

JUDICIAL BENCH CARD

Sentencing Children Who Have Been Convicted As Adults

Judges Should Craft Proportional, Age-Appropriate Sentences for Children Instead of Relying on Mandatory Minimum Sentences.

As of October 2021, “when sentencing a minor convicted as an adult, a court:

1. May impose a sentence **less than** the minimum term required under law; and
2. **May not** impose a sentence of life imprisonment without the possibility of parole or release.”

Md. Code Ann., Criminal Procedure, § 6–235

Through this statute, the legislature has given courts great authority to deviate from mandatory minimums when sentencing children. In light of Maryland 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. This document serves as a guide to assist judges in the consideration of critical, relevant factors during sentencing.

Judges are Constitutionally Required and Legally Empowered to Craft Individualized Sentences for Children Convicted of Felonies.

In *Miller v. Alabama* the Court held that mandatory life without parole (LWOP) sentences are unconstitutional and that courts must consider a child defendant’s age and its associated characteristics and circumstances before ordering such a sentence.¹ Some jurisdictions (through common law or statute) have applied *Miller* in the sentencing of children outside of LWOP situations, including other states within the Fourth Circuit.

In Virginia, when sentencing a child outside of juvenile court, courts are required to consider (1) a child’s exposure to ACEs, early childhood trauma, and experience with any child welfare agency, and (2) the differences between youth and adult offenders.²

In West Virginia, when sentencing a child convicted of a felony, courts are required to consider the factors Maryland judges must consider in resentencing cases (see below) as well as (1) impetuosity, (2) intellectual capacity, (3) peer or familiar pressure, (4) ability to participate meaningfully in his or her defense, (5) capacity for rehabilitation, (6) school records and special education evaluations, and (7) faith and community involvement.³

The Supreme Court of South Carolina directed circuit court judges to consider the mitigating factors of youth in cases where minors are subject to circuit court jurisdiction due to their age or charge of certain felonies.⁴

Some states outside the Fourth Circuit similarly require courts to consider the mitigating factors of youth when sentencing children convicted of felonies.

- The Iowa Supreme Court found that the imposition of mandatory minimum or presumptive sentences on children violates the requirement of proportionality in sentencing and is therefore unconstitutional.⁵
- The Washington Supreme Court held that courts must be able to depart from mandatory minimum sentences and are required to consider the mitigating characteristics of youth.⁶
- Nevada statutes allow for departure of mandatory minimums and require courts to consider the characteristics of youth, a child’s diminished culpability, and differences between children and adults.⁷

Judges Should Consider a Youth’s Trauma History

Since the 1990s, researchers have tied childhood trauma to a plethora of negative outcomes, including poor educational attainment, subsequent victimization, and justice system involvement.⁸ The impact of trauma is cumulative—the more trauma a child or youth experiences, the more negative adult outcomes they have.⁹

Youth can experience trauma that impacts them on an individual level, known as Adverse Childhood Experiences (ACEs)¹⁰:

- Physical, Emotional, or Sexual Abuse
- Physical or Emotional Neglect
- Family/Domestic Violence
- Mental Illness or Substance Abuse in Home
- Separation from Parent(s) and Caregiver(s)
- Incarcerated Household or Family Member

