

Testimony in Support of House Bill 1437 (2020)

Juveniles Convicted as Adults – Sentencing – Limitations and Reduction
Juvenile Restoration Act
Before the Judiciary Committee: March 5, 2020

House Bill 1437, cross-filed with Senate Bill 1038, would alter sentencing for juveniles convicted as adults in a few ways. First, the bill authorizes a court to impose a sentence less than the minimum term required by law—the mandatory minimum—for youth tried as adults. Second, the bill prohibits a court from imposing on a minor the sentence of life without the possibility of parole, regardless of the offense. Finally, House Bill 1437 creates a process through which a minor tried as an adult may seek a sentence reduction. This would only be available if the individual has been imprisoned for at least twenty years, does not pose a danger to the public, and the interests of justice will be better served by a reduced sentence.

These provisions reflect the rehabilitative goal of our justice system, particularly as applied to juveniles for whom culpability is reduced. Although all three elements serve that purpose, this testimony focuses on the policy issues surrounding mandatory minimum sentences for juvenile offenders in adult court.

Our Criminal Justice System is Designed for Adults, Yet Juvenile Culpability is Different

Every state in our nation has laws restricting children from voting, serving on juries, purchasing alcohol, marrying, and other activities. In fact, Congress recently raised to 21 the age for access to tobacco products. These laws recognize that children do not have the mental or emotional maturity that adults have to exercise judgment or to make certain decisions.¹ Yet when a child commits a criminal offense and is tried in adult court, the justifications for those protective laws are overlooked. Worse, when a child tried as an adult is subject to an adult mandatory minimum sentence, those justifications are ignored entirely. House Bill 1437 would acknowledge those underlying justifications and protect children who engage in impulsive, criminal behavior from being subjected to mandatory minimum sentences in adult court.

Our commonsense understanding that children are different from adults is supported by scientific and social science research. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy discussed the three general differences between juveniles under the age of eighteen and adults: (1) a lack of maturity; (2) increased vulnerability to environmental influences; and (3) personality traits that are "more transitory, less fixed." Justice Kennedy relied on research by the neuropsychologist Laurence Steinberg, who adequately explained the differences in the ways adolescents and adults approach risk-taking. Steinberg wrote that risk taking declines between adolescence and adulthood because (1) "the maturation of the cognitive control system, as evidenced by structural and functional changes in the prefrontal cortex, strengthens individuals'

¹ Carolyn B. Lamm, *Youth Offenders Deserve a Chance for Rehabilitation*, Roll Call, 2009. Available at <https://www.rollcall.com/2009/11/11/youth-offenders-deserve-a-chance-for-rehabilitation/>. Accessed 2-22-20.

abilities to engage in longer-term planning and inhibit impulsive behavior”; (2) “the maturation of connections across cortical areas and between cortical and subcortical regions facilitates the coordination of cognition and affect, which permits individuals to better modulate socially and emotionally aroused inclinations with deliberative reasoning and, conversely, to modulate excessively deliberative decision-making with social and emotional information”; and (3) “there may be developmental changes in patterns of neurotransmission after adolescence that change reward salience and reward-seeking.”² Research shows that children’s inability to conform their behavior to adult standards is not a moral failing, but rather a normal developmental step along the way to developing character.³

Interestingly, experts in neuroscience, social science, and psychology all agree that the same immaturity and flexibility that make teenagers more susceptible to outside influences contributing to their decision to initially commit a crime, also makes them *strong candidates for rehabilitation*.⁴ Studies show that adolescents are more capable of rehabilitation than adults, either as a result of natural maturation or through the intervention of criminal sanctions.⁵ Juveniles’ diminished culpability and strong capacity for rehabilitation are persuasive reasons to depart from mandatory minimum sentences that are inappropriate to the unique situation of juvenile offenders.

Mandatory Minimum Sentencing is a Flawed Policy

Mandatory minimum sentencing, in which the legislature sets a floor below which a judge cannot set a sentence, is flawed policy.⁶ This is even more acute with respect to juveniles. Supreme Court jurisprudence and social science supports that mandatory minimums should not be applied to minors.

