

**STATE OF HAWAI‘I**  
**OFFICE OF THE PUBLIC DEFENDER**

**Testimony of the Office of the Public Defender,  
State of Hawai‘i to the House Committee on  
Judiciary & Hawaiian Affairs**

February 16, 2023

H.B. No. 792: RELATING TO MINORS

Chair Tarnas, Vice-Chair Takayama, and Members of the Committee:

The Office of the Public Defender supports the intent of H.B. No. 792 with some recommended revisions. Minors should be treated differently from adults based on their brain development, impulse and behavioral control, vulnerability to negative influences and pressures, and their limited control over their home settings and living conditions which can be traumatic and abusive.

Minors are psychologically different from adults and these differences should be recognized by the legal system. Minors should not be equated with adults in our criminal justice system. Minors are also extremely vulnerable to negative environments and are easily influenced by crime-producing influences such as physical, sexual, and psychological abuse by family members. Moreover, minors are less capable than adults to consider the long-term impact of their actions, control their emotions and impulses, or evaluate risks and reward.

Through the formation of a family court, Hawai‘i has recognized that children must be treated differently from adults in our justice system. Nevertheless, minors, through the waiver of jurisdiction process, are still able to be tried by the adult criminal justice system and receive the harshest penalties under our state laws. This measure seeks to reform this situation and make our laws consistent with United States Supreme Court decisions which have outlawed the imposition of such penalties on juvenile offenders.

The United States Supreme Court, in J.D.B. v. North Carolina, 564 U.S. 261, 131 S. Ct. 2394, 2397, 180 L. Ed. 2d 310 (2011), recognized that children “generally are less mature and responsible than adults,” and that “they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” Moreover, “they are more vulnerable or susceptible to ... outside pressures

than adults,” and they “characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them” Id.

Furthermore, developmental and neurological science concludes that the process of cognitive brain development continues into adulthood, and that the human brain undergoes “dynamic changes throughout adolescence and well into young adulthood.” Richard J. Bonnie, et al., “Reforming Juvenile Justice: A Developmental Approach, National Research Council,” National Research Council (2013), page 96, and Chapter 4.<sup>1</sup>

To ensure that this bill covers all persons who committed an offense prior to reaching the age of eighteen, we recommend that the term “*minor*” be replaced with the term “*minor or adult convicted of a felony offense that was committed prior to reaching the age of majority.*” Otherwise, this bill would not apply to a person who committed the crime prior to reaching the age of eighteen but was convicted as an adult (i.e., age of eighteen or older).

In the Circuit Court of the First Circuit (Oahu), the vast majority of minors and respondents waived into adult court are seventeen years of age and often turn eighteen years of age during the waiver hearing process and trial. Thus, they may not be considered as minors at the time of sentencing. By amending the measure, this committee would clear up any ambiguity. Both *minors* (who are accused of offenses but remain under the age of eighteen at the time of a waiver into adult court and subsequent sentencing) and *respondents* (who are accused of offenses that occurred while still a minor but who have since reached their majority and are at least eighteen years of age) will be included in accordance with HRS §§ 577-1, 571-2, 571-11, 571-13, 571-14 and 571-22.

Thank you for the opportunity to comment on this measure.

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<sup>1</sup> “Reforming Juvenile Justice: A Developmental Approach, National Research Council,” is available at <https://nap.nationalacademies.org/catalog/14685/reforming-juvenile-justice-a-developmental-approach>

# Opportunity Youth Action Hawai'i

February 15, 2023

House Committee on Judiciary and Hawaiian Affairs

Hearing Time: 2:00 PM

Location: State Capitol

Re: HB 792 Relating to Minors

Aloha Chair Tarnas and members of the Committee:

We are writing in support of HB792 relating to minors.

This bill will allow discretion in circuit courts to impose a sentence that includes a period of incarceration that is up to fifty percent shorter than any mandatory minimum when sentencing minors for criminal offenses.

This bill aligns with the growing national sentiments regarding the harsh sentencing of minors. We must consider the vulnerabilities of minors when determining appropriate sentencing and acknowledge that uniform mandatory minimums may not properly address all circumstances. Allowing the court discretion to decline to impose mandatory sentences would prevent minors from being subjected to harsher punishments that may not be warranted by the specific circumstances of their case. This approach would ensure that justice is served fairly and proportionately, and efforts are centered around rehabilitation instead of adhering to the conventional standards of punishment.

Granting courts discretion would be a step towards a more equitable justice system here in Hawaii that can acknowledge the intricate challenges minors may face.

The Opportunity Youth Action Hawaii Hui is a collaboration of organizations and individuals committed to reducing the harmful effects of a punitive incarceration system for youth; promoting equity in the justice system; and improving and increasing resources to address adolescent and young adult mental health needs. We seek to improve the continuity of programs and services for youth and young adults transitioning from minor to adult status; eliminate youth homelessness and housing market discrimination against young adults; and promote and fund more holistic and culturally-informed approaches among public/private agencies serving youth.

# COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / [kat.caphi@gmail.com](mailto:kat.caphi@gmail.com)



## COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Rep. David Tarnas, Chair

Rep. Gregg Takayama, Vice Chair

February 16, 2023

Room 325

2:00 PM

### STRONG SUPPORT FOR HB 792 – SENTENCING OF MINORS

Aloha Chair Tarnas, Vice Chair Takayama and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai`i for more than two decades. This testimony is respectfully offered on behalf of the 4,043 Hawai`i individuals living behind bars<sup>1</sup> and under the “care and custody” of the Department of Public Safety/Corrections and Rehabilitation on any given day. We are always mindful that 918 of Hawai`i’s imprisoned people are serving their sentences abroad -- thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

Community Alliance on Prisons appreciates this opportunity to testify in strong support of HB 792 granting a circuit court, when sentencing a minor for a criminal offense, the discretion to: (1) impose a sentence that includes a period of incarceration that is as much as fifty per cent shorter than any mandatory minimum; and (2) in certain cases, decline to impose a mandatory enhanced sentence.

The question of what constitutes responsible and legal behavior in children and adolescents is an issue with important philosophical, scientific, social, ethical, and practical considerations. A 2016 article entitled, Juvenile Justice and the Adolescent Brain<sup>2</sup> explains development of the frontal cortex – the executive center/decisionmaking center of the brain.

*Scientists know that the adolescent brain is still developing, that it is highly subject to reward- and peer- influence, and that its rate of development varies widely across the population. They have developed basic tools that offer data with which to judge the potential for juvenile desistance, recidivism, and rehabilitation.*

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<sup>1</sup> Department of Public Safety, Weekly Population Report, February 6, 2023.

[https://dps.hawaii.gov/wp-content/uploads/2023/02/Pop-Reports-Weekly-2023-02-06\\_George-King.pdf](https://dps.hawaii.gov/wp-content/uploads/2023/02/Pop-Reports-Weekly-2023-02-06_George-King.pdf)

<sup>2</sup> Juvenile Justice and the Adolescent Brain, BRAIN SCIENCE IS REFORMING JUVENILE JUSTICE POLICY AND PRACTICE, 2016.

<http://clbb.mgh.harvard.edu/juvenilejustice/>

*With its ability to examine the workings of the teenage brain, neuroscience is improving our understanding of adolescents, and potentially, juvenile offenders. Through their window into the brain, neuroscientists understand, for example, that adolescents mature at markedly varied rates. The presumed trajectory of brain development, demonstrated in existing “bright line” age cut offs for voting, military service, and drinking, however, is not reflective of this variability in brain maturity. Similarly, neuroimaging research by CLBB faculty (Somerville, 2010) clarifies that it is teenagers’ heightened vulnerability to reward that drives risky behavior, contrary to longstanding beliefs that teenagers are unable to gauge risks. They can often recognize risks, but incomplete development of brain mechanisms related to modulation of impulsive behavior reduces their tendency to heed those risks.*

*Science may also help us understand which juvenile offenders are likely to commit future crimes and which may not. A longitudinal study, “Pathways to Desistance” (Mulvey, 2011), has collected significant data on factors such as substance abuse and instability in daily routine that lead to youth recidivism. The seminal paper, “Rewiring juvenile justice: the intersection of development neuroscience and legal policy” (Cohen and Casey, 2014), elucidates how key new scientific findings about the development of the adolescent brain may inform policy.*

An article<sup>3</sup> published by the American Bar Association discussed the impact on youth sentenced in adult criminal court.

*...The increase in laws that allow more juveniles to be prosecuted in adult court rather than juvenile court was intended to serve as a deterrent for rising youth violent crime. As such, it is important to evaluate what happens to juveniles who go through the adult court system to determine if they are “deterred” from future crime. A comprehensive literature review was completed by the University of California, Los Angeles (UCLA) School of Law’s Juvenile Justice Project in July 2010 that reviewed the impact of juvenile cases prosecuted in adult court. The report, The Impact of Prosecuting Youth in the Criminal Justice System: A Review of the Literature, ultimately found that there has been little to no deterrent effect on juveniles prosecuted in adult court, and in many states, recidivism rates have actually increased.*

*Statistics compiled from 15 states revealed that juveniles prosecuted in adult court and released from state prisons were rearrested 82 percent of the time, while their adult counterparts were rearrested 16 percent less. Meanwhile, studies have shown that juveniles prosecuted in juvenile court benefit from the services made available to them through that process, as juvenile institutions provide programs and resources specifically designed for juvenile development. Juveniles in adult court often do not have the opportunity to acquire critical skills, competencies, and experiences that are crucial to their success as adults; rather, they are subject to an environment in which adult criminals become their teachers.*

A report on health impacts of charging youth as adults, with recommendations for increased community investment and restorative justice-oriented solutions was released by Human Impact Partners in February 2017.<sup>4</sup>

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<sup>3</sup> Should Juveniles Be Charged as Adults in the Criminal Justice System? By Nicole Scialabba, October 03, 2016.