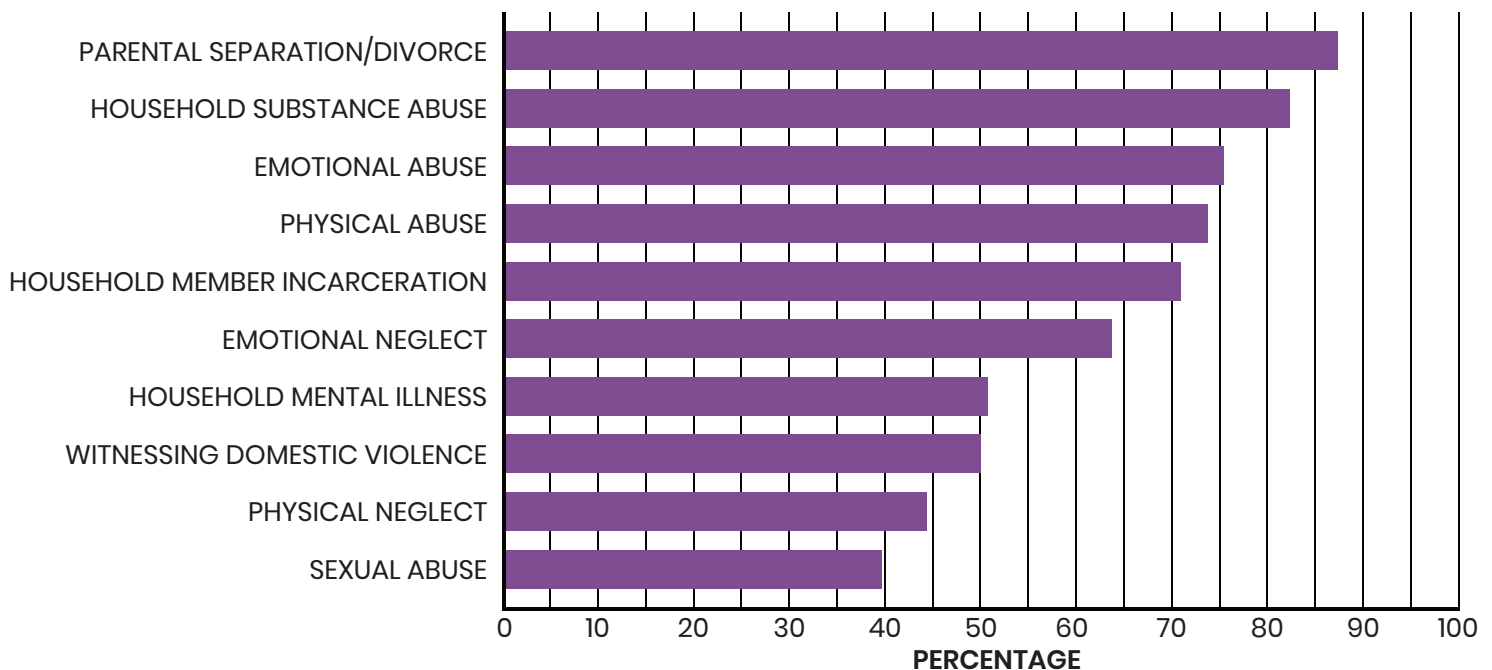
Youth can also experience trauma that impacts them on a collective level, known as Adverse Community Environments¹¹:

- Intergenerational Poverty
- Discrimination
- Community Disruption
- Lack of Opportunity, Economic Mobility, & Social Capital
- Poor Housing Quality & Educational Opportunity
- Violence within the Community

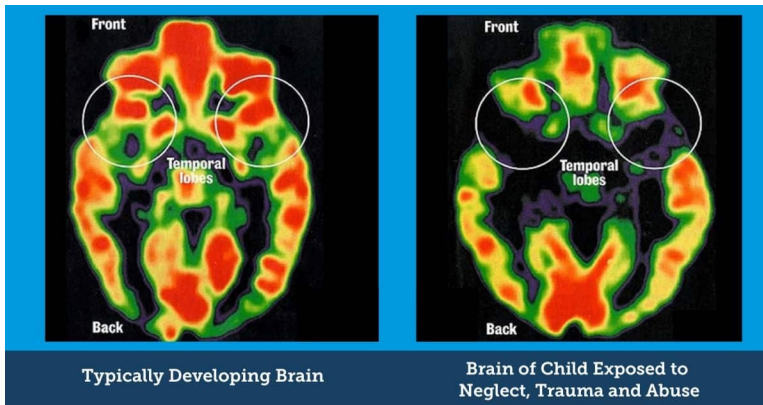
Children convicted as adults in Maryland experienced high rates of ACEs

In a Maryland study of people incarcerated since childhood (92% of whom are racial minorities), every respondent reported experiencing at least one ACE during their childhood and 96% experienced multiple ACEs. Specifically, ACEs were experienced at the following rates:

PREVALENCE OF ACEs IN MARYLANDERS INCARCERATED AS CHILDREN



Tellingly, both abuse and justice system involvement began at young ages. The average age at which respondents first experienced abuse was 6 years old and the average age at which respondents first came into contact with the legal system was 12 years old. Therefore, it is highly probable that a young person before the court has experienced one or more ACEs.



Pediatric imaging studies demonstrate that both cerebral and cerebellar volumes are smaller in abused and neglected youth compared to non-maltreated youth.¹² Smaller cerebral volumes are significantly associated with earlier onset of PTSD trauma which has been linked to adverse brain development in areas responsible for executive functioning.¹³ Thus, childhood trauma can have detrimental effects on the brain networks that establish an individual's ability to think, and regulate their sense of self, motivations, and behaviors.

