of State Legislatures, 23 states, plus the District of Columbia, have fully abolished sentences of life without the possibility of parole for juveniles.[88] The states that have abolished life without parole for juveniles are:

- Alaska.
- Arkansas.
- California.
- Colorado.
- Connecticut.
- Delaware.
- Hawaii.
- Iowa.
- Kansas.
- Kentucky.
- Massachusetts.
- Nevada.
- New Jersey.
- North Dakota.
- Oregon.
- South Dakota.
- Texas.
- Utah.
- Vermont.
- Virginia.
- Washington.
- West Virginia.
- Wyoming.

Additionally, six states that have not abolished life without parole for juveniles currently have no juveniles serving sentences of life without parole. These states are Maine, Minnesota, Missouri, New Mexico, New York, and Rhode Island.[89]

[88] https://www.ncsl.org/research/civil-and-criminal-justice/miller-v-alabama-and-juvenile-life without parole-laws.aspx

[89] The information in this paragraph is based on information provided to Legislative Council Staff by The Campaign for the Fair Sentencing of Youth.

OTHER LEGISLATION

Other legislative enactments in recent years, while not necessarily enacted to address laws directly in conflict with Supreme Court's recent decisions regarding juvenile offenders, are nonetheless broadly consistent with the Court's conclusion, in those decisions, that juvenile offenders are constitutionally different than adult offenders.

One example of state laws requiring juvenile offenders to be treated differently than adults are those that raise the maximum age of a juvenile court's jurisdiction. At present, 45 states have laws providing juvenile courts with jurisdiction over youth 17-years-old and younger. The State of Vermont provides jurisdiction up to age 18. After a Michigan law raising the age of juvenile court jurisdiction to 17 takes effect on October 21, 2021, there will be three states—Georgia, Texas, and Wisconsin—in which the maximum age of a juvenile court's jurisdiction is 16.

Examples of other types of legislative enactments that make changes to the treatment of juvenile offenders in the criminal justice system are:

- Limiting the transfer of juveniles to adult court.
- Extending the period of time youth convicted in the adult criminal justice system may remain in juvenile facilities.
- Adopting blended sanctions for certain youthful offenders that combine elements of the juvenile justice and adult criminal justice system.[90]

[90] Pilnek, L. & Mistrett, M. (2019) "If Not the Adult System, Then Where: Alternatives to Adult Incarceration for Youth Certified as Adults," Campaign for Youth Justice, (Washington D.C.), page 10.

PART VI
SUMMARY OF STAKEHOLDER INPUT

Various state agencies, organizations, and individuals were invited to submit recommendations regarding the sentencing of juvenile offenders in adult criminal court for inclusion in this report. Those who chose to do so provided recommendations relating to life sentences imposed on juveniles, prosecution and sentencing of juveniles in adult court, revisions to the juvenile justice system, and changes to the criminal justice system in general. This part summarizes the recommendations received from stakeholders.[91] Specific written submissions provided by each stakeholder appear in the Appendix.

JUVENILE LIFE SENTENCES

Stakeholders provided recommendations regarding the circumstances under which a court may impose a life sentence on a juvenile. Three recommendations impact life sentences imposed on juveniles in the future, and two impact life sentences already imposed and currently being served.

Eliminate Discretionary Life Without Release Sentences for Juveniles

Nearly all stakeholders recommended prohibiting courts from imposing life sentences without the possibility of release on juveniles. Under current law, a court imposing a life sentence generally has three options relating to release. The court may specify: (a) the offender is eligible for release after 20 years; (b) the offender is eligible for release on a specific date after more than 20 years; or (c) the offender is ineligible for release. Because a court may choose to make an offender ineligible for release, but is not required to do so in most circumstances, these sentences are referred to as "discretionary" life without release sentences.

Eliminate Mandatory Life Without Release for Juvenile "Persistent Repeaters"

Nearly all stakeholders recommended eliminating both discretionary and mandatory sentences of life without the possibility of release for juveniles. As noted above, courts imposing a life sentence generally have discretion to make an offender eligible for release at some point. However, this is not true for a "persistent repeater." A persistent repeater is an offender with two or more previous serious felony convictions or who is being sentenced for a serious child sex offense and has a previous conviction for a similar offense.

State law imposes a mandatory minimum sentence of life without the possibility for parole or extended supervision on a persistent repeater. Under the U.S. Supreme Court's decision in *Miller*, a mandatory life without release sentence is unconstitutional when imposed on a juvenile. Current

[91] Several stakeholders referenced 2019 Assembly Bill 775 and 2019 Senate Bill 815, identical companion bills, as legislation that incorporated statutory changes they recommended. An additional stakeholder referenced 2019 Assembly Bill 1036 as legislation that incorporated a number of recommendations submitted for this report.

state statute applies the mandatory minimum to all persistent repeaters, even though the provision would be unconstitutional under the case law if applied to a juvenile.

Require Dates for Release Consideration and Actual Release of Juveniles

Several stakeholders recommended that a court imposing a life sentence on a juvenile be required to set a date certain at which a juvenile may petition for release. One stakeholder also suggested that state law could specify a date certain at which a juvenile must be granted release, rather than a date at which the juvenile may be considered for release. Legislation could require courts to set a date for release consideration for a juvenile, or a maximum term after which release must be granted, when imposing a life sentence on a juvenile.

Create a "Second Chance" Procedure for Offenders Currently Serving Life Sentences or Extremely Long Sentences for Crimes Committed While a Juvenile

Nearly all stakeholders recommended creating a sentence adjustment procedure to allow offenders currently serving life sentences or extremely long sentences for crimes committed while a juvenile to petition for release after serving at least 15 years. An offender serving a life sentence under the "Truth-in-Sentencing" system is eligible for release either after serving 20 years or on a specific date set by the court, unless the court specified the offender is ineligible for release. Similarly, an offender serving a life sentence under the parole system, who is eligible for parole, must typically serve 20 years in confinement before being eligible for parole or must reach a later parole eligibility date set by the court.

Legislation could create a sentence adjustment procedure allowing an offender who committed an offense while a juvenile and is serving either a life sentence or another type of extremely long sentence, as specified by the legislation, to petition the court to reduce his or her term of imprisonment after 15 years, and then again every five years if the petition is denied. A court reviewing the petition could be required to consider particular factors, including the offender's growth, behavior, and rehabilitation while incarcerated. Legislation could also specify what criteria a court must consider in evaluating the petition, and the authority of a court to convert confinement time to supervision time or to reduce the total length of the sentence.

Specify Criteria Courts Must Consider Before Imposing a Life Sentence on a Juvenile

Two stakeholders recommended that courts be required to consider a list of factors when evaluating whether to impose a life sentence on a juvenile. Current law requires a court to consider certain factors when sentencing an offender, but does not impose any statutory sentencing considerations specific to juveniles or specific to imposing life sentences.

As an example, one stakeholder suggested mandating that courts consider factors such as the following when deciding whether to impose a life sentence on an offender convicted as a juvenile: (a) the offender's age and youthful features including immaturity, impetuosity, and failure to appreciate risks and consequences of conduct; (b) the offender's family and home environment; (c) the circumstances of the offense, including familial and peer pressures; (d) the lack of sophistication of juveniles in dealing with a criminal justice system designed for adults; (e) the offender's intellectual capacity; (f) the offender's history of trauma and involvement in the child

welfare system; (g) the offender's educational and court documents; (h) the offender's capacity for rehabilitation; and (i) any other mitigating factors and circumstances.

PROSECUTING AND SENTENCING JUVENILES IN ADULT COURT

Stakeholders provided the following recommendations suggesting changes to current law regarding the circumstances under which a juvenile may be prosecuted and sentenced in adult criminal court, rather than in juvenile court.

Eliminate Original Adult Court Jurisdiction Over Juveniles

Six stakeholders recommended eliminating original adult court jurisdiction over juveniles, meaning that no juvenile would begin in adult court based on his or her offense or prior record. However, a juvenile court would retain the option to waive a particular juvenile to adult court under existing procedures.

Current law provides that an adult criminal court has original jurisdiction over a juvenile who meets certain criteria regarding the type of offense or prior record. Adult court original jurisdiction applies to juveniles aged 10 and older who commit certain homicide offenses, juveniles with a prior adult court case, and juveniles with a prior adjudication who are accused of committing particular types of battery. Other juveniles begin in juvenile court and may be waived into adult court if they meet certain criteria and the juvenile court makes required findings.

Raise the Age for Juvenile Court Jurisdiction

Six stakeholders recommended that 17-year-olds be subject to juvenile court jurisdiction, rather than adult criminal court jurisdiction. Current law treats all 17-years-olds as adults for purposes of criminal prosecution and sentencing. Wisconsin is one of three states that sets the age of adult criminal court jurisdiction at 17. The specific suggestions provided by stakeholders varied somewhat. Five stakeholders recommended that all 17-year-olds be subject to juvenile court jurisdiction, while one recommended that only 17-year-olds committing first-time, nonviolent offenses be subject to juvenile court jurisdiction and that other 17-year-olds continue to be treated as adults. Legislation could include 17-year-olds in the definition of "juveniles" for purposes of criminal prosecution so that default jurisdiction lies with the juvenile court rather than the adult criminal court.

In addition to recommending that juvenile courts be given jurisdiction over 17-year-old offenders, one stakeholder also suggested appropriating state funds to reimburse counties for additional expenses arising from serving 17-year-olds in the juvenile court system rather than the adult criminal court system. The State generally bears the costs associated with adult criminal offenders, while counties generally bear costs associated with youth served in the juvenile system (though some of these costs are offset by state aids).

Limit Which Juveniles can be Waived Into Adult Court

Three stakeholders recommended restricting waiver of juveniles into adult court so only juveniles who meet limited age or offense criteria would be eligible. Current law permits waiver into adult

court for any juvenile aged 15 or older, regardless of the offense. Current law also permits waiver into adult court for a 14-year-old who commits particular serious or gang-related crimes.

The recommendations varied somewhat, but all suggested eliminating waiver for any offense at age 15. One stakeholder recommended prohibiting waiver until age 16, and even then, only for serious crimes. Another recommended limiting waiver to serious felony offenses, and a third recommended allowing waiver at age 16 for most crimes but allowing it at age 14 for Class A or B felonies. Legislation could prohibit waiver of juveniles to adult court unless a juvenile meets age or offense criteria that are more restrictive than under current law.

Create Juvenile-Specific Sentencing Criteria Adult Criminal Courts Must Consider

One stakeholder recommended requiring adult criminal courts to consider specialized criteria when sentencing a juvenile. As noted above, current law requires a court to consider certain factors when sentencing an offender, but does not impose statutory sentencing considerations that are specific to juveniles.

As an example, the statutes could mandate that a court consider factors such as the following when sentencing a juvenile offender: (a) that because children are less criminally culpable and more amendable to reform, youthful offenders are constitutionally different from adults for purposes of sentencing; (b) that the sentencing goals of deterrence, retribution, and incapacitation are secondary to the goal of rehabilitation when sentencing youthful offenders; and (c) that unless the state proves beyond a reasonable doubt that the youthful offender is permanently incorrigible and is therefore unable to be rehabilitated, youthful offenders must have a meaningful opportunity to obtain release from prison based on maturity and rehabilitation.

Create Release Considerations Specific to Juvenile Offenders

Three stakeholders recommended requiring courts and the Parole Commission to consider specialized criteria when deciding whether to grant release to extended supervision or release on parole to an offender who committed his or her offense as a juvenile. One of the stakeholders additionally recommended that attorneys from the State Public Defender's office be appointed to represent offenders convicted as juveniles at parole hearings.

Current law requires the Parole Commission to consider particular criteria before a commissioner may recommend parole release. Current law does not, however, impose any release considerations specific to offenders who were juveniles at the time of the offense on either courts or the Parole Commission. Legislation could identify specific factors a court or the Parole Commission must consider and address when considering release for an offender convicted as a juvenile.

REVISIONS TO THE JUVENILE JUSTICE SYSTEM

The focus of this research report was criminal sentencing of juveniles in adult court; however, stakeholders also suggested changes to the juvenile justice system and the circumstances under which juveniles are adjudicated.

Eliminate the Serious Juvenile Offender Disposition

Three stakeholders recommended eliminating the existing Serious Juvenile Offender (SJO) disposition. Under current law, a juvenile court may impose various dispositions on a juvenile who is adjudicated delinquent. The most severe disposition is placement in the SJO program.

A juvenile court may place a juvenile in the SJO program if he or she meets certain criteria and the court makes specific findings. To qualify, a juvenile must be either: (a) at least 14-years-old and adjudicated delinquent of a qualifying Class A, B, or C felony; or (b) at least 10-years-old and adjudicated delinquent of certain homicide offenses.[92] The SJO program is administered by DOC and involves intensive and highly structured component phases, including placement in a secure juvenile facility followed by more restrictive supervision, care, and rehabilitation than the ordinary community supervision experienced by other juveniles.[93]

Increase Minimum Age for Delinquency Jurisdiction

Two stakeholders recommended increasing the age at which a minor may be adjudicated delinquent. Under current law, juvenile courts have exclusive jurisdiction over children aged 10 and older who violate criminal laws and may adjudicate these children delinquent. State law treats children aged 9 and younger as juveniles in need of protection or services and these juveniles are not subject to delinquency proceedings. One stakeholder recommended establishing 13 as the minimum age for juvenile delinquency, while another recommended raising the age to between 12 and 14. Legislation could increase the age for juvenile court jurisdiction over juveniles alleged to be delinquent from 10 years to 12, 13, or 14 years.