<https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-asadults/>

<sup>4</sup> Juvenile InJustice: Charging Youth as Adults is Ineffective, Biased, and Harmful, February 2017.

### ***The Justice System is Biased Against Youth of Color***

*Youth of color are overrepresented at every stage of the juvenile court system. Rampant racial inequities are evident in the way youth of color are disciplined in school, policed - iii - and arrested, detained, sentenced, and incarcerated. These inequities persist even after controlling for variables like offense severity and prior criminal record. Research shows that youth of color receive harsher sentences than White youth charged with similar offenses. Youth of color are more likely to be tried as adults than White youth, even when being charged with similar crimes. In California in 2015, 88% of juveniles tried as adults were youth of color.*

### ***"Tough on Crime" Laws Criminalize Youth and are Ineffective***

*Research shows that "tough on crime" policy shifts during the 1980s and 1990s have negatively impacted youth, families, and communities of color. These laws were fueled by high-profile criminal cases involving youth, sensationalized coverage of system-involved youth by the media, and crusading politicians who warned that juvenile "super-predators" posed a significant threat to public safety. The general sentiment – not based on research or data – across the political spectrum was that treatment approaches and rehabilitation attempts did not work. However, time has shown that harshly punishing youth by trying them in the adult system has failed as an effective deterrent. Several large-scale studies have found higher recidivism rates among juveniles tried and sentenced in adult court than among youth charged with similar offenses in juvenile court.*

Children and youth are amenable to rehabilitation. We must understand that children are impulsive and do not always have the capacity to understand the consequences of their actions. We are happy that in 2011, Hawai`i stopped waiving youth into the adult system and we respectfully ask the committee to pass this measure.

*"As a society ... do we want young people to be left to a specific, certain fate in prison ... or do we want a process of education, a process of healing, a process of insight to support them to understand how they got there, a process of growth? What do we want?"*

Malachi, charged as an adult at age 15



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## TESTIMONY IN SUPPORT OF HB 792 BEFORE THE JUDICIARY & HAWAIIAN AFFAIRS COMMITTEE

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*February 16, 2023*

Dear Chairman Tarnas and Members of the Committee:

Human Rights for Kids respectfully submits this testimony for the official record to express our support for HB 792 and urge the committee's adoption of a few friendly amendments. We are grateful to Representative John Mizuno for his leadership in introducing this bill and appreciate the Hawaii Legislature's willingness to address this important human rights issue concerning the use of mandatory minimum sentencing on Hawaii's children.

Human Rights for Kids is a Washington, D.C.-based non-profit organization dedicated to the promotion and protection of the human rights of children. We use an integrated, multi-faceted approach which consists of research & public education, coalition building & grassroots mobilization, and policy advocacy & strategic litigation to advance critical human rights on behalf of children in the United States. A central focus of our work is advocating in state legislatures and courts for comprehensive justice reform for children consistent with the U.N. Convention on the Rights of the Child. We also work to inform the way the nation understands Adverse Childhood Experiences (ACEs) from a human rights perspective, to better educate the public and policymaker's understanding of the relationship between early childhood trauma and negative life outcomes.

Human Rights for Kids supports HB 792 because, if it is signed into law, it will scale back the use of mandatory minimum sentences for children and better align Hawaii's policies with juvenile brain and behavioral development science, international human rights law protecting children from extreme punishment, and prioritize rehabilitating children who come into conflict with the law, rather than overly punishing them.

### **Children Sentenced as Adults**

In the late 1980's and early 1990's states began passing laws to make it easier to transfer children into the adult criminal justice system which exposed them to harsh mandatory minimum sentences and mandatory sentencing enhancements. By the year 2000, a child as young as 10 years old could be tried as an adult for certain offenses. And by 2010, an estimated 139,000 children were housed in adult prisons and jails across the United States.

Policymakers were driven by the now-debunked "Super-Predator Theory" which stated that a new generation of child predators were coming of age who were more violent and less

remorseful than ever before. These children, the authors said, were “Godless, jobless, and fatherless” monsters and urged states to respond by treating them as adults and thereby exposing them to overly punitive mandatory minimum sentences.

An estimated 53,000 children are tried in the adult criminal justice system every year in the United States. These children can face severe punishment that is not age-appropriate and is disproportionate given their young age and lessened culpability relative to that of adults. Through our research HRFK estimates that there are more than 37,000 people in U.S. prisons for crimes committed as children. This represents nearly 4% of the entire U.S. prison population.