The “tough on crime” era, beginning in the 1980s and 1990s, shifted the manner in which the criminal justice system treated juveniles.⁷ During this time two major principles emerged—first, courts were increasingly allowing prosecutors to charge juveniles as adults and viewing them not as children or delinquents, but as equally culpable as adults; second, legislatures were requiring courts to impose mandatory minimum sentences and abolishing parole for all convicted offenders, regardless of age.⁸ Under each of these principles, the legislature or prosecutor focused more on the offense committed, rather than the individual offender.⁹ Rather than treating

² Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78, 99 (2008).

³ *Id.*

⁴ See Carolyn B. Lamm, *supra* note 1.

⁵ *Id.*

⁶ Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework Of The Armed Career Criminal Act And Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 208 (Nov. 2019).

⁷ Caroline Ford, ‘Children Are Different:’ Sentencing Juveniles as Adults, Pulitzer Center, 2019. Available at <https://pulitzercenter.org/blog/children-are-different-sentencing-juveniles-adults>. Accessed 2-18-20.

⁸ *Id.*

⁹ *Id.*

people as individuals, defendants are categorized into groups solely based on their crime, and they are punished for at least a minimum term according to the statute, which has a dehumanizing effect. For crimes that carry mandatory minimums, judges are deprived of discretion, meaning that their consideration of the background of the defendant or the actual circumstances of the offense has only minimal impact on the sentence.¹⁰

The primary goal of mandatory minimum sentencing laws is to promote uniformity by limiting the possibility of irregularity of outcomes and to reduce sentencing disparities.¹¹ However, the adoption of mandatory minimums has not led to a fairer system; to some extent, it has had the opposite effect. By lumping together individuals with differing levels of culpability for the same mandatory minimum punishments, juvenile offenders received punishments disproportionate to their culpability.¹² Additionally, the functional transfer of sentencing authority from trial judges to prosecutors has exacerbated disparities, because prosecutors can choose what charges to bring, asserting mandatory minimum charges for some defendants and not for others. Prosecutors can use mandatory minimums to unfairly persuade defendants to plead guilty to other offenses to avoid the risk of a mandatory minimum sentence¹³ This gives prosecutors more tools to use in their inequitable charging and negotiating practices. Moreover, the history of mandatory minimums shows that they do not reduce crime; instead, mandatory minimums too often result in arbitrary and severe punishment.¹⁴ In 2020, we should acknowledge that mandatory minimums virtually eliminate judicial discretion, provide excessive power to prosecutors, and do not result in more balanced sentencing. No judge should be constrained by the failed mandatory minimum sentencing laws when determining the best approach for sentencing juveniles for whom rehabilitation is quite likely.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that juvenile life sentences without parole are unconstitutional for all crimes including murder. Justice Kagan explained that a mandatory life sentence without parole for a person under the age of eighteen violates the 8th Amendment's prohibition on cruel and unusual punishments, finding such a sentence to be excessive.¹⁵ Rather, the sentencing authority must take into account how children are different and how those differences caution against sentencing them to a lifetime in prison.¹⁶ Moreover, in *Miller*, the Supreme Court mandated individualized sentencing for juveniles.¹⁷ This sentencing process allows a defense attorney to present a comprehensive narrative of the juvenile's diminished culpability, as an alternative approach to mandatory minimum sentencing. Thus, the Maryland General Assembly should respond to the foundation set forth in *Miller* and

¹⁰ *Id.*

¹¹ Anjelica Cappellino and John Meringolo, *The Federal Sentencing Guidelines And The Pursuit Of Fair And Just Sentences*, 77 ALB. L. REV. 771, 816 (2014).

¹² See Rachel E. Barkow, *supra* note 7 at 201.

¹³ *Id.*

¹⁴ Kendra Roth, *Judicial Sentencing for Sexual Assault: Why Mandatory Minimum Penalties Are Not The Answer*, 2017 LIBERTY LAW. 10 (2017).

¹⁵ *Miller v. Alabama*, 567 U.S. 460, 465, 469 (2012).