Eliminate "Status Offenses" Under the Juvenile Justice Code

Two stakeholders recommended eliminating sanctions for "status offenses," meaning offenses that are violations of law because of a youth's status as a juvenile. Examples of status offenses include truancy and curfew violations. Legislation could prohibit a juvenile court from imposing sanctions on a juvenile for a violation of law that would not be a violation if committed by an adult.

Dismiss Delinquency Cases Suspended Due to Incompetency of the Juvenile

Two stakeholders recommended requiring dismissal with prejudice of delinquency cases suspended because of incompetency of the juvenile. Under current law, a court that believes a juvenile is not competent to understand the delinquency proceedings he or she faces may order an examination of that juvenile. If an examination determines the juvenile is not competent to proceed, then the court must suspend proceedings on the delinquency petition and order the county or district attorney to either initiate a civil commitment or a juvenile in need of protection and services (JIPS) petition. Delinquency proceedings are revived if a juvenile becomes

[92] The homicide offenses qualifying a juvenile for the SJO program are the same offenses which give an adult criminal court original jurisdiction over a juvenile. [ss. 938.183 (1) (am) and 938.34 (4h) (a), Stats.] Therefore, the SJO disposition is only available for a juvenile who attempts or commits first-degree intentional homicide, commits first-degree reckless homicide, or commits second-degree intentional homicide if that juvenile is reversed waived back into juvenile court. As noted, these reverse waivers are rare.

[93] s. 938.538 (2) and (3), Stats.

competent, which may occur even after an accompanying JIPS order expires months or years later.[94] Legislation could require delinquency proceedings to be dismissed with prejudice when a juvenile does not become competent during the timeframe of the JIPS order or is found unlikely to become competent.

Eliminate Disposition of Juvenile Detention

One stakeholder recommended eliminating placement in a juvenile detention facility as a disposition juvenile courts may impose on a juvenile. Under current law, a juvenile court may impose various dispositions on a juvenile who is adjudicated delinquent. One of the available dispositions is placement in a juvenile detention facility, which is a locked facility operated by a county and approved by DOC for the secure, temporary holding of juveniles. Under current law, a juvenile may be placed in a juvenile detention facility for up to 365 days.

OTHER JUSTICE SYSTEM CHANGES

Though the focus of this research report is criminal sentencing of juveniles in adult court, stakeholders also suggested changes to the larger criminal justice system. Some of the recommendations impact juveniles, while others impact adult offenders in their late teens or early twenties.

Special Sentencing Scheme and Programming Applicable to Youthful Offenders

Three stakeholders recommended creating a sentencing scheme and programming specific to offenders between 18 and 25 years of age ("youthful offenders"). Under current law, these offenders are subject to the same general sentencing provisions as any other adult offender. One stakeholder recommended creating a sentencing scheme that includes distinctive sentencing criteria for youthful offenders that considers their immaturity and amenability to reform, emphasizes educational and treatment programs, and eliminates long-term collateral consequences of conviction. Two other stakeholders recommended a community-based continuum approach for young offenders that addresses health, education, job training, and prevention and harm reduction. Legislation could create specific sentencing criteria for courts to consider that treat youthful offenders differently than other adult offenders and establish programs and alternatives in the community other than incarceration.

Create Presumption Against Shackling Juveniles Appearing in Court

Two stakeholders recommended limiting the use of shackles such as arm, leg, chest, and belly restraints on juveniles, and requiring courts to make a determination that a juvenile presents a risk of harm or flight before allowing their use. Legislation could create a presumption against shackling juveniles unless a court makes findings that a particular juvenile should be shackled based on safety or security concerns.

[94] s. 938.30 (5) (a), (d), and (e), Stats.

Eliminate Mandatory Sex Offender Registry Reporting for Offenses Committed Before Age 18

Two stakeholders recommended allowing courts to stay sex offender registration for a person who committed an offense while under age 18. Current law imposes mandatory registration with the Wisconsin Sex Offender Registry on a person who is convicted of certain offenses as an adult, even if the offense was committed previously while the person was a juvenile. In contrast, current law allows courts discretion over whether a juvenile who is adjudicated delinquent must register as a sex offender.

Prohibit Charges of Prostitution for Juveniles

One stakeholder recommended prohibiting prosecutors from filing charges of prostitution against juveniles, and instead, referring juveniles to services for victims of human trafficking. Current law allows a victim of trafficking to raise an affirmative defense to any crime the victim commits as a direct result of his or her trafficking, including prostitution. Once invoked, the affirmative defense shifts the burden to the prosecutor to prove, beyond a reasonable doubt, that the person was not a trafficking victim.

Expand Eligibility for Expungement of Criminal Records

One stakeholder recommended expanding the availability of expungement to a larger number of offenders, including those not initially deemed eligible at the time of sentencing. Expungement seals the court records of an offender's criminal conviction, but does not nullify or vacate the conviction. Under current law, expungement is available only for offenders who committed a misdemeanor or lower level felony while under the age of 25 and who the court deemed eligible for expungement at the time of sentencing.

Eliminate Fees and Costs in the Juvenile and Adult Criminal Systems

One stakeholder recommended removing many of the fees and costs imposed on juveniles and adult offenders by the juvenile justice and criminal justice systems. Current law applies numerous fees, costs, and surcharges to offenders, including victim/witness fees, probation fees, attorneys' fees, and restitution.

APPENDIX 1

STAKEHOLDER GROUPS AND AGENCIES CONTACTED

We are grateful to all those who shared their time and expertise to provide background information and recommendations related to the criminal sentencing of juveniles. In connection with preparing this report, Legislative Council staff contacted the following stakeholders:

- Association of State Prosecutors.
- Badger State Sheriffs Association.
- Department of Children and Families.
- DOC.
- Department of Justice.
- Eileen Hirsch.
- Governor's Juvenile Justice Commission.
- Kids Forward.
- Office of the Director of State Courts.
- Office of the State Public Defender.
- State Bar of Wisconsin.
- The Campaign for the Fair Sentencing of Youth.
- Wisconsin Alliance for Youth Justice.
- Wisconsin Counties Association.
- Wisconsin Chiefs of Police.
- Wisconsin Sheriffs and Deputy Sheriffs Association.
- Youth Justice Milwaukee.

The recommendations of stakeholders who chose to submit suggestions for inclusion in this report are included in Appendix 2.

APPENDIX 2

MATERIALS SUBMITTED BY STAKEHOLDERS

CHILDREN & THE LAW SECTION

To: Legislative Council Staff Attorneys – Katie Bender-Olson, David Moore
From: Children and the Law Section Board, State Bar of Wisconsin
Date: October 30, 2020
Re: Legislative Research Report, Criminal Sentencing of Juvenile Offenders

The State Bar of Wisconsin's Children and the Law Section Board, while not taking an official position, makes the following recommendations in accordance with the Criminal Sentencing of Juvenile Offenders interim report scope statement. These recommendations include topics directly related to the criminal sentencing of juvenile offenders, as well as recommendations related to juvenile dispositions that the board felt were important to include for consideration.

Juvenile Life Without Parole

A series of U.S. Supreme Court decisions have addressed the sentencing of juveniles in adult court. In Roper v. Simmons, 543 U.S.551 (2005) the court found that imposing the death penalty for children under 18 years of age violated the 8th Amendment prohibition against cruel and unusual punishment. The court relied heavily on adolescent brain development noting that children most often lack maturity as compared to an adult, are more vulnerable to peer pressure compared to an adult, and that their character is not as well formed as that of an adult. Subsequent cases followed this trend. In Graham v. Florida, 560 U.S. 48 (2010), the court found that a life without parole sentence is cruel and unusual punishment for children that have committed non-homicide offenses. In Miller v. Alabama, 567 U.S. 460 (2012), the court held that a life without parole sentence is cruel and unusual punishment for children, even when convicted of a homicide. Finally, in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), the court announced the retroactive application of *Miller*.

There are over 100 people serving life or de facto life sentences in Wisconsin for both homicide and non-homicide crimes they committed as children. Many of these people are serving sentences of over 40 years until they are eligible for release.

Other states have responded to the Supreme Court decisions by passing legislation banning life sentences without the possibility of parole for children. Some state courts have decided against imposing life without parole sentences for children. For example,

> "In response to Supreme Court rulings restricting the sentencing of children to life without the possibility of parole, many states have revised or eliminated their life without parole statutes. In 2018, the Washington State Supreme Court ruled the sentencing of children to life without parole unconstitutional in that state. That same year, New Jersey established a Commission to examine the practice of sentencing children to life without parole, and to provide recommendations to the legislature. In 2019, Oregon, as part of its major reform law (SB 1008) eliminated juvenile life without parole, and in 2020 Virginia did likewise with the signing into law of HB 35. In Mississippi, HB 387 enhances parole

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eligibility for some prisoners, while in Oklahoma, SB 689 allows all prisoners sentenced to life without parole to seek a sentence modification after 10 years. This brings the number of states (and DC) that have ended juvenile life without parole (through statute or practice) to 30."[1]

Wisconsin should pass legislation that prohibits imposing a juvenile life or de facto life sentence without parole for children convicted in adult court. A maximum number of years before release should be identified. In addition, Wisconsin should provide an automatic retroactive review and release after a certain number of years for those serving life/de facto life sentences imposed when they were children.

Original Adult Jurisdiction

Original adult jurisdiction over children runs counter to the judicial idea, enshrined in multiple court cases as noted above[2], that children are fundamentally different from adults and must be treated differently by our legal systems. The decision to put a child in adult criminal court should require a deliberate decision by a judge that takes into consideration factors related to the personality, mental health, developmental capacity, prior record of the child, and the suitability of facilities, services and procedures available for the child. These factors are already encompassed in the waiver criteria pursuant to Wis. Stat. § 938.18(5).

The current reverse waiver criteria require the child to prove three negatives in order to be transferred to juvenile court:

1. The child must prove that if convicted he or she could **not** receive adequate treatment in the criminal justice system.
2. Transferring jurisdiction would **not** depreciate the seriousness of the offense.
3. Retaining jurisdiction is **not** necessary to deter the child or other children from committing the alleged violation.[3]

These criteria have little to do with the characteristics or risk of the child, and the evidence needed to prove these negatives is not clear cut. These criteria do not give courts full discretion to determine when a child should face adult consequences, and putting a child in an adult courtroom should only be done with great deliberation.

When children start off their case in adult criminal court, they lose their right to confidentiality in the proceedings. Even if they are transferred to juvenile court through a reverse waiver hearing, their name and information has in most cases already been disclosed, and in some cases, widely spread through news stories.

Additionally, under the current original adult jurisdiction statute, children as young as 10 years old can be charged as adults for intentional homicide or attempted intentional homicide, first degree reckless homicide or second degree intentional homicide. Older children and young teens

[1] http://www.campaignforyouthjustice.org/images/reportthumbnails/cFYJ%20Annual%20Report.pdf
[2] See *Roper v. Simmons*, 543 U.S.551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012)
[3] Wis. Stat. § 970.032(2).

are often incompetent to stand trial, which raises serious concerns regarding the fairness of the reverse waiver procedures.[4] A reverse waiver hearing cannot be held until the child is found competent to proceed. Thus, those children who are found not competent are stuck in adult court until they can be trained to competency in facilities that are not set up for them.

Wisconsin should pass legislation that will eliminate original adult jurisdiction over children. The existing procedures for waiver of juvenile court jurisdiction should be utilized whenever the State believes criminal jurisdiction is appropriate.

Mandatory Sex Offender Reporting

There are several offenses that require mandatory sex offender reporting. Under juvenile court jurisdiction a circuit court has discretion to stay that part of a dispositional order requiring a delinquent child to register as a sex offender. [5] Often a stay of the reporting requirement is entered at the beginning of a dispositional order, the youth is afforded sex offender treatment, and the reporting requirement is revisited near the completion of the dispositional order. This affords youth the ability for rehabilitation and to avoid the stigma associated with being on the sex offender registry when, upon completion of treatment, they are evaluated as to their risk to reoffend.

Studies show that juvenile sex offenders under the age of 18 are at low risk for reoffending, with a recidivism rate lower than 3%.[6]

Often sex offenses may be reported and charged months and years after the offense, sometimes leaving adults facing charges of sexual assault that occurred when they were a juvenile. Current Wisconsin statutes of limitations reflect this circumstance.[7] Delays in charging can result in disparate treatment of defendants when reports of sexual assault are significantly delayed as current law does not provide courts any discretion in staying the sex offender registry when the individual is charged after he or she has turned 17, even if the alleged assault occurred when he or she was a juvenile.

Allowing for the discretionary stay of mandatory sex offender reporting for offenses that occurred before age 18 aids the offender and society by potentially eliminating the collateral consequences of registering as a sex offender. This includes effects on educational opportunities, the risk of job loss, and the elimination of housing barriers which will deter an individual from becoming a productive member of the community. This also strengthens the protective capacity of the sex offender registry by requiring only higher risk offenders to register.

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[4] Grisso, T. et al. (2003) Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities Trial Defendants: Youths aged 15 and younger performed more poorly than young adults, with a greater proportion manifesting a level of impairment consistent with that of persons found incompetent to stand trial.

[5] Wis. Stats. § 938.34(15M), 938.34(16) and State v. Cesar G., 2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 102-106.

[6] Caldwell, M.F. (2016, July 18). Quantifying the Decline in Juvenile Sexual Recidivism Rates. *Psychology, Public Policy, and Law*.

[7] Wis. Stats. § 939.74 Time limitations on prosecutions.

