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## **POSITION ON PROPOSED LEGISLATION**

<b>BILL: HB754 (CROSS-FILED WITH SB 769)</b>
<b>FROM: Maryland Office of the Public Defender</b>
<b>POSITION: Favorable With Amendments</b>
<b>DATE: February 15, 2022</b>

The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on HB754, with amendments to remove subsection (C)(3) (page 3, lines 8-15) to match the text of SB769.

The U.S. Supreme Court has repeatedly held that “youth is more than a chronological fact” and the most severe penalties should not be “imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”<sup>1</sup> This bill gives judges needed guidance for determining what factors to weigh when examining the diminished culpability of young people.

The hallmark of all children, including early adolescents (age 11-14) and late adolescents (age 14-18), is that their brains are still growing and changing. Those changes continue through late adolescence and into early adulthood.<sup>2</sup> A simple truth most of us recall: adolescence is a time of heightened sensation-seeking and risk-taking behavior where the opinions of our peers has an outsized, heightened importance.<sup>3</sup> Over the past 25 years, neuroscientists have gained a more full

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<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551, 570 (2005)

<sup>2</sup> Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as *Amici Curiae* in Support of Neither Party, *Graham v. FL*, Nos. 08-7412, 08-7621 (hereinafter *AMA Graham Brief*), 15, *citing* B.J. Casey et al., *The Adolescent Brain*, 28 *Developmental Rev.* 62, 68 (2008). *See also*, Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 *Proc. Nat’l Acad. Sci.* 8174, 8177 (2004); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 *Nature Neurosci.* 861 (1999); Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 *Developmental Med. & Child Neurology* 4 (2002); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 *J. Neurosci.* 8819 (2001); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 *Nature Neurosci.* 859 (1999).

<sup>3</sup> Need CITE

understanding of the biological basis for these adolescent behaviors.<sup>4</sup> Specifically the prefrontal cortex, and limbic and paralimbic systems are acting as competing systems during adolescence. The pre-frontal cortex is the part of our brain that enables us to intentionally control our emotional responses, and engage in planning and organization by assessing risk, evaluating potential rewards and consequences, and controlling our impulses.<sup>5</sup> While the cognitive and executive functioning areas of the adolescent brain are weak and underdeveloped; areas of the brain's limbic and paralimbic system associated with impulsivity and emotion are intensely active. For example, the amygdala, which detects and initiates reactions to perceived danger, is often more highly active in children and adolescents, resulting in adolescents engaging in disproportionate fight or flight responses.<sup>6</sup> In other words, at the same time, the adolescent's prefrontal cortex is not developed enough to override and control signals from the amygdala, the amygdala is more actively directing the child to act aggressively than will be the case in adulthood.

I have seen this play out in many of my cases, but most recently in that of my client Andrew Zaragoza. This committee heard some of his testimony on February 10 in support of HB94, but to briefly summarize, when Andrew stood up to his sexually abusive mother and told her he was calling child protective services, she stabbed him. Andrew had never physically fought back when his mother molested him on other occasions, but after years of abuse he could not take it any more. This occasion was different because in his words "I just wanted her to stop and I was afraid she was going to kill me." As an adolescent, his amygdala would have been over-producing the hormones (cortisol and adrenaline) that cause the physical sensations that tell us

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<sup>4</sup> The biological processes of myelination and gray matter pruning are visible neurologic processes that demonstrates the measurable differences between the brains of adolescents and adults. Myelination is a process through which myelin (a fatty substance, and the brain's "white matter") coats the neuron axons that carry information throughout the brain and nervous system. Like an unisulated wire, an axon without myelin, can not transmit information reliably and quickly from one part of the brain to another. AMA *Graham* Brief, 23, citing Elkhonon Goldberg, *The Executive Brain: Frontal Lobes & the Civilized Mind* 144 (Oxford Univ. Press, 2001). Gray matter is composed of neurons on the brain's surface that "perform the brain's tasks." AMA *Graham* Brief at 19. Magnetic resonance imaging has vastly improved neuroscientific understanding of the pruning process and its relationship to executive functioning. *Id.* at 20. There is an observable "blossom[ing]" of gray matter during adolescence that then decreases. *Id.*, citing Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 *Brain & Cognition* 73, 85 (2002); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 *Nature Neurosci.* (1999). Pruning down gray matter leads to greater efficiency of neural processing and strengthens the brain's ability to reason and consistently exercise good judgment. Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 *Brain & Cognition* 73 (2002) (subjects of study aged 10 to 22 years); B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 *Biological Psychol.* 241, 241 (2000) ("findings are consistent with the view that increasing cognitive capacity during childhood coincides with a gradual loss rather than formation of new synapses"); see also Daniel J. Siegel, *The Developing Mind: Toward a Neurobiology of Interpersonal Experience* 13-14 (Guilford Press 1999).

<sup>5</sup> Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 *Nature Neurosci.* 859, 860 (1999).

