

A Judicial Bench Card

Sentencing Children Who Have Been Convicted as Adults

Judges must consider specific youth-related factors when sentencing a child.

(VA. CODE ANN. § 16.1-272(D) (2020))

After July 1, 2020, when sentencing a child outside of juvenile court, the court **must** consider:

- the child's exposure to adverse childhood experiences (ACEs), early childhood trauma, and experience with any child welfare agency, and
- the differences between youth and adult offenders.

What are Adverse Childhood Experiences?¹

In 1998, medical researchers introduced the concept of Adverse Childhood Experiences (ACEs). These experiences occur in the homes of children across the country. Researchers found a graded relationship between how many ACEs an individual experienced in childhood and subsequent negative health outcomes in adulthood; meaning, the more ACEs a child experienced, the more physical health problems they had as adults. ACEs include:

- Physical abuse
- Emotional abuse
- Sexual abuse
- Physical neglect
- Emotional neglect
- Family/domestic violence
- Mental illness in home
- Substance abuse issues in home
- Separation from parent(s)
- Parent or sibling incarcerated

Subsequent research has found ACEs are associated with a variety of negative life outcomes, including poor educational attainment, subsequent victimization, and justice system involvement. In 2014, the OJJDP Journal of Juvenile Justice published a study that found 48% of male and 63% of female juvenile offenders in Florida had experienced at least 4 ACEs, and 90% of all youth had experienced 2 or more ACEs.² Researchers have identified other forms of trauma that should also be considered ACEs because they are highly correlated with negative outcomes in adulthood, including:

- Peer bullying/violence
- Experiencing racism
- Foster care involvement
- Poverty
- Experiencing/witnessing community violence

Because their brains are still developing, children are both less culpable for their actions than adults and more amenable to rehabilitation.

The prefrontal cortex, the area of the brain responsible for reasoned decision-making, is not fully developed in children, rendering them less able than adults to plan their actions, assess the long-term consequences of their behavior, control impulses, and solve problems.

- This impulsivity, combined with the inability to consider or appreciate the consequences of their actions, promotes excessive risk-taking.
- Children are more vulnerable to trauma and less able to remove themselves from unhealthy or unsafe situations at home or in the community.
- Children are more vulnerable to the negative influences of peers and adults.
- Because the area of the brain responsible for reasoning and judgment is still developing in children, any criminal or delinquent behavior is likely a reflection of transient immaturity, making children more amenable to rehabilitation than adults.³

Mandatory minimum sentences are disproportionate for children.

- State law requires consideration of youth-related factors at sentencing and allows judges to depart from any mandatory minimum sentence (VA. CODE ANN. § 16.1-272 (2020)).
- Mandatory minimums inherently foreclose full consideration of 1) a child's age; 2) the "hallmark features" of youth, including "immaturity, impetuosity, and failure to appreciate risks and consequences," (*Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)); and 3) the child's family, home, and community environments.
- State courts in Washington (Slip Opinion No. 95578-6, *In re Pers. Restraint of Ali*, 2020; see also *State v. Houston-Sconiers*, 391 P.3d 409, 420 (Wash. 2017)), Massachusetts (*Commonwealth v. Perez*, 80 N.E.3d 967 (Mass. 2017)), and Iowa (*State v. Lyle*, 854 N.W.2d 378 (Iowa 2014)), have found that the imposition of mandatory minimum or presumptive sentences on children violate the requirement of proportionality in sentencing, and are therefore unconstitutional.
- Fairness and uniformity require that judges consider and incorporate youth-related mitigating factors when children face any mandatory minimum sentence.⁴

Judges must craft proportional, age-appropriate sentences for children instead of relying on mandatory minimum sentences.

- Judges are constitutionally required and legally empowered to craft individualized sentences for children convicted of felonies.
- After July 1, 2020, when creating or reviewing the sentence of a child convicted of a felony, the court may:
 - depart from any mandatory minimum, or
 - suspend any applicable sentence. (VA. CODE ANN. § 16.1-272(A)(3) (2020))
- In light of Virginia law, as well as emerging jurisprudence, sentencing judges should begin with the presumption that a mandatory minimum sentence is disproportionate for a child convicted in adult court.

When crafting or reviewing a sentence for a child, judges must:

- Ensure the presentence report contains:
 - A scientifically grounded examination of the total number of ACEs the child has experienced.
 - Details about which ACEs the child has experienced and their impact.
 - Details about any involvement in the child welfare system or similar disruption in the home life of the child such as housing instability or parent/sibling incarceration.
- Seek and consider full information about the following:
 - How the child's experiences with ACEs may have influenced their behavior.
 - How much of the crime was related to peer influences or other youth-related factors.
 - Whether the child has been able to access treatment between the child's offense and their sentencing or re-sentencing and, if so, how the child responded.
- Consider the following questions:
 - Am I viewing this child as if they were an adult who committed this offense, or am I considering their age and experiences at the time of the offense?
 - Am I considering the trauma they experienced as a child and how such trauma impacted them?
 - Would it be developmentally appropriate and constitutionally proportional to give this child the same sentence as an adult who committed a comparable offense?
 - How might unintentional biases I have (about this child's race, gender, socio-economic status, disability, etc.) factor into any decisions I am making?
 - How can I best protect the community and serve this child by ensuring the child receives the most rehabilitative programming possible?
 - Does this sentence serve the best interests of the child and society?

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Sources

¹ For information about the original ACEs research, see Vincent J. Felitti, et al., [*Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: The adverse childhood experiences \(ACE\) study*](#), 14(4) AM. J. OF PREVENTIVE MED. 245 (1998); Maxia Donga, et al., [*The relationship of exposure to childhood sexual abuse to other forms of abuse, neglect, and household dysfunction during childhood*](#), 27 CHILD ABUSE & NEGLECT 625 (2003). For information about subsequent research, see Tracie O. Afifi, et al., [*Confirmatory factor analysis of adverse childhood experiences \(ACEs\) among a community-based sample of parents and adolescents*](#), 20(1) BMC PEDIATRICS 178 (2020); David Finkelhor, et al., [*A revised inventory of Adverse Childhood Experiences*](#), 48 CHILD ABUSE & NEGLECT, 13 (2015); Roy Wade, et al., [*Household and community-level Adverse Childhood Experiences and adult health outcomes in a diverse urban population*](#), 52 CHILD ABUSE & NEGLECT, 135 (2016).

² See Michael T. Baglivio, et al., [*The Prevalence of Adverse Childhood Experiences \(ACE\) in the Lives of Juvenile Offenders*](#), OJJDP Journal of Juvenile Justice, Volume 3, Issue 2, Spring 2014.

³ For information about the diminished culpability of youth and increased amenability to rehabilitation, see Laurence Steinberg & Elizabeth Scott, [*Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*](#), 58(12) Am. Psychologist 1009 (2003); Beatriz Luna, [*The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation*](#), 63(6) Hastings Law J. 1469 (2017).

⁴ See Suzanne S. La Pierre & James Dold, [*The Evolution of Decency: Why Mandatory Minimums and Presumptive Sentencing Schemes Violate the Eighth Amendment for Child Offenders*](#), 27:2 VA. J. OF SOC. POL. & THE LAW 165 (2020).