Finality for Incompetent Children

Children have a constitutional right to understand the court proceedings and assist in their defense.[8] If at any point during a court proceeding there is a reason to doubt a child's competence, competency must be raised. The court then may order a competency evaluation, and the evaluator will offer an opinion regarding the child's competence. If the court determines that the child is competent, the legal proceedings continue. For those who the court finds incompetent, there can also be a period of treatment to attempt to train the child to competence. Because youth's capacities for decision-making are still developing, competency can be a uniquely difficult issue to address for children in the court system.[9] Incompetence in children can stem from mental illness, intellectual disability, and/or developmental immaturity.[10]

Children who are found incompetent in Wisconsin are subject to a juvenile in need of protection and services (JIPS) order or civil commitment order (chapter 51).[11] Under a JIPS order, children can receive most of the same consequences that children face under a delinquency order, including out-of-home placements in treatment centers, group homes and foster homes, requirements to participate in therapy and community service, and intensive supervision. Under current law, delinquency cases that are suspended due to a finding of incompetence can be brought back against the child even when a JIPS order has expired.[12] This allows for delinquency charges to be revived potentially years after a child was found to be incompetent, and after, the child has already participated in rehabilitation through JIPS supervision. The possibility that an incompetent child can face these charges as an adult years later is a huge burden, and is inconsistent with the goals and ideals of the juvenile justice system.

Wisconsin should pass legislation to address the concerns of incompetent children who have suspended delinquency cases by providing finality to those cases through dismissal with prejudice when a child is found not likely to become competent or after they have not become competent within the statutory time frame allowed.[13]

Important Issues regarding Juvenile Dispositions

Juvenile Detention as a Dispositional Placement

The guidelines under which juvenile detention centers operate were last reviewed or modified in 2010 and were designed to address safety and basic programming standards for the traditional short-term placements for which juvenile detention facilities and programs were intended. Prior to 2011, state statutes permitted placing a youth in secure detention for up to 30 days as a disposition. In the 2011-13 budget, that time limit was extended to 180 days and was

[8] Dusky v. United States, 362 U.S. 402 (1960); *In Re Gault*, 387 U.S. 1 (1967).
[9] K. Larson, T. Grisso, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers* (2011).
[10] *Id.*
[11] Wis. Stat. § 938.30(5).
[12] *In the Interest of A.L.*, 2019 WI 20.
[13] As noted by the Wisconsin Supreme Court in A.L., this is distinct from children who are deemed to be not responsible under a NGI plea. *Id.*, footnote 7.

subsequently extended to 365 days in the 2013-15 budget. Minimal language about facilities providing mental health and education services for these longer placements was included, but that language does not provide meaningful direction or guidance for facilities or for DOC or DCF to fulfill its oversight responsibilities. In many counties, detention centers are being used as treatment centers while not being required to adhere to the licensing requirements of a treatment center. The standards provided for detention centers are woefully inadequate to ensure that the kinds of services needed for youth placed in long-term confinement are provided. "The increased and unnecessary use of secure detention exposes troubled young people to an environment that more closely resembles adult prisons and jails than the kinds of community and family-based interventions proven to be most effective."[14] Wisconsin should pass legislation to eliminate detention as a placement at disposition.

Hidden Fines and Fees

Fines and fees in the juvenile justice and criminal justice systems have a disparate impact on poor families. Many families find it difficult to pay these bills, leading to a cycle of debt and financial struggle. These fines and fees, or legal financial obligations include things such as victim/witness fees, probation fees, fees for experts and evaluations, attorney's fees, and restitution. Legal financial obligations have significant negative impact on youth and families, in material and emotional ways.[15] They exacerbate poverty and racial inequality.[16] Wisconsin should pass legislation to remove hidden fines and fees for children and parents at disposition and sentencing.

Victims of Sex Trafficking

Wisconsin should pass legislation to prohibit charging anyone under the age of 18 with prostitution. Victims of sex trafficking need help and services, not punishment. A protective system response for juvenile sex trafficking victims consists of a statutory mechanism to direct minor victims away from a punitive response and into services. A protective system response requires long term legislative and implementation efforts, and an important first step is eliminating criminal liability for prostitution offenses for minors.

For more information, please do not hesitate to contact our Government Relations Coordinator, Lynne Davis, ldavis@wisbar.org or 608.852.3603.

[14] Holman, Barry and Ziedenberg, J., The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities, *A Justice Policy Institute Report*, p. 2
[15] Paik, Leslie and Packard, C., Impact of Juvenile Justice Fines and Fees on Family Life: Case Study in Dane County, WI, p. 4.
[16] *Id.*

Wisconsin Department of Children and Families

Governor Tony Evers
Secretary Emilie Amundson
dcf.wisconsin.gov

November 10, 2020

Senior Staff Attorney Katie Bender-Olson
Senior Staff Attorney David Moore
Wisconsin Legislative Council
1 East Main Street, Suite 401
Madison, WI 53703

Dear Ms. Bender-Olson and Mr. Moore,

The Department of Children and Families is the state agency with responsibility for oversight of the community-based youth justice system. As such, we are pleased that the Joint Legislative Council has asked the Legislative Council staff to prepare a legislative interim research report on criminal sentencing of juvenile offenders, and we welcome the opportunity to provide input.

When DCF assumed responsibility for the community-based youth justice system, we engaged in an extensive stakeholder-driven information gathering and strategic planning process. The resulting Youth Justice Vision is that the Wisconsin youth justice system focuses on prevention and diversion and provides accountability and services to youth and families in the system that prepares them to thrive. Even at the "deep end" of the system, decisions on when and how to sentence youth in adult criminal court should be informed by the growing body of research and evidence on effective practice in youth justice.

Regarding the Research Report's specific focus on sentences to life imprisonment, DCF recommends statutory changes that would eliminate life sentences for youth under the age of 18, both by adjusting sentences imposed in the past and prohibiting them going forward. This change would be consistent with direction from the United States Supreme Court. It also is consistent with the growing body of research on adolescent brain development, which shows that adolescents are fundamentally different from adults in their ability to self-regulate, their sensitivity to peer influences, and their ability to make future-oriented judgments and decisions. Imposing lifetime incarceration for an act committed prior to adulthood runs counter to this evidence and does not promote public safety.

DCF further recommends that all statutes that allow for prosecuting youth in adult criminal court be reassessed in light of adolescent brain development research and the research on the effects of criminal sentences for youth. Research has shown that trying youth in the adult criminal system does not deter crime and increases recidivism, thereby negatively impacting public safety. In addition, youth held in adult jails are more likely be victimized while in custody. Finally, research shows worse long-term outcomes for youth with an adult, versus a juvenile, criminal record, as they do not have access to the programs and services specifically designed for youth to acquire the skills, competencies, and experiences that are crucial to their success as adults. Statutory changes that would better align Wisconsin law with this body of research include eliminating automatic adult court jurisdiction of minors; limiting waivers to adult court to serious felony offenses; and raising the age of adult criminal court jurisdiction to 18.

Secretary's Office
DCF-F-22-E (R. 08/2020)

201 East Washington Avenue, G200
P.O. Box 8916
Madison, WI 53708-8916

Phone: 608-422-7000
Fax: 608-422-7161

Thank you for your consideration of these recommendations.

Sincerely,

Amanda Merkwae
Legislative Advisor

GOVERNOR'S JUVENILE JUSTICE COMMISSION

TONY EVERS, GOVERNOR
JENNIFER GINSBURG, CHAIR

November 10, 2020

Dear Wisconsin Legislative Council,

As you may be aware, the Governor's Juvenile Justice Commission (GJJC) was re-created by Executive Order #43 on September 3, 2019. The GJJC serves as the State Advisory Group (SAG) to the Governor and the Legislature on matters critical to juvenile justice, under the Federal Juvenile Justice and Delinquency Prevention Act (JJDPA). The GJJC is comprised of juvenile justice professionals, including law enforcement, corrections professionals, attorneys, judges, mental health practitioners, and non-profit organizations dedicated to improving outcomes for youth. The GJJC also includes justice involved youth members and individuals with experience in the juvenile justice system.

In this capacity, the GJJC is writing with recommendations to incorporate into the 2020 Legislative Interim Research Report on Criminal Sentencing of Juvenile Offenders. As significant stakeholders in the scope of this report, the GJJC proposes modifications to the procedures and standards for sentencing juvenile offenders in adult criminal court, including the procedures and standards for determining a juvenile's eligibility for release to supervision.

The recommendations emphasize a larger statewide need to alter the entire Juvenile Justice Code, Chapter 938, created 25 years ago at a time of nationwide paranoia about an emerging generation of "super-predators." [1] Although this criminological theory was later discredited, the Code is premised upon faulty assumptions that align Chapter 938 closely to Criminal Code, despite revisions in 2011. The Code fails to incorporate current best practice, social science, and hard science relating to childhood development and brain science. The GJJC would like to make it known that broader-scale re-tooling of juvenile justice legislation is necessary, in addition to the following recommendations in direct response to inquiries on the life sentencing of juveniles.

- The GJJC recommends changes to current law related to life sentences imposed on juveniles in the past.
  - The creation of a new sentence adjustment procedure is recommended for juveniles currently serving life sentences who committed crimes before turning 18, and who have served at least 15 years of their sentences.
- The GJJC recommends changes to current law related to life sentences imposed on juveniles going forward.
  - The GJJC supports prohibiting courts from imposing a life sentence, without eligibility for release, on juveniles who commit crimes before turning 18. The GJJC supports the shift towards requiring courts to set a date in which juvenile would be eligible for release to extended supervision.
- The GJJC recommends the elimination of original adult jurisdiction over juveniles.
  - The GJJC recommends the elimination of original adult court jurisdiction and believes the existing procedures for waiver of juvenile court jurisdiction should be utilized whenever the State believes criminal jurisdiction is appropriate.

[1] DeLisi, Matt, Brendan D. Dooley, and Kevin M. Beaver. 2007. "Super-Predators Revisited" *Criminology Research Focus.*

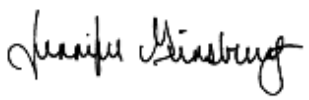
- The GJJC supports raising the age for criminal jurisdiction to 18.
    - As of 2021, Wisconsin is one of three states that will treat 17-year-olds as adults for criminal prosecution. Texas and Georgia represent the other two states.

The GJJC would like to thank the Legislature for the opportunity to provide input and recommendations on this study report addressing criminal sentencing of juvenile offenders. In efforts to align with national trends and U.S. Supreme Court decisions regarding juvenile justice practice, the GJJC appreciates the opportunity to partner with the Legislature to ensure that in Wisconsin, "kids are kids," being served in the juvenile justice system and treated differently than adults.[2]

The GJJC welcomes future opportunities to partner with the Governor, Legislature, and other state agencies to guide the large-scale and critical changes necessary for Wisconsin's Juvenile Justice Code to serve youth, families, and communities in a more equitable, racially-just, trauma and evidence-informed manner.

Thank you for your time and consideration to include these recommendations into the 2020 Legislative Interim Research Report on Criminal Sentencing of Juvenile Offenders.

Regards,



GJJC Chair, Jennifer Ginsburg

Attachment: Wisconsin GJJC Commissioner List

[2] U.S. Supreme Court decisions include:
Roper v. Simmons
J.D.B v. North Carolina
Miller v. Alabama

Wisconsin Governor's Juvenile Justice Commissioner List

November 10, 2020

1. Secretary Emilie Amundson, Department of Children and Families
   Designee: Shelby McCulley, Bureau of Youth Services Director
2. Judge Carl Ashley, Milwaukee Circuit Court
3. Monika Audette, Barron County Restorative Justice Program Operations Leader
4. Samuel Benedict, Former Regional Attorney Manager, State Public Defender's Office, Waukesha
5. Secretary Kevin Carr, Department of Corrections
   Designee: Ron Hermes, Division Administrator of Juvenile Corrections
6. Jennifer Ginsburg, Executive Director, Safe Harbor Child Advocacy Center
7. Ben Gonring, Assistant State Public Defender, Madison
8. Jessica Jimenez, Youth Member
9. Thomas Mann, Former JusticePoint Representative
10. Sharlen Moore, Youth Justice Milwaukee Director
11. Tweed Shuman, Sawyer County Board Chairman, Lac Courte Oreilles Tribal Council Member
12. David Steinberg, La Crosse County Juvenile Detention Superintendent
13. Melinda Tempelis, Outagamie County District Attorney
14. Charles Tubbs, Sr., Director, Dane County Emergency Management
15. Revelle Warren, Milwaukee Constituent Services Director, Office of the Governor
16. Sean Wilson, Smart Justice Statewide Organizer, ACLU of Wisconsin
17. Marcus Williams, Youth Member
18. Youth Leadership Team Member, Department of Children and Families
19. Youth Leadership Team Member, Department of Children and Families

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Kelli Thompson
State Public Defender

December 10, 2020

Attorneys Katie Bender-Olson & David Moore
Legislative Council
1 E. Main St.
Madison, WI 53703

Dear Attorneys Moore & Bender-Olson,

Thank you for the opportunity to provide feedback for the Legislative Council Interim Report on Criminal Sentencing of Juvenile Offenders.

The State Public Defender's office (SPD) provides representation for juveniles in delinquency and certain civil proceedings such as Children in need of Protection and Services (CHIPS) and Termination of Parental Rights (TPR) cases. SPD provides representation in more than 70% of juvenile proceedings statewide.

Issues related to the sentencing of juveniles are well known to SPD and have been the subject of policy efforts for, in some instances, years. As the criminal legal system learns more about topics like trauma informed care, adverse childhood experiences, adolescent brain development, and other predictors of future behavior, it has become more important to focus on how juveniles are treated as it has a direct bearing on the future safety and prosperity of the community.

The recommendations below include items both directly related to the sentencing of juveniles in adult court as well as other items related to procedures and standards that have a direct impact on sentencing juveniles.

