MARYLAND OFFICE OF THE PUBLIC DEFENDER

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POSITION ON PROPOSED LEGISLATION

BILL: Juvenile Justice Restoration Act of 2024 - House Bill 319

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: February 6, 2024

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 319.

Background. The 2022 General Assembly implemented evidence-based reforms to the juvenile justice system in efforts to limit youth incarceration and reallocate resources towards data-driven, evidence-based programming for at-risk youth. Despite growing fears of juvenile delinquency, there is also a growing awareness around the country that juvenile justice systems which focus on community resources can reduce costs and yield better outcomes with fewer racial disparities.

Maryland's success in raising the age of juvenile court jurisdiction to 13 brought Maryland in line with international human rights standards. House Bill 319 would be a critical misstep for Marylanders and places their youngest at risk.

As the Committee is aware, until 2022, Maryland did not have a minimum age of criminal responsibility, in violation of widely accepted international human rights standards. Prior to passing a minimum age, Maryland regularly charged elementary school children – some as young as *six* years old – with delinquent acts.[1] To put these age limits in context, a typical 10 year old will be in either the 4th or the 5th grade. As such, Maryland law requires that children must be at least 13 years old in order to be responsible enough to babysit.[2]

House Bill 319 openly flouts this progress the 2022 General Assembly made in raising the age of juvenile court jurisdiction. Under the proposed law, a child of age 10, 11, or 12, who is too immature to babysit, would be deemed mature enough to be responsible for possession of a

[1] Prior to 1994, Maryland relied on the common-law doctrine of *doli incapax*, which held that from age 7 to 14 children were presumed not to have criminal capacity and required the prosecution to prove criminal capacity beyond a reasonable doubt. The presumption of infancy was removed by the legislature in 1994. In re Devon T., 85 Md. App. 674 (1991); Acts 1994, c. 629, § 1, eff. Oct. 1, 1994.
[2] Maryland Code Annotated, Family Law Article §8-501.

firearm or handgun, and can be brought to court if they are merely ***arrested*** for two or more incidents. This law presents numerous issues of moral and legal significance and carries the potential to lead to untenable and counterproductive results.

Executive Functioning and Felonious Intent. The proposed legislation harms children ages 10-12 if they are ***alleged*** to have committed a crime involving the use or possession of a firearm, or if the child is ***arrested*** for ***any crime*** on two prior occasions. These proposed amendments in House Bill 319 subject very young children in their pre-teenage years to the judicial system, despite the opinions of scientists and the United States Supreme Court that age is inextricably linked to culpability.[3]

Executive functioning refers to the cognitive processes that direct, coordinate, and control other cognitive functions and behavior, including inhibition, attention, and self-directed execution of actions. While there is ample research related to adolescent executive functioning and youth justice policy, but because *so few places prosecute very young kids*, there is comparatively little research about *pre*-adolescent children in the youth justice systems. The majority of research regarding executive functioning in pre-adolescents has focused on implications for education and occupational therapy. However, it would be nonsensical to ignore that the executive functioning of an elementary or middle school-aged child is vastly different than that of a high school student. Discussions of executive functioning, while scientific, are critical to understanding the legal concept of felonious intent.

One-Third of Thirteen Year Olds Are Incompetent to Stand Trial. Compounding this error, children under the age of 13 are statistically unlikely to be competent to stand trial.[4] Pre-adolescent children demonstrate poor understanding of trial matters, in addition to poorer reasoning and ability to recognize relevant information for a legal defense. In fact, 1/3 of children under 13 function with impairments at a level comparable with mentally ill adults who have been found incompetent to stand trial.[5] In 2020, the Maryland Department of Health's

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[3] Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2010), J.D.B. v. North Carolina, 564 U.S. 261.