<sup>6</sup> Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as *Amici Curiae* in Support of Neither Party, *Graham v. FL*, Nos. 08-7412, 08-7621, citing, *inter alia*, Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 *J. Am. Acad. Child & Adolescent Psychiatry* 1, 1 (1999); William D.S. Killgore & Deborah Yurgelun-Todd, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 *Neuroimage* 1215 (2004).

we are in danger,<sup>7</sup> while his under-developed pre-frontal cortex would have had more difficulty accurately assessing when the danger was over. After his mother stabbed him in the chest, he picked up a hammer laying on a nearby dresser and hit her in the head. Andrew's mother dropped the knife she used to stab him, and because she was still screaming that she was going to kill him, he picked up that knife and stabbed her. The State's Attorney argued stabbing her was evidence of premeditation. But as a 16 year old, and in that moment of panic, Andrew couldn't see – the way an older person may have - that at that point it might be safe to run. I say might, because none of us ever really knows what it's like to be in a situation like that, and it's impossible to truly know when someone else would, in fact, have been safe- even in hindsight.

The jury found Andrew not guilty of First Degree (premeditated) Murder, but found him guilty of Second Degree Murder (without premeditation or deliberation). Interestingly, one of the questions asked by the jury was whether someone is permitted to use lethal force to defend against a sexual assault. At sentencing the Judge was presented with information about his youth and its attendant characteristics, and sentenced him to serve 15 years (half of the then statutory maximum) and recommended the DOC's Patuxent Youth Program, which is where he is currently housed.

The judge in Andrew's case was not required to specifically consider his youth. This bill would require a judge to examine a child victim who commits a crime capacity for rehabilitation, their ability to appreciate risks and understand the consequences of their actions, their prior exposure to adverse childhood experiences and trauma, and to make a record of how those considerations impacted the sentence imposed.

Although neither peer nor familial pressure were present in Andrew's case, I have represented more children than I can remember for whom this was a factor in the commission of their criminal acts. I have represented children who were breaking into cars in order to steal items that parents would then pawn. I have represented children who sold drugs in order to financially support their parents and siblings because part time minimum wage jobs don't earn enough income. As police often say, drug dealing and guns go hand in hand; and some of those children have shot people when those drug deals have gone awry.

As a juvenile defender, I know the mere presence of peers is a factor in the commission of many criminal acts. For example, I have represented kids who were part of a group when one member of the group decided to demand money, cell phones, and in one instance Pokémon cards, from another kid. In some of those situations the complainant felt surrounded by the group of kids and that fear of being surrounded was enough to make them give up the item in question. In some situations one of the group punched the complainant, or displayed a weapon that some of the other members of the group didn't know he had. When I ask my clients questions like why they didn't do choose a different course of action, stand up to their friend, or simply walk away, the answers are often "I don't know" and "I didn't think of that." Peer influence is a factor in those cases. I say peer influence rather than peer pressure because studies have determined that no actual pressure need to be applied in order for kids to feel the effects of peer pressure. "Strikingly, mere awareness

that peers were watching encouraged risky behavior among juveniles, but not adults.<sup>8</sup> Neuroimaging also shows different activation in different brain areas across the experimental variables. Adults showed significantly greater activation in brain regions involved in executive functions and the regulation of impulses, whether or not they were being observed by peers. By contrast, adolescents showed significantly greater activation in brain areas associated with reward processing when they were told that their peers were watching than when they were not being observed.<sup>9</sup> This is true of even our best and brightest adolescents and young adults- as a study among college students learned.<sup>10</sup>

This means that even our best, most well behaved, and brightest, most-resourced, adolescents will sometimes make bad decisions when with their friends without being able to articulate why they did them or why they didn't do something differently. The majority of children I represent have mental illness, or intellectual disabilities, or experience adverse childhood experiences like living in chaotic homes and under-resourced, over-policed, and unsafe neighborhoods. For those children, the realities of an adolescent brain combined with peer influence is a recipe for poor decision making that can be addressed through rehabilitative services.

The factors outlined in HB754 have real and tangible meaning for children who commit criminal acts. These factors can, and should, be considered by sentencing judges for all children. HB 754 acknowledges that youth, especially those who have been abused and neglected, should be offered treatment and rehabilitation instead of retribution and incarceration. Understanding that long-term results for youth who commit even serious crimes are best achieved in the youth justice system, our support is contingent on amending the bill to remove subsection (C)(3) (page 3, lines 8-15) to match the text of SB769. This amendment would reflect the available research, and would achieve the goals of rehabilitating instead of punishing trauma-exposed youth. Without the amendment, this bill will create a new pathway to incarcerate vulnerable youth in Maryland. Given that imprisoning children makes us all less safe, this is something we should avoid at all costs

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<sup>8</sup> *Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, Miller v. Alabama*, 567 U.S. 460132 S.Ct. 2455 (2012) (Internal citations omitted).

<sup>9</sup> Chein J, Albert D, O'Brien L, Uckert K, Steinberg L. Peers increase adolescent risk taking by enhancing activity in the brain's reward circuitry. *Dev Sci*. 2011 Mar;14(2):F1-10. doi: 10.1111/j.1467-7687.2010.01035.x. PMID: 21499511; PMCID: PMC3075496. Smith, A. R., Chein, J., & Steinberg, L. (2014, January 20). Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known. *Developmental Psychology*.

<sup>10</sup> Jason Chein, *Peers and Adolescent Risk Taking*, Emerging Trends in the Social and Behavioral Sciences. John Wiley and Sons, 2015).