SENTENCING RECOMMENDATIONS

These recommendations are directly related to the sentencing of juveniles:

1. Juvenile Life Without Parole

   Beginning with the 2005 United States Supreme Court decision in *Roper v. Simmons* and continuing with the decisions in *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*, federal case law says that a life sentence without the possibility of parole for a juvenile is cruel and unusual punishment. The *Montgomery* decision applied the previous decisions retroactively.

Wisconsin has approximately 120 individuals serving a life sentence in prison now. Of these individuals, 45 have a parole eligibility date of more than 40 years from their original sentencing in the 1990s. There is also a significant racial disparity in this population as more than 70% of this population are people of color despite Wisconsin's population being more than 85% white.

Based on the series of U.S. Supreme Court rulings, motions can be made in individual cases to consider modifying the sentences but this has several disadvantages. First, there is little statewide consistency in how the law is applied in each case. This can lead to additional litigation in the future. Second, the SPD is statutorily prohibited from providing representation in cases like these. Given the cost and limited resources of individuals who were incarcerated as juveniles and have been incarcerated for decades, hiring private counsel is difficult and legal aid resources are not widely available. Finally, litigating each case without structure can be more costly in the aggregate as each case will take longer as individual judges review and reinterpret the U.S. Supreme Court caselaw.

RECOMMENDATION: In 2019, SPD worked on a bill draft (Attached, LRB 0139/P1) to create a process for state court review of juvenile life without parole sentences. The major provisions of the bill draft include:

- Creating a statutory framework for adjustment of the original juvenile life without parole sentence
    - Can request a sentence adjustment after 15 years
    - Gives criteria for court to consider in reviewing case
    - Requirements for notification to prosecutor, original sentencing court, and victim
    - Retroactive to apply to more than 120 currently incarcerated individuals sentenced as juveniles
- Prohibit imposition of life sentences without parole for juveniles in the future
- Eliminates mandatory life sentences without parole for juveniles to comply with federal constitutional law

2. Age of court jurisdiction

Wisconsin statute defines who is considered an adult for the purposes of court Jurisdiction. There are several interrelated issues on this topic.

First, Wisconsin is now one of just three states that automatically considers all 17 year olds as adults in the justice system. In 1995, Wisconsin lowered the age from 18 to 17 as part of a nationwide trend based on anecdote rather than concrete data and evidence. All states except Wisconsin, Georgia, and Texas have since moved to restore the age to 18. Treating 17 year olds as adults has long term negative ramifications for those individuals and the community. This focuses on sentencing and punishment to the exclusion of treatment and services which would often have a greater impact. Having a criminal sentence carries negative ramifications long beyond the end of the sentence for education, employment, and housing.

Second, and related to the age of adult court jurisdiction, Wisconsin has a statutory process to "reverse waive" a youth into juvenile court after being automatically placed in adult court. The presumption of this process was changed in the 1990s so that instead of a prosecutor convincing a judge to place a young person in adult court, the burden is on the youth to prove why they should not be in adult court. The criteria to meet that burden are antithetical to neuroscience research, research which has now been codified in cases like *Miller* and *Montgomery*. The criteria to obtain a "reverse waiver" require that youth prove a series of negatives.

Also related to the age of jurisdiction, Wisconsin law allows youth as young as 10 to be charged as a juvenile delinquent. The age used to be 12 which is the minimum age in most other jurisdictions. Similar to the 17 year old issue, this limits access to services which would have a much more beneficial long term effect than a delinquency adjudication.

RECOMMENDATIONS: There are several general areas of policy change which would address the issues identified above.

- **Raise the age of adult court jurisdiction from 17 to 18 years old.** Several bipartisan proposals have been offered to do this over the last few legislative sessions These proposals are limited in scope to focus only on first time, non-violent misdemeanants.
- **Raise the minimum age of delinquency jurisdiction from 10 to between 12 and 14 years old.** Research shows that most youth under 14 are not competent to participate in their own defense. Wisconsin spends a significant amount of time and money on delinquency proceedings when they ultimately become a Juvenile in Need of Protection and Services (JIPS) petition.
- **Change the presumption on the waiver provisions.** Largely addressed by changing the age of court jurisdiction provisions above, reviewing the statute relative to waiver and "reverse waiver" to ensure that youth receive the presumption of their case originating in juvenile court would reduce the burden and long term harm of youth having their cases proceed in the adult jurisdiction.
- **Limit the scope of the Serious Juvenile Offender Program.** The scope of crimes and age of individuals who are placed in the Serious Juvenile Offender Program (SJOP, Wis. Stat. s. 938.538) has grown over time so that many more youth fall into its parameters. SJOP has become a far too accessible way to treat youth like adults without actually placing them in the adult system. This does not result in better outcomes over time.

3. Placement on the sex offender registry

There are several adult offenses for which part of the sentence includes mandatory sex offender registry reporting. In a juvenile case, the sentencing judge has limited discretion on whether or not a juvenile must register as a sex offender. But in circumstances when it takes some time to file charges, or in cases in which a prosecutor may opt to charge misdemeanor underage sexual activity (Wis. Stat. s. 948.093) in "Romeo and Juliet" situations, a person may be subject to more stringent sex offender registry requirements than the criminal penalties they may face from the original charge.

RECOMMENDATION: Allow a sentencing judge to stay sex offender registration for any person who was under 18 when the crime was committed.

The following recommendations are not directly related to sentencing but have a procedural impact on the ultimate act of sentencing.

1. Changes to the competency statute

   Being competent to understand court proceedings and assist in their own defense is a constitutional right for both juveniles and adults. Especially with juveniles, competency can include both mental health issues but are also complicated by the fact that children are still developing and don't have fully formed decision making capacity.

   If competency is raised, the court can order a competency evaluation to determine if the juvenile is able to proceed. If the evaluator determines that the juvenile is not competent, then treatment may be provided to obtain competency. If the child is determined Incompetent, the delinquency proceeding can be converted to a JIPS order or a civil mental health commitment. The consequences of a JIPS order can look very similar to the consequences of a delinquency order. While the treatment is proceeding, the original delinquency proceeding is suspended but can be revived long after the JIPS order has expired, even after the juvenile has become an adult.

   RECOMMENDATION: Change statute to provide finality to a delinquency proceeding by allowing it to be dismissed if the juvenile doesn't regain competency within the timeframe of the JIPS order or if they are found not likely to regain competency.

2. Policy regarding shackling of juveniles

   Shackles, including arm, leg, chest, and belly restraints, are used on juveniles throughout Wisconsin without regard to assessed risk to the juvenile or other court personnel. This has profound trauma and psychological impact on juveniles. It also creates a perception of guilt which affects the perceived fairness of the justice system.

   RECOMMENDATION: Create a statewide policy requiring findings to be made regarding safety and security prior to the use of shackles on juveniles.

Thank you again for the opportunity to provide this feedback. If you have any additional questions, please feel free to use our office as a resource.

Sincerely,

/s/

Adam Plotkin
Legislative Liaison
Office of the State Public Defender

State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-0139/P1
EAW:amn

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

AN ACT ***to amend*** 302.113 (title), 302.113 (1), 302.113 (2), 302.114 (1), 303.065 (1) (b) 1., 304.02 (5), 304.06 (1) (b), 304.071 (2), 939.616 (1g), 939.62 (2m) (b) (intro.), 950.04 (1v) (gm), 950.04 (1v) (m), 973.01 (3), 973.01 (4), 973.014 (1) (intro.), 973.014 (1g) (a) (intro.), 973.15 (2m) (a) 1. and 978.07 (1) (c) 1.; and ***to create*** 973.014 (3), 973.017 (2c), 973.018 and 977.05 (4) (i) 10. of the statutes; **relating to:** sentencing for crimes committed by a person who is under the age of 18.

Analysis by the Legislative Reference Bureau

This bill creates a sentence adjustment procedure for a "youthful offender," defined under the bill as a person who committed a crime before he or she turned 18 years old. This bill also prohibits a court from sentencing a youthful offender to life imprisonment without the possibility of parole or release to extended supervision, and creates new mitigating factors in the sentencing criteria when sentencing a youthful offender. Finally, this bill eliminates statutory mandatory life sentences without parole for youthful offenders in order to align with federal constitutional law.

Under current law, an inmate can petition to reduce the confinement portion of his or her bifurcated sentence after serving a certain proportion of the sentence. An inmate who is serving a life sentence can petition to be released to extended supervision or parole after serving at least 20 years of his or her sentence or after

another date set by the sentencing court. This bill creates a new procedure for a youthful offender, including a youthful offender who is serving a life sentence, to receive a sentence adjustment after serving 15 years of his or her sentence. Under the bill, one year before the inmate is eligible to petition for the sentence adjustment, the Department of Corrections is required to notify the youthful offender of his or her eligibility. The court may reduce the term of imprisonment for the youthful offender and may modify the conditions of parole or extended supervision if the court determines that the interests of justice warrant a reduction, taking into account the factors enumerated in the bill. If the court denies the petition under the bill, the youthful offender may petition again every five years, up to five times. Under the bill, DOC is required to send a notice to all youthful offenders who have served at least 14 years of their sentences within six months after the bill takes effect.

Under current law, when a court makes a sentencing decision, it must consider certain guidelines, including whether there were any aggravating factors present. Under this bill, when a court is sentencing a youthful offender, it must also consider mitigating factors related to the age and maturity of the youthful offender. These sentencing guidelines for youthful offenders take effect retroactively under the bill, meaning that they apply to any conviction for which sentencing has already occurred.

Under current law, if a person is convicted of a serious felony on three separate occasions or a serious child sex offense on two separate occasions, the person is subject to a mandatory life sentence without the possibility of parole or extended supervision. However, in *Miller v. Alabama*, 567 U.S. 460 (2012), the U.S. Supreme Court held that imposing a mandatory life sentence without parole for a juvenile constitutes cruel and unusual punishment and therefore violates the eighth amendment of the Constitution. This bill clarifies that the statutory mandatory sentence of life imprisonment without the possibility of parole or extended supervision for repeat offenders does not apply to youthful offenders. This bill also prohibits a court from imposing a life sentence without the possibility of parole or extended supervision for a youthful offender. These changes to sentencing also apply retroactively under the bill.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 302.113 (title) of the statutes is amended to read:

302.113 (title) **Release to extended supervision for felony offenders not serving life sentences and youthful offenders.**

SECTION 2. 302.113 (1) of the statutes is amended to read:

302.113 **(1)** An inmate is subject to this section if he or she is serving a bifurcated sentence imposed under s. 973.01 or, if the inmate is a youthful offender, as defined in s. 973.014 (3) (a), a life sentence imposed under s. 973.014 (3) (b) or (c) or, if the youthful offender is sentenced before the effective date of this subsection .... [LRB inserts date], s. 973.014 (1g).

SECTION 3. 302.113 (2) of the statutes is amended to read:

302.113 **(2)** Except as provided in subs. (3) and (9), an inmate subject to this section is entitled to release to extended supervision after he or she has served the term of confinement in prison portion of the sentence imposed under s. 973.01, as modified by the sentencing court under sub. (9g) or s. 302.045 (3m) (b) 1., 302.05 (3) (c) 2. a., 973.018, 973.195 (1r), or 973.198, if applicable.

SECTION 4. 302.114 (1) of the statutes is amended to read:

302.114 **(1)** An inmate is subject to this section if he or she is serving a life sentence imposed under s. 973.014 (1g) (a) 1. or 2. An inmate serving a life sentence under s. 939.62 (2m) or 973.014 (1g) (a) 3. is not eligible for release to extended supervision under this section. This section does not apply to a youthful offender, as defined in s. 973.014 (3) (a), who was sentenced under s. 973.014 (1g) before the effective date of this subsection .... [LRB inserts date].

SECTION 5. 303.065 (1) (b) 1. of the statutes is amended to read:

303.065 **(1)** (b) 1. A person serving a life sentence, other than a life sentence specified in subd. 2., may be considered for work release only after he or she has reached parole eligibility under s. 304.06 (1) (b) or 973.014 (1) (a) or (b) or (3) (b), whichever is applicable, or he or she has reached his or her extended supervision eligibility date under s. 302.114 (9) (am) or 973.014 (1g) (a) 1. or 2. or (3) (c), whichever is applicable.

SECTION 6. 304.02 (5) of the statutes is amended to read:

304.02 **(5)** Notwithstanding subs. (1) to (3), a prisoner who is serving a life sentence under s. 939.62 (2m) (c) or 973.014 (1) (c) ~~or~~, (1g), or (3) (c) is not eligible for release to parole supervision under this section.

SECTION 7. 304.06 (1) (b) of the statutes is amended to read:

304.06 **(1)** (b) Except as provided in s. 961.49 (2), 1999 stats., sub. (1m) or s. 302.045 (3), 302.05 (3) (b), 973.01 (6), ~~or~~ 973.0135, or 973.018, the parole commission may parole an inmate of the Wisconsin state prisons or any felon or any person serving at least one year or more in a county house of correction or a county reforestation camp organized under s. 303.07, when he or she has served 25 percent of the sentence imposed for the offense, or 6 months, whichever is greater. Except as provided in s. 939.62 (2m) (c) or 973.014 (1) (b) or (c), (1g) ~~or~~, (2), or (3) (b) or (c), the parole commission may parole an inmate serving a life term when he or she has served 20 years, as modified by the formula under s. 302.11 (1) and subject to extension under s. 302.11 (1q) and (2), or reduction under s. 973.018, if applicable. The person serving the life term shall be given credit for time served prior to sentencing under s. 973.155, including good time under s. 973.155 (4). The secretary may grant special action parole releases under s. 304.02. The department or the parole commission shall not provide any convicted offender or other person sentenced to the department's custody any parole eligibility or evaluation until the person has been confined at least 60 days following sentencing.

