

NEW YORK COUNCIL OF DEFENSE LAWYERS

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February 9, 2015

VIA U.S. Mail

Honorable Patti B. Saris
Chair, United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Amending the U.S. Sentencing Guidelines to Reflect Recent Supreme Court Case
Law and Juvenile Brain and Behavioral Science

Dear Honorable Patti B. Saris:

This letter is submitted on behalf of the New York Council of Defense Lawyers (the "NYCDL"). The NYCDL is a professional association comprised of approximately 250 experienced attorneys whose principal area of practice is the defense of criminal cases in federal court. Among its members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Its membership also includes current and former attorneys from the Office of the Federal Defender, including the Executive Director and Attorney-in-Chief of the Federal Defenders of New York.

The NYCDL's members thus have gained familiarity with the Guidelines both as prosecutors and as defense lawyers.

The NYCDL submits this letter to request that the Sentencing Commission declare that the current Guidelines are inapplicable to juvenile offenders under the age of 18 ("juvenile offenders") and to request that the Commission revise the Guidelines to account for the difference between adult and juvenile offenders. The sentencing standards set forth in the current Guidelines were created for use with adult offenders and do not in any event account for recent scientific advancements in the understanding of adolescent brain and behavioral development or for the United States Supreme Court decisions regarding the "lessened culpability" of juvenile offenders.

Scientific studies have demonstrated that the brains of individuals under the age of 18 are not fully developed. Research has shown that the human brain undergoes massive structural and functional changes during the teenage years. Importantly, the brain systems that control complex judgments—such as risk/reward evaluations and self-control—are not fully developed until the early 20's or later, and certainly not in individuals under the age of 18. *See* Sara B. Johnson, Robert W. Blum, Jay N. Giedd, Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, *J. Adolesc. Health*, 2009 September; 45(3): 216–221. Due to these differences between the juvenile and adult brain, individuals under the age of 18 are more inclined toward risky behavior, have a decreased ability to accurately access future consequences and control impulses, and are more likely to be influenced by environmental factors such as peer pressure and family dynamics. Further, research shows that personality traits change significantly during the transition from adolescence to adulthood. Therefore, juvenile offenders are less susceptible to deterrence and are more open to rehabilitation. Moreover, juvenile offenders often outgrow their criminal behavior. *See generally* Laurence Steinberg, Age of Opportunity: Lessons from the New Science of Adolescence (2014); "The Teenage Brain," special issue, *Current Directions in Psychological Science* 22, no.2 (2013). Numerous studies have shown that only a small minority of juvenile offenders—between five and ten percent according to most studies—become adult criminals. In fact, a juvenile arrested at 16 has the same likelihood of arrest as his peers who have never been arrested by the time he turns 24.5. *See* National Research Council, Comm. on Assessing Juv. Just. Reform, *Reforming Juvenile Justice: A Developmental Approach* at 25 (Richard J. Bonnie et al., eds., 2013).

Since 2005 the Supreme Court has relied on the "fundamental differences between juvenile and adult minds"¹ to distinguish between juvenile and adult offenders for sentencing purposes. In *Roper v. Simmons* (2005), the Court struck down the death penalty for juvenile

¹ *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012)

offenders as a violation of the 8th Amendment.² In *Graham v. Florida* (2010), the Court prohibited life without parole sentences for juvenile offenders who committed non-homicide offenses.³ Finally, in *Miller v. Alabama* (2012), the Court struck down mandatory life without parole sentences for juvenile offenders who committed homicide offenses. In all three cases the Court found that “children are constitutionally different from adults for purposes of sentencing.”⁴ The Court based its decisions on the fact that the differences between the adult and adolescent brain renders juveniles less culpable and more susceptible to rehabilitation. The Court emphasized that the distinctive attributes of the adolescent brain diminish the penological justifications underpinning sentencing schemes designed for adults.

The Guidelines have a considerable impact on the sentencing decisions made by federal judges. Although the Guidelines are not mandatory, federal judges are required to consider the Guidelines sentencing calculation when determining an appropriate sentence.⁵ However, the Guidelines do not systematically distinguish between juveniles and adult offenders. In fact, prior to 2010 the Sentencing Guidelines specifically provided that “[a]ge (including youth) is not ordinarily relevant to sentencing.” See § 5H1.1 (1987-2009).⁶

The NYCDL firmly believes that juvenile offenders differ in significant ways from adult offenders and that the Guidelines should reflect these differences. In light of the fundamental differences between the adult and adolescent mind, and the Supreme Court’s recognition that children are constitutionally different for purposes of sentencing, we strongly urge the Commission to issue a statement that the Guidelines should not be applied to juvenile offenders.

² *Roper v. Simmons*, 543 U.S. 551 (2005)

³ *Graham v. Florida*, 560 U.S. 48 (2010)

⁴ *Miller*, 132 S.Ct. at 2464.

⁵ E.g. *U.S. v. Martin*, 520 F.3d 87, 91 (1st Cir. 2008) (“the guidelines are the starting point for the fashioning of an individualized sentence, so a major deviation from them must ‘be supported by a more significant justification than a minor one’”); *United States v. Williams*, 524 F.3d 209 (2d Cir. 2008) (The Second Circuit relied on *Gall v. United States*, 552 U.S. 38, 49 (2007), for the proposition that, “as a matter of administration and to secure nationwide consistency, the guidelines should be the starting point” for crafting all federal prison sentences.); *United States v. Martinez-Barragan*, 545 F.3d 894 (10th Cir. 2008) (“[D]istrict courts must apply the guidelines and consider their recommended sentence as one of the sentencing factors in 18 U.S.C. § 3553(a.)”); *Gunter*, 462 F.3d 237, 247 (3d Cir. 2006) (“Courts must continue to calculate a defendant’s Guidelines sentence precisely as they would have before Booker”); *United States v. Green*, 436 F.3d 449, 455-56 (4th Cir. 2006) (“[T]o sentence a defendant, district courts must (1) properly calculate the sentence range recommended by the Sentencing Guidelines; (2) determine whether a sentence within that range and within statutory limits serves the factors set forth in § 3553(a) . . . (3) implement mandatory statutory limitations; and (4) articulate the reasons for selecting the particular sentence, especially explaining why a sentence outside of the Sentencing Guideline range better serves the relevant sentencing purposes set forth in § 3553(a.)”); *United States v. Mix*, 457 F.3d 906, 911 (9th Cir. 2006) (“District courts,[] ‘must consult [the] Guidelines and take them into account when sentencing,’ even though they now have the discretion to impose non-Guidelines sentences”); *United States v. Rodriguez-Alvarez*, 425 F.3d 1041, 1046 (7th Cir. 2005) (“Sentencing courts must continue to calculate the applicable guidelines range even though the guidelines are now advisory”).

⁶Since 2010 Section 5H1.1 has stated that “[a]ge (including youth) may be relevant in determining whether a departure is warranted. . . .”

Hon. Patti B. Saris
February 9, 2015
Page 4

Very truly yours,

A handwritten signature in black ink, appearing to read 'A A S' with a stylized flourish.

Alexandra A.E. Shapiro
President

cc: (by mail) Hon. Charles R. Breyer, Vice Chair
Hon. William H. Pryor, Jr., Commissioner
Dabney Friedrich, Commissioner
Rachel Barkow, Commissioner
Isaac Fulwood, Jr., Ex-Officio
Jonathan J. Wroblewski, Ex-Officio

(by email) Catherine M. Foti, Esq.
(Chair, NYCDL Sentencing Guidelines Committee)