The confluence of the relaxation of juvenile transfer laws and increase in mandatory minimum sentences has been the driving force behind the tens of thousands of people who have been incarcerated since childhood.

### **Adverse Childhood Experiences**

In the vast majority of cases, children who come into conflict with the law are contending with early childhood trauma and unmitigated adverse childhood experiences (ACEs), including psychological, physical, or sexual abuse; witnessing domestic violence; living with family members who are substance abusers, suffer from mental illness or are suicidal, or are formerly incarcerated. Studies have shown that approximately 90% of children in the juvenile justice system have experienced at least 2 ACEs, and 27% of boys and 45% of girls have experienced at least 5 ACEs.

### **Juvenile Brain & Behavioral Development Science**

Studies have shown that children’s brains are not fully developed. The pre-frontal cortex, which is responsible for temporal organization of behavior, speech, and reasoning continues to develop into early adulthood. As a result, children rely on a more primitive part of the brain known as the amygdala when making decisions. The amygdala is responsible for immediate reactions including fear and aggressive behavior. This makes children less capable than adults to regulate their emotions, control their impulses, evaluate risk and reward, and engage in long-term planning. This is also what makes children more vulnerable, more susceptible to peer pressure, and being heavily influenced by their surrounding environment.

Children’s underdeveloped brains and proclivity for irrational decision-making is why society does not allow children to vote, enter into contracts, work in certain industries, get married, join the military, or use alcohol or tobacco products. These policies recognize that children are impulsive, immature, and lack solid decision-making abilities until they’ve reach adulthood.

### **Racial Disparities**

Black children are disproportionately represented in the adult criminal justice system, comprising 58% of all children confined in adult prisons. In addition, roughly 83% of children prosecuted in the adult criminal justice system are racial minorities. Black children represent 87% of drug cases, 48% of property cases, and 63% of the public order offense cases where children are tried in the adult criminal justice system.

### **The U.S. Supreme Court**

The Supreme Court has emphasized through its cases in *Roper v. Simmons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and *Montgomery v. Louisiana* (2016) that **“the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”** (Emphasis Added).



The Court has also found that, “only a relatively small proportion of adolescents” who engage in illegal activity “develop entrenched patterns of problem behavior,” and “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,” including “parts of the brain involved in behavior control.”

### **International Human Rights Law**

In 1989 the United Nations adopted the Convention on the Rights of the Child (CRC), which sets forth minimum standards for the treatment of children who come into conflict with the law. For the purposes of this legislation, Articles 10 and 14 of the International Covenant on Civil and Political Rights states:

“Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status . . . the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”

Article 37 of the CRC adds that:

“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”

The need to treat children differently from adults is at the core of these human rights protections. This cannot be accomplished, however, if the same standards used to hold adults accountable are used on children. To protect children’s human rights Hawaii must join Washington, Iowa, Nevada, Virginia, Montana, Maryland, and D.C. in allowing judges greater discretion when sentencing children who have been convicted in adult court.

Nelson Mandela once said, “*There is no keener revelation of a society’s soul than the way in which it treats its children.*” Children can and do commit serious crimes. While they must be held responsible, our response must not be focused on retribution. Instead, it must be measured and assure age-appropriate accountability that focuses on the unique capacity of children to grow, change and be rehabilitated. HB 792 does that, by simply giving judges greater discretion when sentencing children. It does not require judges to do anything, aside from consider how children are different from adults at the time of sentencing. And if children are not deserving of mercy when they make mistakes, who among us is?

We strongly urge this committee to vote favorably upon HB 792 to give judges greater flexibility to depart from harsh mandatory minimum sentences for children. We would also encourage the committee to adopt the friendly amendments included on the next page. Thank you for your consideration.

With hope and love,



James. L. Dold  
President & Founder,  
Human Rights for Kids

## **FRIENDLY AMENDMENTS**

- (1) Page 3, line 5, after “adults,” add “adverse childhood experiences or early childhood trauma,”
- (2) Page 3, line 15, after “(b)” strike “When imposing any sentence that includes a period of incarceration of five years or more,” and Capitalize “May”

**HB-792**

Submitted on: 2/14/2023 7:14:21 PM

Testimony for JHA on 2/16/2023 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Patricia Mcmanaman	Individual	Support	Written Testimony Only

Comments:

A judge should have these options where a child is waived and tried as an adult. Children are often impulsive and don't fully appreciate the consequences of their actions. They deserve a second chance.

Thank you,

Pat McManaman

**HB-792**

Submitted on: 2/15/2023 10:29:05 AM

Testimony for JHA on 2/16/2023 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Ruth Love	Individual	Oppose	Written Testimony Only

Comments:

If the child did the crime then they need to serve previously established minimum sentences up to the maximum sentence. New more lenient sentences will not solve problems, only create more.

Thank you,

Mrs Ruth Love