SECTION 8. 304.071 (2) of the statutes is amended to read:

304.071 **(2)** If a prisoner is not eligible for parole under s. 961.49 (2), 1999 stats., or s. 939.62 (2m) (c), 973.01 (6), 973.014 (1) (c) ~~or~~, (1g), or (3) (c), or 973.032 (5), he or she is not eligible for parole under this section.

SECTION 9. 939.616 (1g) of the statutes is amended to read:

939.616 **(1g)** If a person is convicted of a violation of s. 948.02 (1) (am) or 948.025 (1) (a), notwithstanding s. 973.014 (1g) (a) 1. and 2. and except as provided under s. 973.018, the court may not make an extended supervision eligibility date determination on a date that will occur before the person has served a 25-year term of confinement in prison.

SECTION 10. 939.62 (2m) (b) (intro.) of the statutes is amended to read:

939.62 **(2m)** (b) (intro.) The actor is a persistent repeater if the offense for which he or she is presently being sentenced was committed after he or she attained the age of 18 and one of the following applies:

SECTION 11. 950.04 (1v) (gm) of the statutes is amended to read:

950.04 **(1v)** (gm) To have reasonable attempts made to notify the victim of petitions for sentence adjustment as provided under s. 973.018 (3) (e), 973.09 (3m), 973.195 (1r) (d), or 973.198.

SECTION 12. 950.04 (1v) (m) of the statutes is amended to read:

950.04 **(1v)** (m) To provide statements concerning sentencing, disposition, or parole, as provided under ss. 304.06 (1) (e), 938.32 (1) (b) 1g., 938.335 (3m) (ag), ~~and~~ 972.14 (3) (a), and 973.018 (4) (d).

SECTION 13. 973.01 (3) of the statutes is amended to read:

973.01 **(3)** NOT APPLICABLE TO LIFE SENTENCES. If a person is being sentenced for a felony that is punishable by life imprisonment, he or she is not subject to this section but shall be sentenced under s. 973.014 (1g) or (3).

SECTION 14. 973.01 (4) of the statutes is amended to read:

973.01 **(4)** NO GOOD TIME; EXTENSION OR REDUCTION OF TERM OF IMPRISONMENT. A person sentenced to a bifurcated sentence under sub. (1) shall serve the term of

confinement in prison portion of the sentence without reduction for good behavior. The term of confinement in prison portion is subject to extension under s. 302.113 (3) and, if applicable, to reduction under s. 302.045 (3m), 302.05 (3) (c) 2. a., 302.113 (9g), 973.018, 973.195 (1r), or 973.198.

SECTION 15. 973.014 (1) (intro.) of the statutes is amended to read:

973.014 **(1)** (intro.) Except as provided in sub. (2) or (3), when a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, but before December 31, 1999, the court shall make a parole eligibility determination regarding the person and choose one of the following options:

SECTION 16. 973.014 (1g) (a) (intro.) of the statutes is amended to read:

973.014 **(1g)** (a) (intro.) Except as provided in sub. (2) or (3), when a court sentences a person to life imprisonment for a crime committed on or after December 31, 1999, the court shall make an extended supervision eligibility date determination regarding the person and choose one of the following options:

SECTION 17. 973.014 (3) of the statutes is created to read:

973.014 **(3)** (a) In this subsection, "youthful offender" means a person who committed an offense before the person attained the age of 18 years.

(b) When a court sentences a youthful offender to life imprisonment for a crime committed on or after July 1, 1988, but before December 31, 1999, the court shall set a date on which the youthful offender is eligible for parole.

(c) When a court sentences a youthful offender to life imprisonment for a crime committed on or after December 31, 1999, the court shall set a date on which the youthful offender is eligible for release to extended supervision.

(d) When sentencing a youthful offender to life imprisonment under par. (b) or (c), the court shall inform the youthful offender of the procedure for petitioning for a sentence adjustment under s. 973.018.

(e) When sentencing a youthful offender to life imprisonment under par. (b) or (c), the court shall consider, in addition to all other relevant factors, all of the following:

1. That, because children are less criminally culpable and more amenable to reform, youthful offenders are constitutionally different from adults for the purposes of sentencing.

2. That the sentencing goals of deterrence, retribution, and incapacitation are secondary to the goal of rehabilitation when sentencing youthful offenders.

3. That unless the state proves beyond a reasonable doubt that the youthful offender is permanently incorrigible and is therefore unable to be rehabilitated, youthful offenders must have a meaningful opportunity to obtain release from prison based on maturity and rehabilitation.

SECTION 18. 973.017 (2c) of the statutes is created to read:

973.017 **(2c)** MITIGATION FOR YOUTH. When making a sentencing decision for a person who had not attained the age of 18 years at the time the crime was committed, the court shall consider all of the following mitigating factors:

(a) That, because children are less criminally culpable and more amenable to reform, youthful offenders are constitutionally different from adults for the purposes of sentencing.

(b) That the sentencing goals of deterrence, retribution, and incapacitation are secondary to the goal of rehabilitation when sentencing youthful offenders.

(c) That unless the state proves beyond a reasonable doubt that the youthful offender is permanently incorrigible and is therefore unable to be rehabilitated, youthful offenders must have a meaningful opportunity to obtain release from prison based on maturity and rehabilitation.

SECTION 19. 973.018 of the statutes is created to read:

973.018 Sentence adjustment for youthful offenders. (1) DEFINITION. In this section, "youthful offender" has the meaning given in s. 973.014 (3) (a).

(2) SENTENCE ADJUSTMENT; FACTORS. A court may reduce a term of imprisonment, including life imprisonment under s. 973.014 (3), for a youthful offender who has served 15 years of his or her term of imprisonment if the court finds that the interests of justice warrant a reduction. In making its determination, the court shall consider all of the following:

(a) The sentencing factors set forth in ss. 973.014 (3) (e) and 973.017 (2c).

(b) The youthful offender's subsequent growth, behavior, and rehabilitation while incarcerated.

(3) PETITION FOR SENTENCE ADJUSTMENT. (a) One year before the youthful offender becomes eligible for a sentence adjustment under this section, the department shall provide written notice of the eligibility to the qualifying youthful offender, the sentencing court, the district attorney for the county in which the youthful offender was sentenced, and the state public defender. Notice under this paragraph shall include notice of the youthful offender's right to counsel and notice that if the youthful offender believes that he or she cannot afford an attorney, the youthful offender may ask the state public defender to represent him or her.

(b) A youthful offender has a right to counsel in the sentence adjustment proceedings under this section. The right to counsel begins at the service of notice under par. (a).

(c) After service of notice under par. (a) and upon request by the youthful offender or the youthful offender's attorney, the court shall make documents from the sentencing hearing available to the youthful offender or his or her attorney, including the presentence investigation report in accordance with s. 972.15 (4m) and the transcript from the sentencing hearing.

(d) A qualifying youthful offender may file a petition for a sentence adjustment under this section. The petitioner shall file the petition and any affidavits and other written support for the petition in the sentencing court no more than 90 days before the youthful offender's eligibility date. A copy of the petition shall be served on the district attorney in the county in which the youthful offender was sentenced.

(e) Upon receipt of a petition under par. (d), the district attorney shall notify any victims of the crime in accordance with s. 950.04 (1v) (gm).

(4) HEARING. (a) The court shall hold a hearing within 120 days of a petition filed under sub. (3) (d), unless all parties agree to an extension for the hearing date.

(b) The court shall consider relevant information, including expert testimony and other information about the youthful offender's participation in any available educational, vocational, volunteer, community service, or other programs, the youthful offender's work reports and psychological evaluations, and the youthful offender's major violations of institutional rules, if any.

(c) The youthful offender has the right to attend the hearing, the right to be represented by counsel, and the right to testify, present evidence, and cross-examine witnesses.

(d) The victim shall be given the opportunity to provide a statement concerning sentencing in accordance with s. 950.04 (1v) (m).

(e) A hearing under this subsection shall be recorded.

(f) The decision of the court on a petition under sub. (3) is a final adjudication subject to appeal under s. 809.30.

(5) ORDER. If the court finds that the interests of justice warrant a sentence adjustment, the court may amend the judgment of conviction according to one of the following:

(a) If the youthful offender is serving a sentence for a crime committed before December 31, 1999, reduce the parole eligibility date and modify the conditions of parole. The court may also reduce the sentence, but shall provide for at least 3 years of parole supervision after release from prison.

(b) Upon request by the youthful offender, for a crime committed before December 31, 1999, convert an indeterminate sentence to a bifurcated sentence under s. 973.01 or 973.014 (1g). If the court converts the indeterminate sentence to a bifurcated sentence, the court shall set a date for release to extended supervision under s. 302.113 that is no later than the original parole eligibility date. The court may also modify the conditions of parole or extended supervision.

(c) For a crime committed on or after December 31, 1999, reduce the term of confinement in prison and modify the conditions of extended supervision. The court may also reduce the total length of the bifurcated sentence. Notwithstanding s. 973.01 (2) (d), the court shall provide for at least 3 years of extended supervision under s. 302.113.

(d) For a life sentence without the possibility of parole or release to extended supervision under s. 973.014 (1) (c) or (1g) (a) 3., convert the sentence to a life

sentence with the possibility of parole or release to extended supervision and set a date for parole eligibility or release to extended supervision and conditions for parole or extended supervision accordingly.

(6) SUBSEQUENT PETITIONS. A youthful offender is eligible to file a subsequent petition under sub. (3) no earlier than 5 years after a hearing is held under sub. (4), unless the court sets an earlier date. A youthful offender may file no more than 5 petitions under sub. (3) during his or her sentence.

(7) SENTENCE MODIFICATION ON OTHER GROUNDS. Nothing in this section limits the youthful offender's right to resentencing, sentence adjustment, or sentence modification on other grounds, including under s. 302.113 (9g) or 302.114.

SECTION 20. 973.15 (2m) (a) 1. of the statutes is amended to read:

973.15 **(2m)** (a) 1. "Determinate sentence" means a bifurcated sentence imposed under s. 973.01 or a life sentence under which a person is eligible for release to extended supervision under s. 973.014 (1g) (a) 1. or 2. or (3) (c).

SECTION 21. 977.05 (4) (i) 10. of the statutes is created to read:

977.05 **(4)** (i) 10. Cases involving youthful offenders under s. 973.018 (3).

SECTION 22. 978.07 (1) (c) 1. of the statutes is amended to read:

978.07 **(1)** (c) 1. Any case record of a felony punishable by life imprisonment or a related case, after the defendant's parole eligibility date under s. 304.06 (1) or 973.014 (1) or (3) (b) or date of eligibility for release to extended supervision under s. 973.014 (1g) (a) 1. or 2. or (3) (c), whichever is applicable, or 50 years after the commencement of the action, whichever occurs later. If there is no parole eligibility date or no date for release to extended supervision, the district attorney may destroy the case record after the defendant's death.

SECTION 23. Nonstatutory provisions.

(1) No later than the first day of the 6th month beginning after the effective date of this subsection, the department of corrections shall provide written notice under s. 973.018 (3) (a) to all youthful offenders who have served at least 14 years of their terms of imprisonment.

SECTION 24. Initial applicability.

(1) The treatment of ss. 973.014 (1) (intro.), (1g) (a) (intro.), and (3) and 973.017 (2c) first applies to a conviction for which sentencing has occurred on the effective date of this subsection.

(2) The treatment of s. 973.018 first applies to a youthful offender who is serving a term of imprisonment on the effective date of this subsection.

(END)

YOUTH JUSTICE MILWAUKEE

MEMO
To: Wisconsin Legislative Bureau
From: Sharlen Moore, Director of Youth Justice Milwaukee and Urban Underground
Date: November 10, 2020
RE: Considerations for Sentencing of Youth in Wisconsin

Background
In 2017, Youth Justice Milwaukee (YJM) launched a community-centered youth decarceration campaign to create a needed continuum of care and community based system of safety and accountability for Milwaukee youth and families. Youth Justice Milwaukee's advocacy platform has three areas of focus:

1. closing youth prisons and replacing them with small, home-like, youth centered residential programs;
2. building a community based continuum of care that is age appropriate, trauma responsive and culturally appropriate; and,
3. eliminating disparities that lead to disproportionate incarceration rates for youth of color.

At the start of this campaign, the crisis at Lincoln Hills and Copper Lake had been exposed and bipartisan support of Act 185 was established. Milwaukee County still had the largest number of youth at Lincoln Hills and was developing a plan for reform that centered around opening a new 24 bed non secure facility for boys, and expanding secure facilities to include a total of 80-90 beds for boys and girls in two locations. By contrast, in 2020 there are significant changes in those plans and other positive achievements, of which YJM is proud to be a part.

Current Situation
Youth Justice Milwaukee supports the elimination of Juvenile Life Without Parole. We are interested in policies that reduce youth incarceration in favor of more effective alternatives.

In fact, all three of our campaign's objectives relate to sentencing of youth whether it be the length of sentence, the place where the sentence is carried out or the disparities between sentences of youth of color and their white peers. However, it should be noted that a cohesive and data driven approach to funding a youth centered, community based continuum of care will largely circumvent sentencing altogether. That is the alternative that research shows to be the most effective in reducing the types of behaviors that lead to incarceration.

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WWW.YOUTHJUSTICEMKE.ORG

That said, it is important to be honest about the ways in which our current juvenile justice code, WI Chapter 398, drives youth into the adult system by way of juvenile justice. The harshest aspect of Chapter 398 is the Serious Juvenile Offender status. This status tells us what a young person did but not what they need or whether they have access to what they need to stay safe.