¹⁶ *Id.*

¹⁷ *Id.*

ban mandatory minimums for juveniles in adult court because they are a disproportionate punishment for juvenile offenders.

Adverse childhood experiences and early childhood trauma is directly connected to criminal behavior in children. The upbringing and childhood experiences of juvenile offenders varies, but they are often marked by very tumultuous upbringings that include frequent exposure to violence and often being victims of abuse themselves.¹⁸ In 2012, The Sentencing Project studied individuals sentenced to life as juveniles and found that (1) 79% of these individuals witnessed violence in their homes regularly; (2) fewer than half were attending school at the time of their offense; (3) 47% were physically abused, and 80% of girls reported histories of physical abuse; and (5) 77% of girls reported histories of sexual abuse.¹⁹ Judges should be able to consider these factors to provide a more comprehensive understanding of what is going on in a child's life when determining the appropriate rehabilitative sentence for a minor.

Judges Don't Like Mandatory Minimums

Judges are not supportive of mandatory minimums because they interfere with judicial discretion.²⁰ Mandatory minimums shift sentencing power away from judges and toward prosecutors who have vast discretion over what charges to bring, and whether to charge under a statute requiring mandatory minimum sentences.²¹ Consequently, when a juvenile is charged under a mandatory minimum statute, a judge cannot exercise compassion or impose a rational sentence that reflects juvenile culpability and the possibility of rehabilitation. Rather, mandatory minimum laws have obliged judges to put juveniles in prison for lengthy periods of time despite the judge's personal opposition to the punishment. Justice Stephen Breyer and Justice Anthony Kennedy have both spoken out publicly against mandatory minimums; Justice Breyer stated that setting mandatory minimum sentences for specific crimes was "a terrible idea" and Justice Kennedy stated that he could not "accept neither the necessity nor the wisdom of federal mandatory minimum sentences."²² In a 2010 survey of federal district court judges, 62% said

¹⁸ Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project, 2019. Available at <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>. Accessed 2-20-20.

¹⁹ *Id.*

²⁰ Ava Shahani, *The Time Does Not Fit The Crime: Eliminating Mandatory Minimums For Nonviolent Drug Offenders In Favor Of Judicial Discretion*, 23 SW. J. INT'L L. 445, 454 (2017).

²¹ William W. Berry III, *Individualized Sentencing*, 76 Wash. & Lee L. Rev. 13 (Winter 2019).

²² Jess Bravin, *Two Supreme Court Justices Say Criminal-Justice System Isn't Working*, The Wall Street Journal, 2015. Available at <https://www.wsj.com/articles/two-supreme-court-justices-say-criminal-justice-system-isnt-working-1427197613>. Accessed 2-24-20; See, e.g., Marcia Coyle, *Judges Give Thumbs Down to Crack, Pot, Porn Mandatory Minimums*, NAT'L L.J., June 16, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202462736591>.

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mandatory minimums were too harsh.²³ Additionally, some judges have gone as far as resigning from their jobs because they felt so strongly against mandatory minimums.²⁴

Conclusion

House Bill 1437 recognizes that juveniles are fundamentally different from adult offenders, and the need to give judges discretion in their ability to depart from mandatory minimums when sentencing a juvenile in adult court. Under House Bill 1437, juveniles who commit crimes would still be held responsible for their actions, but they would be held responsible with the understanding that they are children or adolescents who are still maturing and have the ability to be rehabilitated.

This testimony was prepared by Brooke Kasoff, Student attorney, and is submitted on behalf of the Public Health Law Clinic at the University of Maryland Carey School of Law and not by the School of Law, the University of Maryland, Baltimore, or the University of Maryland System.

²³ Judge Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison*, *The Nation*, (2012). Available at <https://www.thenation.com/article/archive/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri/>. Accessed 3-4-20.

²⁴ *A Federal Judge Says Mandatory Minimum Sentences Often Don't Fit The Crime*, NPR, 2017. Available at <https://www.npr.org/2017/06/01/531004316/a-federal-judge-says-mandatory-minimum-sentences-often-dont-fit-the-crime>. Accessed 2-22-20.