Because Their Brains are Still Developing, Children are More Amenable to Rehabilitation and Less Culpable for Their Actions Than Adults.

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 is especially true for children with severe trauma histories whose development is even more delayed.

- Children are motivated by short-term rewards and less able to consider long-term outcomes.¹⁴
- Impulsivity, combined with the inability to consider or appreciate the consequences of their actions, promotes excessive risk-taking.
- Children are more vulnerable to trauma—which further compromises a child's ability to learn and make decisions¹⁵—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.¹⁶

Mandatory Minimum Sentences are Disproportionate for Children.

Courts have long acknowledged the impact of brain development on a young person's behavior. Accordingly, Supreme Court cases from the last several decades have confirmed that children's diminished capacity to control their emotions and think long-term compared to adults, means they deserve less punishment.¹⁷

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.

Fairness and uniformity require that judges consider and incorporate youth-related mitigating factors when children face any mandatory minimum sentence.¹⁸

Maryland Resentencing Requirements are Instructive

When the Maryland legislature passed the law permitting judges to deviate from mandatory minimums, it also passed a law allowing children convicted as adults (who were already serving their time) to seek a sentence reduction. Judges are required to consider specific factors in resentencing, including factors pertaining to the hallmarks of youth. Given that the legislature passed both laws to enable judges to treat young people less harshly in sentencing, the youth-related factors judges are required to consider in resentencing requests should also be considered by judges in initial sentencing determinations, including:

1. The individual's age at the time of the offense,
2. The nature of the offense and the history and characteristics of the individual,
3. Whether the individual has completed an educational, vocational, or other program,

4. Any report of a physical, mental, or behavioral examination of the individual conducted by a health professional,
5. The individual's family and community circumstances at the time of the offense, including any history of trauma, abuse, or involvement in the child welfare system,
6. The extent of the individual's role in the offense and whether and to what extent an adult was involved in the offense,
7. The diminished culpability of a juvenile as compared to an adult, including an inability to fully appreciate risks and consequences, and
8. Any other factor the court deems relevant.¹⁹

Applying these considerations to mandatory minimum departure is in accordance with Maryland sentencing guidelines which note that the guides are voluntary and that judges may base their decision on other circumstances pertaining to the crime or because the child does not warrant being sentenced within the guidelines.²⁰

When Crafting a Sentence for a Child, Judges Should 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?
- Am I considering characteristics associated with youth, including the youth-related factors considered in Maryland resentencing hearings?
- Has the child been able to access treatment between the child's offense and their sentencing and, if so, how has the child responded?
- 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?

Endnotes

¹ *Miller v. Alabama*, 567 U.S. 460 (2012)

² VA. CODE ANN. § 16.1-272(D) (2020).

³ West Virginia Code § 61-11-23(c)1-15

⁴ *Jones v. State*, 889 S.E.2d 590, (2023)

⁵ *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014)

⁶ 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)

⁷ NRS 176.017

⁸ 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); 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).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Pair of Aces Tree, Center for Community Resilience, Milken Institute School of Public Health, The George Washington University, https://publichealth.gwu.edu/sites/g/files/zaxdzs4586/files/2023-06/resource-description_pair-of-aces-tree.pdf; see also Ellis W, Dietz WH, Chen KD. Community Resilience: A Dynamic Model for Public Health 3.0. J Public Health Manag Pract. 2022 Jan-Feb 01;28(Suppl 1):S18-S26. doi: 10.1097/PHH.0000000000001413. PMID: 34797257; Pinderhughes, H., Davis, R., & Williams, M. (2015). Adverse community experiences and resilience: A framework for addressing and preventing community trauma. Oakland, CA: Prevention Institute.

¹² Michael D. De Bellis, Abigail Zisk, “The Biological Effects of Childhood Trauma,” Child and Adolescent Psychiatric Clinics of North America, Volume 23, Issue 2, 2014, Pages 185-222.

¹³ *Id.*

¹⁴ https://www.prisonpolicy.org/scans/aba/Juvenile_confessions.pdf

¹⁵ <https://www.cdc.gov/aces/about/index.html>

¹⁶ 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).

¹⁷ *Thompson v Oklahoma*, 487 U.S. 815 (1988)

¹⁸ 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).

¹⁹ Maryland Code, Criminal Procedure § 8-110 (d)(1),(2), (4), (7)-(11)

²⁰ <https://msccsp.org/guidelines/departure/>