Youth with an SJO status have access to the same services and programs as youth who are incarcerated for a non-SJO offense. The administrative code that regulates the facilities is virtually the same for both groups of youth. Both youth are eligible for community supervision, but it is through two different agencies. One has a label of Serious Juvenile Offender, and the other does not. Detention facility superintendents report that there is no distinction between these groups of youth, according to the people who serve them each day.

More importantly, youth of color receive SJO orders at higher rates than their white peers. This trend increases the racial disparities - even as the overall number of incarcerated youth declines year after year.

Chapter 398 also includes sanctions for status offenses which has an escalating effect for system involvement and a destabilizing effect on support services. This is especially true for youth of color since they often have less access to community based services in the first place.

Recommendations

Escalating involvement with juvenile justice sets children up to be involved with the adult system, as the negative effects of confinement compound one another. This is not what Wisconsin needs. In addition, to eliminating the Juvenile Life Without Parole sentencing, we feel the juvenile justice code needs to be rewritten to reflect current best practice and protocol. A revised code would eliminate the Serious Juvenile Offender status and status offenses. Finally, Wisconsin needs to reimagine a community based continuum based on Emerging Adult research (18-24 year olds). Our approach to this important demographic needs to consider their needs in terms of health, education, job training, prevention and harm reduction, in order to end racial disparities and reliance on incarceration.

11/09/2020

Attorneys David Moore and Katie Bender-Olson
Legislative Council
1 East Main St., Ste 401
Madison, WI 53707

Dear Mr. Moore and Ms. Bender-Olson:

Wisconsin Alliance for Youth Justice (WAYJ) is a group made up of victims of violent crimes, and the family and friends of individuals that were juvenile offenders who received extreme sentences. We strongly believe youthful offenders are not the same as adult offenders and should not be sentenced as adults. Those who have, should be granted an opportunity for meaningful release. WAYJ is honored to have the opportunity to share our policy recommendations regarding two areas of concern: Juvenile life without parole sentences and the age at which young people are considered criminally liable as adults in Wisconsin.

JUVENILE LIFE WITHOUT PAROLE

WAYJ and the Wisconsin Justice Initiative (WJI) continue to support elements of 2019 Assembly Bill 775, which would ban life without parole sentences and provide for a sentence review and possible modification after a juvenile sentenced to life in prison served 15 years. This bill would not promise release after 15 years, but it would promise that the State of Wisconsin would consider the neurological changes that occur in young people in their 20's and recognize that teens are capable of great, positive changes as they grow and leave their greatest risk-taking, reckless years behind them. The bill would also eliminate mandatory life without parole sentences for youthful offenders. This would bring the state into compliance with U.S. Supreme Court rulings.

The issues of juvenile offenders in adult court that received extreme sentences has become a national topic. To this point, 23 states and Washington, D.C. have prohibited life without parole as a sentencing option for children and there is legislation being reviewed in additional states to abolish this extreme sentence or juveniles. Instead of condemning them to die in prison, children should be held accountable in an age appropriate manner that aligns with both the constitutional and human rights standards for sentencing children.

RAISE THE AGE

The laws governing when a juvenile becomes an adult in the eyes of the criminal justice system are inconsistent, overly punitive, and lead to absurd results. They also ignore or minimize, as do LWOP sentences, the immaturity and impulsiveness of youth and what we know about brain development. WAYJ and WJI support raising to age 18 the age for adult prosecutions in the state.

Drawing on recent scientific and sociological research, the Supreme Court has refused to classify juveniles "among the worst offenders'' in Roper v Simmons. Focusing on three "general'' differences between children and adults, the Court concluded that juvenile defendants are clearly less culpable for

their actions than adults. First, the "comparative immaturity and irresponsibility'' of juveniles render them prone to poor decision-making. The Court noted that "adolescents are overrepresented in virtually every category of reckless behavior.'' Next, because they tend to have "less control, or less experience with control over their environment,'' juveniles are often more susceptible to "negative influences and outside pressures.'' Finally, the Court asserted that a juvenile's character and personality traits are "less formed'' and "more transitory'' than those of an adult. As a result, the character traits of youth tend to be impermanent and there is a greater possibility that a juvenile's "character deficiencies will be reformed.''

No child is born bad. Extreme sentences disproportionately affect the most vulnerable members of society. Nearly 80 percent of juvenile lifers reported witnessing violence in their homes, more than half witnessed weekly violence in their neighborhoods, half have been physically abused and 20 percent have been sexually abused during their life. Children of color are disproportionately sentenced to die in prison--serving life without parole at a per capita rate that is 10 times that of white children convicted of the same offense. It is our greatest hope that Wisconsin will enact reforms that provide real second chance opportunities for offenders who received an extreme sentence as a juvenile. As well as create age appropriate, trauma informed sentencing alternatives for children who commit serious crimes and are transferred to adult courts.

We are sure you have all the cases cited from attorneys and other professionals in this area of expertise. However, WAYJ, the collective of mothers, fathers, brothers, sisters, children, grandparents, family of their victim's and other loved ones of those so harshly sentenced as juveniles. We ask, need Wisconsin's legislature to support 2019 AB775.

Wendy Sisavath
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Wisconsin Alliance for Youth Justice
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Lisa Reid
Team Leader
Wisconsin Alliance for Youth Justice
920-450-5186
wayjfamily@gmail.com

11/09/2020

Wisconsin Alliance for Youth Justice, would like to share some support letters from directly impacted people.

****

Exhibit 1

Dear Legislator,

I am writing this as a family member crime victim to ask that you support the proposed bill for mandatory parole consideration for children who have committed violent crimes.

My mother, Evelyn Leis, and my brother, William Leis, were murdered in a double homicide on October 8, 1999. An eighteen year- old and sixteen year- old were apprehended, tried, and sentenced.

I honestly tried to not give much thought to them; they were in prison where they needed to be. Thirteen years after the murders, however, I came to a place in my life where I realized that I was not doing well; I had an underlying spirit of anger and bitterness that was surfacing that I decided I did not want to live with for the rest of my life .

I contacted the Restorative Justice program at the UW in Madison and with their help was able to meet the younger of the two men, Daniel Cerney, in May of 2016 at Green Bay Correctional Institution. We talked about our lives before and after the murders and I learned more of what happened that night. He was remorseful and I was able to forgive him for what he had done.

Since then, we have shared correspondence and I have visited him three more times. I have come to believe that Daniel has done much in prison to turn his life around by obtaining his GED, taking many classes, learning a trade and holding down several jobs in prison. He has become a committed Christian and truly regrets what he has done.

I honestly believe he is now a fine young man who made a very poor decision when he was sixteen. I also believe no purpose will be served with many more years of prison confinement. With this bill, a parole board would be able to evaluate Daniel's case and make their decision for what they believe is best for society with the possibility for him to live a productive, normal life on the outside of prison.

I ask that you give your support to this bill.

Thank you and sincerely,

Mary E. Rezin-Victims family member
27042 Hwy. 21,
Tomah, WI 54660
608-633-8037

Exhibit 2

My name is Andrae L. Bridges and it gives me great pleasure to write this letter in support of what Wisconsin Alliance for Youth Justice is trying to accomplish on behalf of offenders like me. I am a juvenile lifer who, like the majority of juvenile lifers received a sentence for harsher than the adults we're supposedly sentenced as. In 1991, just six days after my 16th birthday I was arrested, charged

with First Degree Intentional Homicide-Party to a Crime, waive as an adult, and subsequently sentenced to life in prison without the possibility of parole until the year 2037, when I will be 61 years old. Even then release is not guaranteed. I had a 20-year-old co-defendant who received a far lighter sentence.

My sentence came at a time when societal notions of juvenile behavior were underdeveloped and the juvenile super-predator myth pervaded the criminal justice system. Over the last 20 years this myth has been discredited and abandoned. Since my conviction, the science around brain development has completely transformed society's views of youthful offenders. I have most certainly changed my views, as I am no longer the angry, misguided, self-destructive little boy I was that entered the system nearly 30 years ago. During this time, I have been afforded the opportunity to reflect on the severity of my crime and the traumatic abuse I endured as a child. Not only has counseling helped to heal the psychological and emotional wounds that plagued my upbringing, but I have become a thoughtful, sensitive, and reflective adult. Today I am model prisoner. Although I am not owed a second chance, I undoubtedly deserve one.

Nothing written here is intended to minimize the seriousness of my offense. I have acknowledged my role in the crime as well as expressed deep remorse to the victim's family. My life before the crime was turbulent and unstable, marked by physical, emotional, and sexual abuse by the adults in my life, including family members. But I have never used my troubled childhood as an excuse for my actions, although it dangerously magnified the impulsivity and recklessness characteristic of all youth.

Thank you so very much for your time and interest in this matter!

Sincerely,
Andrae L. Bridges-Currently Incarcerated

Exhibit 3

I write to you today as a mother but in this case so much more. I have no explanations for my son Zachary's behavior the night of October 5, 2008, but I can tell you he is no longer that 16-year-old boy. That night, my son took the life of his father (my estranged husband), the father of his sister, the brother to his aunt and surviving uncle, the uncle to nieces and nephews, and son to his grandmother. It tore my family apart. I knew he was having issues with his dad, he was having a hard time with the recent loss of his grandmother, and there were new friends I did not know well but later found out did drugs and drank. Children can be reckless, and I believe Zach was acting recklessly.

I passionately believe that Zach, if allowed a meaningful opportunity of release, would be a productive member of society. During his almost 12 years at he was at Waupun Correctional Institution, he has earned his GED, taken college courses to better his education, completed programming that was available to him at that facility, held many different jobs and was taught welding. He was endorsed to medium security level after eleven years of being under maximum security at Waupun. It took over a year for them to transfer him to a medium facility (New Lisbon Correctional Institution) and Waupun apparently requested to keep him for another 6 months for his welding skills and work ethic. Zach became a pen pal to a college student in Florida around 8 years ago, in that time, they have made a special connection and he asked her to marry him. He has a dream to be a husband, father, provider and protector for his family.

11/09/2020

The judge asked him if he was a stupid kid or a monster. From the changes I have seen in him and how much he has grown into a respectful, polite, helpful and well-rounded man. I am proud to be his mother and hope you can see the wonderful person he has turned out to be, despite his environment.

I ask the 2019 Assembly Bill 775 be supported so youthful offenders who are transferred to adult court and receive(d) extreme sentences be given a meaningful opportunity for release. This is the perfect time for Wisconsin to get started moving in alignment with the rest of the nation regarding their children and how we can rehabilitate instead of condemning them to die in prison.

Thank you for your time and consideration,

Lisa M. Reid-Mother
988 3rd St. #9
Menasha, WI 54952
920.450.5186
Lisa.reid1221@gmail.com

Exhibit 4

When I think of meaningful release in relation to my experience, I feel the only real meaning is that I am free. My perspective is that the W.D.O.C. had not prepared me for life out here in any real way.

I was told to get my h.s.e.d., get a vocational skill and get a job. I accomplished these things. I have training in cabinet making, C.N.C programming and operation, food preparation, tailoring and in numerous other areas, yet prior to release, as well post-release, there was no effort by the W.D.O.C to help place me in any of these fields of employment. Many men and women have developed skills such as welding, electrical or Computer Assisted Drafting which are all in-demand skills, yet these people are expected to get out of prison and find work on their own. The same goes for housing in a different manner: no training on how to find housing, yet we are still expected to gain housing on our own.

In the area of the juvenile issue many of us have been in prison for a MINIMUM of 20 YEARS and have no life experience when it comes to filling out job applications or job hunting in general. We do not know how to find or rent apartments. We do not know how to get a smart phone. We do not know how to file taxes. The list of what we did/do not know how to do is nearly endless. There ARE some programs available in prison, but they are few and far between and are not offered in all institutions.

Release is meaningful in and of itself, but beyond that it isn't overly meaningful. Our road is ALL up hill. I used to harshly judge people that came back to prison shortly after release, but I now get it. Releasing someone from prison that went in when they were a kid, did 20 plus years and expecting them to succeed is EXACTLY like taking someone from the backwoods of Wisconsin, dropping them in the middle of Tokyo, with no help, and expecting them to succeed. Success may happen due to the strength of the individual, but on the whole failure should not be a surprise.

My experience is that I am OVERWHELMED. I know how to do next to nothing out here. Thank God I have strong support from family and friends. This is all good for me, but what about those that do not have support?

11/09/2020

General issues may be summed up, from my perspective, as follows: housing, employment, spiritual nurturing, education, followed by basic life skills such as filling out health insurance forms. I was never taught that in prison. Lets make sure that all the children have meaningful releases and that can happen by supporting AB775.

Sincerely,
Craig Sussek (recently released youthful offender who received an extreme sentence)

EVAN GOYKE

STATE REPRESENTATIVE
18th ASSEMBLY DISTRICT

July 28, 2020

Wisconsin Legislative Council
Re: Legislative Interim Report on Criminal Sentencing of Juvenile Offenders

Dear Attorneys Bender-Olson and Moore, and Corrections Committee Colleagues,

I'm excited that the co-chairs of the Joint Legislative Council have selected a report on Criminal Sentencing of Juvenile Offenders. This is an important topic that deserves our attention and in many states across the country has been a source of bipartisan collaboration.

At the end of session I introduced 2019 Assembly Bill 1036. This is a long bill that introduces a number of policies that I believe need to be changed in Wisconsin. Link to bill: https://docs.legis.wisconsin.gov/2019/related/proposals/ab1036.pdf

To summarize the more important areas:

1) 17 year olds. Wisconsin is now one of only three states in America that universally treats ALL 17 year olds as adults. Any crime allegedly committed by a 17 year old means that kid will be tried in adult court and be incarcerated at an adult facility. Only Texas, Georgia, and Wisconsin have a statutory exclusion to 17 year olds being tried as juveniles. In 2018 Missouri changed their law and in 2019 Michigan did as well - both on bi-partisan votes.