[4] Bath, E., & Gerring, J. (2014). National trends in juvenile competency to stand trial. *Journal of the American Academy of Child & Adolescent Psychiatry, 53*, 265-268, Bonnie, R. J., & Grisso, T. (2000). Adjudicative competence and youthful offenders. In T. Grisso & R. G. Schwartz (Eds.), *Youth on trial: A developmental perspective on juvenile* justice (pp. 73-103). Chicago, IL: University of Chicago Press; Costanza, M. B. (2017). *The development of competency to stand trial-related abilities in a sample of juvenile offenders* (Doctoral dissertation). Retrieved from ProQuest; Grisso, T. (2014). Protections for juveniles in self-incriminating legal contexts, developmentally considered. *The Journal of the American Judges Association, 50*(1), 32-36*;* Grisso, T. (2005). *Evaluating juveniles' adjudicative competence: A guide for clinical practice*. Sarasota, FL: Professional Resource Press; Grisso, T. (2004). *Double jeopardy: Adolescent offenders with mental disorders*. Chicago, IL: University of Chicago Press; Grisso, T., & Kavanaugh, A. (2016). Prospects for developmental evidence in juvenile sentencing based on *Miller v. Alabama*. *Psychology, Public Policy, and Law, 22*(3), 235-249; Lawrence Steinberg, *Adolescent Development and Juvenile Justice*, Annual Review of Clinical Psychology (2009).

[5] Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N. D., & Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior, 27*(4)*,* 333-363. https://doi.org/10.1023/A:1024065015717;

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Juvenile Forensic Services Office gave a presentation to the State Advisory Board for Juvenile Services which included statistical information about children who were found incompetent to stand trial. In the three year span discussed, between 63% and 74% of the children under 13 years old who were evaluated were found incompetent to stand trial. Given the established fact that 1/3 of children under 13 are likely incompetent to stand trial, failing to raise competency in most cases for very young Respondents would amount to ineffective assistance of counsel. Evaluating competency is a cost intensive process that can take years to resolve.[6] As a result, the youngest children to be prosecuted in our system—who are the least culpable—often do not face court intervention until months or years after their alleged misbehavior.

Prosecuting a population of children who statistically are less likely to be competent to stand trial would be a dire mistake. When children are found incompetent to stand trial the case itself is on hold, and no therapeutic or rehabilitative services are implemented until the child either attains competency or the case is dismissed. This means that these children get none of the services they need, and which they could access through either the Department of Social Services or DJS through either Child in Need of Assistance (CINA) or Child in Need of Services (CINS) proceedings. In order for rehabilitation to work, children need to be held accountable for wrongdoing in a fair process that promotes healthy moral development.[7] This process results in children being prosecuted and penalized long after the underlying incident, and leads children to perceive the legal system as unjust. Distrust in the system reinforces delinquent behavior, does not foster prosocial development, and increases recidivism.[8] This directly thwarts the goals of treatment, guidance, and rehabilitation which are the goals of the juvenile court system, and places children at greater risk because they are being prosecuted rather than treated in other systems.

Ethics and Equal Protection for Children Ages 10-12. Requiring that a child specifically within the ages of 10-12 come within the Juvenile Court Jurisdiction for two or more arrests, and for ***any*** crime, is an ethical and equal protection issue. There is no rational basis for treating younger children more harshly than older adolescents. If a youth is displaying behavior that requires the attention of the police at the age of 10, 11, 12 years old, the rational response is to assess what needs the child has that are not being met within the community—through the CINS Petition Process, Diversion, School-Based or Community Programming, among others—not to require they be charged with delinquency and appear in a court system they statistically do not understand.

Proponents are urging higher penalties for children under the age of 13 who are arrested on multiple occasions, but to what end? Moreover, under the current Juvenile Causes Act, if a youth is found to have committed a firearm or gun-related offense, the Court has the discretion to

[6] Md. CJ 3-8A-17-17.8
[7] National Academies of Science, *Reforming Juvenile Justice: A Developmental Approach* (2013) pg 183-210.
[8] National Research Council 2014. Implementing Juvenile Justice Reform: The Federal Role. Washington, DC: The National Academies Press. https://doi.org/10.17226/18753 at 17.

