

# Prosecutor Guidance for Child Defendants

**RISE for Youth** and **Human Rights for Kids** urge Commonwealth Attorneys to consider the following youth-related factors as *guidance* when deciding:

- (1) Whether to charge a child as an adult;
- (2) What crime to charge a child with (in light of the sentence he or she may face); and
- (3) What sentence to recommend to the court upon conviction.

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

## What are Adverse Childhood Experiences?

In 1998, medical researchers introduced the concept of Adverse Childhood Experiences (ACEs). These seven experiences, which the researchers subsequently expanded to a list of ten, occurred in the home of children across the country. Researches founded a graded relationship between how many ACEs an individual experienced 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
- Physical neglect
- Mental illness in home
- Separation from parent(s)
- Emotional abuse
- Emotional neglect
- Substance abuse issues in home
- Household member incarcerated
- Sexual abuse
- Family/domestic violence

Subsequent research has found ACEs are associated with a variety of negative outcomes, including poor physical and mental health, victimization, and justice system involvement. Additionally, researchers have identified other childhood experiences that should be considered ACEs as they are also highly correlated with negative outcomes in adulthood, such as the following:

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

## **Children are developmentally different from adults and therefore less culpable for their actions.**

- Because children’s brains are not fully developed, they are less mature and less able to assess long-term consequences of their behavior.
- Children are more impulsive and more willing to take risks than adults.
- 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 negative influence by their peers and by adults.
- Due to their ongoing brain development, children are more amenable to rehabilitation than adults.

## **When deciding whether to try a child as an adult, what offense to charge them with, and what sentence to recommend, consider the following:**

- The total number of ACEs the child has experienced
- Details about which ACEs the child has experienced
- Involvement in the child welfare system
- How the child’s experiences with ACEs may have influenced their behavior.

## **Deciding what crimes to charge and what venue to proceed in is a critical point in a child defendant’s life. It is important that such a determination is made only after evaluating all of the circumstances in the child’s life that led up to the alleged offense.**

- As a general matter, Prosecutors should decline to prosecute children under 16 in criminal court.
- For child defendants whose rehabilitative needs exceeds the time available in juvenile court, or where additional public safety concerns dictate prolonged state supervision, prosecutors should pursue a ‘Serious Youthful Offender’ designation.

### **Courts are empowered to depart from mandatory minimums when sentencing children.**

(VA. CODE ANN. § 16.1-272(A)(3) (2020))

After July 1, 2020, when sentencing a child convicted of a felony, the court may:

- depart from any mandatory minimum, or
- suspend any applicable sentence.

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**Sentencing recommendations are also a key component of how the courts will treat children convicted as adults. The ability of the court to depart from mandatory minimums is key to crafting proportional, trauma-informed, and age-appropriate sentences for children.**

- State law requires consideration of youth-related factors at sentencing. VA. CODE ANN. § 16.1-272(D) (2020). Mandatory minimums inherently prevent full consideration of a child’s age, the “hallmark features” of youth, including “immaturity, impetuosity, and failure to appreciate risks and consequences,” and the family, home, and community environments of the child. *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).
- Fairness and uniformity require that judges consider and incorporate youth-related mitigating factors when children face any mandatory minimum sentence. 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).

**When recommending a sentence to the court for a child defendant, consider the following:**

- Am I viewing this child as if they were an adult who committed this offense, or am I considering their age 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 the sentence I am recommending?
- What sentence can I recommend that holds this child accountable for the harm caused while ensuring the child returns to the community rehabilitated?
- 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?