This is the largest, most important change we can make to the sentencing of juveniles in Wisconsin. Here is additional information from July 1, 2020 from NCSL: https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx

Legislation has been introduced in prior sessions by both parties to address this issue. The best and cleanest way to handle this policy is to send all 17 years back to juvenile jurisdiction and compensate counties for the additional juvenile expenses through a sum sufficient appropriation.

2) Original Jurisdiction and Adult Court Waiver criteria and procedures. Juveniles may be waived into adult court under certain circumstances and under others may automatically begin in adult court and later moved to juvenile court. These procedures should be modernized and simplified.

In the legislation I introduced above, I propose to eliminate starting juveniles in adult court. Rather, the waiver procedure and criteria would be used when appropriate based on the individual circumstances of the case and the juvenile rather than the nature of the criminal charge. Additionally, I believe waiver into adult court should be reserved for a smaller more violent population and more juveniles, especially those under the age of 15, should remain in juvenile court.

3) Facilities. In 2017 Act 185, we unanimously began the process of closing Lincoln Hills. Progress has been made to fund county run facilities, but has stalled in funding state run facilities. Changes made to how juveniles are sentenced to adult offenses will change the incarcerated population and thus change the facilities we will need. These changes need to be made now to avoid over-building facilities and capacity in state run facilities for juveniles sentenced in adult court.

Incredible progress has been made to reduce the number of juveniles in state custody. As of Friday, July 24th, there were only 70 boys at Lincoln Hills and 8 girls at Copper Lakes. These numbers are roughly half what they were a year or two ago. This is progress and the Leg Council report should include these more recent trends, reasons for the trends, and what they mean for future decisions on facilities and capacity.

I hope this helps and I look forward to the report and working with my colleagues on both sides to address these much needed changes.

Sincerely,

State Representative Evan Goyke
18th Assembly District

State Capitol: P.O. Box 8952, Madison, WI 53708 (608) 266-0645 Toll-free: (888) 534-0018
E-mail: rep.goyke@legis.wi.gov Web: http://goyke.assembly.wi.gov

KIDS FORWARD
Every Kid. Every Family. Every Community.

MEMO

To: Wisconsin Legislative Council
From: Erica Nelson, Kids Forward/ Race to Equity, Director
Date: November 12, 2020
RE: Considerations for Sentencing of Youth in Wisconsin

Thank you for providing an opportunity to share our thoughts and recommendations relating to the sentencing of youth in Wisconsin.

Kids Forward aspires to make Wisconsin a place where every child thrives by advocating for effective, long-lasting solutions that break down barriers to success for children and families. For over 100 years, Kids Forward has used a research and community-informed approach to advocate for change that will help every kid, every family, and every community.

Commitment to Eliminating Racial Disparities

Juvenile Justice reform has been a component of our work under the umbrella of Race to Equity, a county-based, data-driven strategy to reduce racial disparities across Wisconsin.[1] Most recently, Kids Forward has partnered with Youth Justice Milwaukee to build a broad-based statewide coalition that promotes a robust community-based continuum of care to reduce youth incarceration. This effort is called Youth Justice Wisconsin and is currently studying the impact of Covid 19 on reducing the use of secure custody.

Support for Eliminating Juvenile Life Without Parole

Kids Forward supports the elimination of Juvenile Life Without Parole. Eliminating this aspect of youth sentencing aligns with our commitment towards eliminating racial disparities, improving child wellbeing, and increasing access to community-based services that prevent, reduce and repair harm. Moreover, because this sentencing policy does not reflect the workings of a compassionate and restorative system that is developmentally appropriate, maintaining it is likely to continue the deep and lasting harmful impact on the youth, their families, and our communities. It should be eliminated. This change should be adopted as a fundamental step towards needed transformative reforms directed at 16-24 year olds, commonly referred to as Opportunity Youth or Emerging Adults.

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[1] The Complex Maze of The Juvenile Justice System In Wisconsin And Its Impact On Youth Of Color

A MEMBER OF COMMUNITY SHARES OF WISCONSIN
555 W. Washington Ave. #200, Madison, WI 53703 (608) 284-0580 kidsforward.org

The most recent research from across the country reveals that Wisconsin can do a much better job improving public safety, social outcomes, and racial disparities by adopting comprehensive reform of its juvenile justice code.[2] Our current juvenile justice code, WI Chapter 398, is not in line with contemporary or progressive approaches in that it sets the age of delinquency as 10-17, creates the Serious Juvenile Offender (SJO) status, limits expungement, and requires sanctions for status offenses. Moreover, it exacerbates racial disparities because individuals considered SJOs or sanctioned for status offenses are disproportionately juveniles of color. And the escalating effects of system involvement through status offenses also increases disparities and worsens outcomes.

Longitudinal study has determined that incarceration during youth is associated with worse outcomes in adulthood in several areas.[3] Furthermore, all of these sections of the code emphasize what a child has done, but do nothing to provide for what they need in order to repair harm and develop into a healthy adult. In other words, it is imperative that we shift our primary focus in youth justice away from exclusively punishment and more towards addressing the underlying drivers of the alleged delinquency. Wisconsin cannot afford socially or economically to continue on our current path, nor should we accept the current outcomes and disparities as inevitable.

Recommendations

In addition, to eliminating the Juvenile Life Without Parole sentencing provisions, we feel the juvenile justice code needs to be rewritten to reflect current best practice and protocol. A revised code should eliminate the Serious Juvenile Offender status and status offenses, and include 18-24 year olds. Wisconsin needs to reimagine a community-based continuum grounded in Emerging Adult research, Opportunity Youth voice and cross-system collaboration that expands on what partners are already striving for in Wisconsin. Our approach to this important demographic needs to consider their needs in terms of health, education, job training, prevention and harm reduction, in order to end racial disparities and reliance on incarceration.

In conclusion, Kids Forward strongly recommends eliminating Juvenile Life Without Parole sentencing, addressing the needs of Emerging Adults by raising the age of delinquency, and lastly, undertaking significant reform of our state's juvenile justice code.

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[2] file:///home/chronos/ue5cb99aeb889d279ddb3e15270a2b6308a747ce0/MyFiles/Downloads/Public_safety_and_emerging_adults_in_connecticut.pdf

[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5260153/

The CAMPAIGN for the FAIR SENTENCING of YOUTH

Attorneys David Moore and Katie Bender-Olson
Wisconsin Legislative Council
1 East Main St., Suite 401
Madison, WI 53707

Mr. Moore and Ms. Bender-Olson,

Thank you for the opportunity to offer recommendations regarding Wisconsin's imposition of extreme sentences, such as life in prison without the possibility of parole, against people who are under the age of 18 years old. My name is Preston Shipp, and I serve as Senior Policy Counsel for the Campaign for the Fair Sentencing of Youth (CFSY). The CFSY is a national organization that supports age-appropriate sentences for children that balance the need for public safety with age-appropriate sentencing policies that focus on rehabilitation and reintegration back into society, given young people's diminished culpability and their profound capacity to make positive transformation and move beyond the worst moment of their young lives.

Recent scientific studies have shown that adolescents' brains are not fully developed until they reach their mid-twenties. Children are consequently less capable than adults in long-term planning, the regulation of emotion, impulse control, and the evaluation of risks and consequences of their conduct. They are also more vulnerable and impacted by trauma, more susceptible to peer pressure, and heavily influenced by their surrounding environment, which is rarely in their control. Based on these fundamental differences between children and adults, the U.S. Supreme Court has concluded that children are not as culpable as adults and have greater rehabilitative potential. Therefore the Court has held in a series of decisions that children are constitutionally different from adults, and life without the possibility of parole is unconstitutional in the vast majority of cases involving a person under the age of 18. People who are given lengthy sentences for crimes they committed while they were still children must have meaningful opportunities to demonstrate rehabilitation and prove themselves deserving of a second chance.

Given the adolescent brain research and the holdings of the U.S. Supreme Court, 24 states and jurisdictions have now passed laws abolishing life without the possibility of parole for people under the age of 18. States as diverse as Texas and Hawaii, Wyoming and Massachusetts, West Virginia and Nevada, Arkansas and Utah have all acknowledged through legislation that children are fundamentally different from adults and must never be told that they have no future but to die in prison. Wisconsin has the opportunity to join this diverse chorus of states by enacting legislation to abolish life without parole for people under the age of 18, providing a review mechanism after a set term of years, and setting forth the factors particular to youth that must be considered.

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RECOMMENDATIONS:

1. Follow the lead of states such as Arkansas, Nevada, Oregon, Utah, Virginia, and West Virginia by eliminating extreme sentences, most notably life without the possibility of parole, as sentencing options for children. No child should ever be condemned to die in prison. Instead, Wisconsin should enact reforms that create age-appropriate, trauma-informed sentencing alternatives for children that focus on rehabilitation and reintegration into society and recognize that no child is beyond the hope of redemption.

2. Create meaningful, periodic parole review or judicial re-sentencing hearings that provide opportunities for release for all children who received lengthy adult sentences and have experienced rehabilitation. Arkansas, the District of Columbia, Oregon, and Virginia, have all passed legislation ensuring that after a set term of years, a parole board or sentencing judge will periodically evaluate the sentences of youthful offenders. In West Virginia, Oregon, and the District of Columbia, review occurs after service of 15 years. In North Dakota and Virginia, review occurs after 20 years. We would strongly encourage some form of sentencing review in the 15-20 year range, as this period of time allows for full development and maturation.

3. Ensure that child status and other youthful characteristics are considered both at the time the sentence is originally imposed and when the sentence is later reviewed by a judge or parole board. The key factors to be considered, articulated by the U.S. Supreme Court, include: (1) the child's age and his or her youthful features including immaturity, impetuosity, and failure to appreciate risks and consequences of the conduct; (2) the child's family and home environment; (3) the circumstances of the offense, including the child's role and the way familial and peer pressures may have affected his or her behavior; (4) the child's lack of sophistication in dealing with a criminal justice system that is designed for adults; (5) intellectual capacity; (6) history of trauma and involvement in the child welfare system; (7) a review of educational and court documents; (8) the possibility of rehabilitation and/or participation in rehabilitative and educational programs while incarcerated; and (9) any other mitigating factors or circumstances, including evidence submitted by the individual's counsel.

Thank you again for allowing the CFSY to offer these recommendations based on our years of work in other states, and for your careful consideration of this issue. Please contact me directly by phone (615-604-3506) or email (pshipp@fairsentencingofyouth.org) if I can provide further information.

Very sincerely,

Preston Shipp
Senior Policy Counsel
Campaign for the Fair Sentencing of Youth

November 7, 2020
Eileen Hirsch
224 Virginia Terrace
Madison, WI 53726

Attorneys David Moore and Katie Bender-Olson
Legislative Council
1 East Main St., Suite 401
Madison, WI 53707

Dear Mr. Moore and Ms. Bender-Olson:

Thank you for offering me an opportunity to comment on sentencing of juveniles in adult court. I have worked on juvenile and criminal justice issues since 1978, first at the non-profit Youth Policy and Law Center, then for 30 years at the State Public Defender, and finally for the University of Wisconsin Law School's Remington Center, before my retirement in 2018.

The most important development in juvenile justice during those forty years, I believe, is the development of brain imaging technology in the late 1990's, which revealed that teen-age recklessness and impulsivity stem from anatomically-based differences between adult and adolescent brains. As the American Medical Association stated in a brief to the United States Supreme Court in ***Roper v. Simmons*** (2004), adolescents have "disabilities in areas of reasoning, judgment and control of their impulses" because "regions of the adolescent brain do not reach a fully mature state until after the age of 18."

The United States Supreme Court has concluded that three general differences between adolescents and adults are significant to sentencing:

1. "A lack of maturity and an underdeveloped sense of responsibility," which "often result in impetuous and ill-considered actions and decisions."
2. "[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."
3. "[T]he character of a juvenile is not as well formed as that of an adult." Therefore, "a greater possibility exists that a minor's character deficiencies will be reformed."

These differences are relevant to sentencing, the Supreme Court has held because "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and maturity." Additionally, juveniles are "less susceptible to deterrence," and rehabilitation should have greater emphasis at sentencing.

When this groundbreaking knowledge is applied to juvenile and criminal justice policy it becomes apparent that we must incorporate these principles into adult sentencing statutes and amend our laws to expand the jurisdiction of juvenile court and its emphasis on character formation.

As to sentencing in adult court, I recommend the following:

1. Amend the statutes governing sentencing criteria (secs. 973.014 and 973.017) to include the criteria for sentencing juvenile offenders set forth in ***Roper v. Simmons*** and related cases. The specific language I favor is in 2019 AB 775 and SB 815.

2. Give every juvenile offender a realistic opportunity for release from prison at the point s/he has served 15 years in prison, through a "second chance hearing." Again, the procedure and criteria I recommend for that hearing are in AB 775 and SB 815. Also, require that the state parole commission incorporate the same criteria into their consideration of parole for juvenile offenders, and that attorneys be appointed to represent juvenile offenders at parole hearings.

3. Prohibit life without the possibility of parole sentences for juvenile offenders.

4. Enact distinctive sentencing criteria for youthful offenders, ages 18 to 25, recognizing that full maturation of the brain is not achieved until approximately age 25, and require sentencing courts to take that immaturity and amenability to reform into account in sentencing. Youthful offender legislation should also include emphasis on educational and treatment programs and elimination of long-term collateral consequences.

Additionally, a focus only on sentencing of juveniles in adult court is too narrow, in light of the groundbreaking research on adolescent brain development. Like almost every state in the nation, Wisconsin should eliminate original adult court jurisdiction over anyone under the age of 18, and leave it to the discretion of judges in juvenile court to determine which cases are better heard in adult criminal court.