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impose the highest penalties available in the juvenile system: commitment to the Department of Juvenile Services until age 21.[9] This outcome is true regardless of the age of the child, and the Juvenile Courts currently have jurisdiction over children ages 10-12 who commit crimes of violence, which include crimes involving the use of a handgun or firearm.[10] If a youth is suspected of possession of a firearm, the needs of that child can more swiftly be addressed outside of a court system that would require their attorney to assess for competency and delay the process of providing services to that child and their family.

Legal scholars have long recognized that laws must be coherent, clear, stable, and practicable for the Rule of Law to be sustained.[11] A system that more severely penalizes the youngest children in our system, ***based upon two arrests***, and subjects them to potential removal from their homes and families, could lead children to perceive the legal system as unjust. Such distrust reinforces delinquent behavior, detracts from prosocial development, and increases recidivism.[12] Likewise, while it is dangerous for a young child to have access to firearms, distrust in the system is also dangerous. Charging children who—through negligent or reckless behavior by adults—gain access to weapons in the juvenile court system would only delay the services these children may need. Furthermore, charging a younger child based upon arrest rates presents due process issues, equal protection and racial inequality issues, and would emphatically increase distrust. This provision would also likely deter families from looking to the police and the Department of Juvenile Services for help when it is needed.

Child Interrogation Protection Act and The Child's Right To Consult With An Attorney. In 2022, Maryland passed the Child Interrogation Protection Act ("CIPA"). By providing this essential protection, Maryland made a commitment to upholding basic legal principles and deeply embedded constitutional rights. An amendment to this bill which allows for a child's parent, guardian, or custodian to consents to the custodial interrogation of the child, without the child's consultation with an attorney, is contrary to the studies utilized to pass CIPA in 2022 and deprives children of their right to be properly advised by an objective and trained lawyer.

Evidence suggests that the presence of a parent neither increases juveniles' assertion of their rights nor mitigates the coercive circumstances inherent in police interrogations.[13] Many parents are unaware that their presence or participation in their child's interrogation can fail to protect their child's right against self-incrimination. The majority of adults misunderstand their

[9] Courts & Judicial Proceedings §3-8A-19.
[10] Courts & Judicial Proceedings §3-8A-3.
[11] Lon Fuller, *The Morality of Law*, YALE UNIVERSITY PRESS (1964).
[12] National Research Council 2014. Implementing Juvenile Justice Reform: The Federal Role. Washington, DC: The National Academies Press. https://doi.org/10.17226/18753 at 17.
[13] Naomi E. S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, Waving Goodbye to Waiver: A Developmental Argument Against Youth's Waiver of Miranda Rights, 21 LEG. & PUB. 1, 52 (2018) (citing Thomas Grisso & Carolyn Pomicter, Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver, 1 LAW & HUM. BEHAV. 321, 340 (1997)).

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legal rights and protections within a criminal setting, especially involving custodial interrogations. As the law currently stands, a parent has the right to be notified of their child's custodial status; this right belonging to the parent is distinct from the child's independent right to an attorney at all stages of a legal proceeding, and the additional right to consult with counsel created by CIPA prior to a custodial interrogation.

Children are entitled to legal protections as individuals—separate and apart from their parents. Every child has the right to understand their legal rights and protections. Children also have the right to understand what it means to abandon their rights, and that any waiver of their rights must be knowingly, intelligently, and voluntarily made. Parents cannot replace legal counsel for a child, especially when the child is accused of delinquency or criminal acts. Accordingly, CIPA must remain as written to protect the children of Maryland's constitutional rights.

Conclusion. With the current laws as they stand, Maryland's juvenile justice system is focused on aligning the laws that impact children with the established science of adolescent development. Children need to be held accountable for wrongdoing in a developmentally appropriate way that promotes healthy moral growth. An effective youth legal system is a fair legal system, with laws that improve the odds that young children who come into contact with the justice system will successfully and safely transition to adulthood. A law that removes protections and imposes higher standards on the youngest children in our system does not accomplish this goal.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on House Bill 319.

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