As to juvenile court jurisdiction, I recommend the following:

1. Return 17-year-olds to juvenile court jurisdiction. Wisconsin is now one of only three states that does not set age 18 as its jurisdictional boundary. In ***Roper v. Simmons***, the Supreme Court held that a "juvenile" was anyone under age 18. The state should conform with that definition. (sections *938.02, 938.12, 938.44).*

2. Establish 13 as the minimum age for delinquency jurisdiction. Traditionally, juvenile court delinquency jurisdiction has begun at age 12 or 13. Younger children who commit crimes can be found in "need of protection or services." (sec. 938.12)

3. Establish 16 as the minimum age that jurisdiction over children accused of committing a crime can be transferred to adult criminal court, with a narrow exception for very serious crimes. (sec. 938.18)

4. Eliminate the statute establishing original jurisdiction in adult criminal court.(sec. 938.183). All proceedings should start in juvenile court, and if appropriate, the juvenile court can "waive" its jurisdiction, transferring the case to adult court.

I would be happy to meet with you or any interested legislator to discuss these ideas further. Thank you for your work on this important issue.

Sincerely,

Eileen Hirsch
Eileenhirsch224@gmail.com

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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November 10, 2020

Director Anne Sappenfield
Wisconsin Legislative Council
One East Main Street, Suite 401
Madison, WI 53703

Dear Director Sappenfield:

I was contacted by Wisconsin Legislative Council Senior Staff Attorneys Katie Bender-Olson and David Moore regarding Wisconsin's Interim Research Report on Criminal Sentencing of Juveniles. It is my understanding that this report will look at issues related to juvenile offenders who have been sentenced in adult criminal court, with a focus on those who have received a sentence of life imprisonment. Further, it is my understanding that the report will discuss options for changes in procedures and standards for determining a juvenile's eligibility for release. I have been asked to provide input from a victims' rights perspective.

While it is unclear to me exactly what options may be considered in your report, it is likely victims' constitutional rights under Article I, sec. 9m will be implicated if changes are made to the procedures and standards for determining a juvenile's eligibility for release for juveniles who have been sentenced to life imprisonment in adult court. For example, at any proceeding where release of an inmate is being considered, upon request, victims have a right to reasonable and timely notice of the proceeding, to attend and to be heard. If changes are made to the procedures and standards for release of juveniles who are sentenced to life imprisonment in adult court, those changes must conform with the statutory and constitutional rights of victims. Victims must be notified of these changes and of their rights associated with these procedures and standards. Further, the parties who are responsible for ensuring these rights are provided to victims should be identified and notified of any rights associated with these new procedures and standards.

Victims of crime are not a monolithic group; the impact such changes may have on victims cannot be entirely anticipated. However, it is reasonable to assume that any change in a sentence or the conditions of release could cause significant emotional distress and confusion for the victims impacted by these changes. I cannot speak for all victims of homicide and I urge you to seek additional input from victims and advocacy groups about how to minimize the trauma that is experienced when a case is revisited many years after disposition. Procedures that force a victim to revisit a crime can have serious retraumatizing effects upon a victim. It is important to consider how information is communicated to victims

in such cases and to prioritize doing so in a trauma-informed fashion. I strongly advise accounting for this and obtaining input from victims of homicide before making changes to any procedures and standards for juveniles sentenced to life imprisonment in adult court.

Thank you for seeking the input of the Wisconsin Department of Justice, Office of Crime Victim Services. Any meaningful justice system reform must incorporate the interests and rights of crime victims. I appreciate your attention to the impact this issue may have on victims of homicide.

Sincerely,

Michelle L. Viste

Michelle L. Viste
Executive Director

MLV:au

To: Wisconsin Legislative Council
From: Criminal Law Section, State Bar of Wisconsin
Date: October 22, 2020
Re: Criminal Sentencing of Juvenile Offenders

Background

The Criminal Law Section is a voluntary organization within the State Bar, representing criminal defense lawyers, prosecutors, judges, and academicians. Our purposes include, in the words of our by-laws, the adoption of "advocacy positions to promote respect, fairness, and professionalism in the administration of criminal justice in Wisconsin." We understand that the Legislative Council is undertaking a study of criminal sentencing of juvenile offenders. This is an important and timely topic for public discussion—and one with which many of our members have considerable practical experience.

Recommendation

Although there are a number of aspects of current Wisconsin law and practice in this area that warrant attention by policymakers, we would particularly highlight concerns regarding the imposition on juvenile offenders of life sentences that do not ever permit the possibility of future release. For a juvenile convicted in adult court of first-degree intentional homicide, Wisconsin law does not currently distinguish juvenile from adult offenders, thus permitting the imposition of a whole-life sentence on the juvenile. We recommend that all juveniles convicted of this offense be given an opportunity at some point in time to apply for release to the extent that release is warranted by the offender's rehabilitation and lack of ongoing dangerousness.

STATE BAR OF WISCONSIN

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Reasoning

Differentiating juvenile and adult offenders is a commonsense practice. As explained by the United States Supreme Court, juveniles are simply different than adults. *Roper v. Simmons*, 543 U.S. 551, 569 (2005). First, juveniles have an underdeveloped sense of responsibility and lack the maturity of an adult. *Id.* Juveniles make shortsighted decisions that result in miscalculated risk and underappreciated long-term consequences. *Id.* Second, juveniles are more susceptible to peer pressure and surrounding negative influences than adults. *Id.* Third, the character of the juvenile is malleable and less well-formed than that of an adult. *Id.* at 570. "These differences render suspect any conclusion that a juvenile falls among the worst offenders." *Id.* In short, the reduced culpability and enhanced rehabilitative prospects of juvenile offenders make it inappropriate to consign them to a punishment that leaves them with no hope whatsoever of ever leaving prison alive—no matter how long they live and how much they do to turn their lives around behind bars.

Wisconsin has long recognized that juvenile delinquents should be treated differently than adult criminals. Indeed, Wisconsin law dedicates an entire Chapter (938) to criminal process for juvenile offenders, which is separate from the adult criminal process. To be sure, the law also provides for young offenders who commit the most serious crimes to be prosecuted in adult, not juvenile, court. However, the adult venue does not alter the different nature of the juvenile offender, which, at least in some respects, should still be recognized by the law regardless of where the prosecution occurs.

Consistent with these observations and a clear national trend, Wisconsin lawmakers should abolish life-without-release sentences for juveniles.[1] There are a variety of ways that life-sentencing options for juveniles could be restructured. For instance, by way of illustrating one potential option that might be considered, when a juvenile is given a life sentence, the judge could be required to set a time when the juvenile would be eligible to petition for release, no sooner than fifteen years into the prison term at the earliest, with a maximum date for release to extended supervision at the age of 45.[2] Such a structure would not only reflect a due regard for the distinctive

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[1] With the recent additions of Oregon (2019) and Virginia (2020), sentencing juveniles to life terms without the possibility of release is now banned in twenty-nine states and the District of Columbia. CAMPAIGN FOR YOUTH JUSTICE, WINNING THE CAMPAIGN: STATE TRENDS IN FIGHTING THE TREATMENT OF CHILDREN AS ADULTS IN THE CRIMINAL JUSTICE SYSTEM, 2005-2020, at 31 (2020), http://www.campaignforyouthjustice.org/images/reportthumbnails/CFYJ%20Annual%20Report.pdf.

[2] *See, e.g.*, W. Va. Code Ann. § 61-11-23 (West) (requiring parole consideration for juvenile offenders no later than fifteen years into prison term).

nature of the juvenile offender, but also the social science that points to a general pattern of declining criminal activity on the part of most offenders after their teens or early twenties.[3] In determining whether release is appropriate, the considerations should be the protection of the community and the rehabilitation and accountability of the offender. While incarcerated, appropriate counseling, services, and structure need to be provided to offenders to maximize the chances of molding them into productive and responsible members of our society.

Regardless of the specific approach to implementation, eliminating life sentences without possibility of release for juveniles is consistent with the longstanding recognition in Wisconsin law that juveniles are different than adults. This change would bring Wisconsin in line with existing social science research and the spirit of recent Supreme Court cases.[4]

For more information, please do not hesitate to contact our Government Relations Coordinator, Lynne Davis, ldavis@wisbar.org or 608.852.3603.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only. The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

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[3] *See, e.g.*, Jeffrey Todd Ulmer & Darrell J. Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations, in* THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY 337, 337 (Kevin M. Beaver, J.C. Barnes & Brian B. Boutwell, eds. 2014) ("Today, the peak age-crime involvement (the age group with the highest age-specific arrest rate) is younger than 25 for all crimes reported in the FBI's UCR program except gambling, and rates begin to decline in the late teenage years for more than half of the UCR crimes."); Dana Goldstein, *Too Old to Commit Crime?*, N.Y. TIMES, March 20, 2015, https://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html ("Research by the criminologist Alfred Blumstein of Carnegie Mellon and colleagues has found that for the eight serious crimes closely tracked by the F.B.I. — murder, rape, robbery, aggravated assault, burglary, larceny-theft, arson and car theft — five to 10 years is the typical duration that adults commit these crimes, as measured by arrests.").

[4] *Cf.* State v. Bassett, 428 P.3d 343, 355 (Wash. 2018) (holding that sentencing juvenile offenders to life without parole or early release constitutes cruel punishment in violation of state constitution).

STATE BAR OF WISCONSIN

Leaders in the Law. Advocates for Justice.®

MEMORANDUM

To: Wisconsin Legislative Council
From: Lisa Roys, Director of Advocacy and Access to Justice, State Bar of Wisconsin
Date: October 26, 2020
Re: Criminal Sentencing of Juvenile Offenders

The State Bar of Wisconsin, a professional association with more than 25,000 members, has long supported public policy efforts related to juvenile justice, and appreciates the opportunity to share policy recommendations related to sentencing of juvenile offenders in adult criminal court.

While the State Bar has sections that lobby on criminal justice and juvenile law issues on behalf of their membership, the organization also takes legislative positions on general policy items of importance to the legal profession; expressed as Board of Governor policy positions. These positions are taken on behalf of the organization as a whole, often because members or leaders believe these issues have risen to the level of importance that the full State Bar should support these measures.

Two State Bar policy positions directly align with the scope of the Criminal Sentencing of Juvenile Offenders working group, raise the age and juvenile shackling, while one position indirectly aligns with the focus of the report, expungement. We encourage members of the legislature to consider legislation related to each of these policies, as State Bar members believe they will have a positive impact on the juvenile justice system.

Raise the Age

Often referred to as 2nd Chance, the State Bar supports efforts to return first-time, nonviolent 17-year-old offenders to juvenile court jurisdiction.

At this time, all 17-year-olds in WI are considered adults for the purposes of criminal prosecution with no ability to be waived into juvenile court. In January 2021, Wisconsin will be one of only three remaining states that sets the age of criminal responsibility at 17 years, a trend that has been rapidly reversing nationwide.

Studies repeatedly show that youth placed in an adult prison reoffend after release at higher rates than young people placed in a juvenile institution. If treated as juveniles, teens have a better chance to learn from the situation and take steps to find success in the future. By keeping 17-year-olds in adult court, we are preventing them from getting the treatment they need to reduce the risk they will reoffend.

The juvenile system is also more likely to provide services that require a youth to make restitution and/or community service; offers victims the opportunity to participate in victim-

offender dialogue if they choose to do so; and requires youth to participate in treatment services that reduce the likelihood of reoffending.

Juvenile Shackling

The State Bar of Wisconsin opposes the presumption that a juvenile must be shackled when brought to court.

Data from all over the country shows that shackling is not necessary to maintain courtroom safety, while indiscriminate shackling of youth can unnecessarily humiliate, stigmatize, and traumatize them. The practice also impedes the attorney-client relationship, chills juveniles' constitutional right to due process, runs counter to the presumption of innocence, and draws into question the rehabilitative ideals of the juvenile court. In addition, when a young person is brought before a court, the perception of guilt from bringing them in shackles just adds to biases already existing in the system.

As of July 2019, thirty-two states have limited the automatic shackling of children during court proceedings. In many Wisconsin counties, detained youth are shackled in court without any proof that they are a flight or safety risk. The practice impedes the ability of youth to fully process, understand, and participate in their legal proceedings.

With a presumption against indiscriminate shackling, the judge retains the ultimate authority on shackling. Evaluative factors can be utilized by each court to determine whether restraints are necessary. Unless the court makes a judicial determination that the child presents a substantial, present risk of harm or flight, shackling is unnecessary and harmful.

Expungement

This past session, Sen. Darling and Rep. Steffen introduced SB-039/AB-033, which expanded the ability of certain persons to expunge court records. The State Bar of Wisconsin supported that measure, and has a policy position supporting the broad remedial purpose of expungement.

Expungement for those who qualify helps individuals get a fresh start, including many who committed their crimes in their youth and continue to be impacted by those convictions well into adulthood. Over the years, studies have shown time and again even minimal contact with the criminal justice system can have a significant detrimental impact on various aspects of a person's life. The collateral consequences of a criminal record can be a life-long barrier to success, presenting obstacles to employment, housing, education, family reunification and often resulting in significant debt.

The criminal justice system aims to prepare ex-offenders to re-enter society and successfully move forward with their lives upon release from prison, probation, or parole. All too often, however, ex-offenders encounter substantial barriers in attempting to do so, long after paying the price for their past. One of the most significant ways to remove or reduce these barriers is to allow for the expungement of criminal records.

If you have any questions or would like additional information on these recommendations, please contact State Bar lobbyists Lynne Davis, ldavis@wisbar.org (608) 250-6045 or Cale Battles, cbattles@wisbar.org (608) 250-6077.