



TESTIMONY IN SUPPORT OF H. 594 BEFORE THE VERMONT HOUSE COMMITTEE ON JUDICIARY

March 10, 2020

Dear Chairwoman Grad and Members of the Vermont House Committee on Judiciary:

Human Rights for Kids respectfully submits this testimony for the official record to express our support for **H. 594**. We are grateful to Representative Rachelson for her leadership in introducing this bill and appreciate the Vermont Legislature's willingness to address this important human rights issue relating to convicting and sentencing children to life imprisonment under Vermont's felony murder rule.

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 and around the world.

Over the years too little attention has been paid to the most vulnerable casualties of mass incarceration in America — children. From the point of entry and arrest to sentencing and incarceration our treatment of children in the justice system is long overdue for re-examination and reform. Human Rights for Kids supports **H. 594** because, if it is signed into law, it will end the inhumane practice of sentencing children to life imprisonment under the felony murder rule.

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 sentences, including the death penalty and life without parole. 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 transferring them into the adult criminal justice system, thereby exposing them to overly punitive sentences that were not designed with children in mind.

Juvenile Brain & Behavioral Development Science

In the years following the “super-predator” era, studies have continued to show 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.

It is also for these reasons, that the U.S. Supreme Court in a litany of cases over the past 15 years has found that the use of the death penalty and life without parole are disproportionate sentences for child offenders and violates the 8th Amendment’s prohibition on cruel and unusual punishments.

Dynamic mapping of human cortical development



Source: “Dynamic mapping of human cortical development during childhood through early adulthood,” Nitin Gogtay et al., Proceedings of the National Academy of Sciences, May 25, 2004; California Institute of Technology.

The U.S. Supreme Court & Other Legal Jurisprudence

Starting in 2005, the U.S. Supreme Court began considering the emerging juvenile brain and behavioral development science in *Roper v. Simmons* and held that the Eighth Amendment forbids the imposition of the death penalty on children because children are constitutionally different from adults.¹ Five years later, the Court in *Graham v. Florida* struck down life without parole sentences for children convicted of non-homicide offenses, holding that the state “must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation.”

Just a few years later in 2012, the Court addressed the issue of extreme sentences again in *Miller v. Alabama* where it struck down mandatory life without parole sentences for homicide offenses.² Sentencing courts must now consider “how children are different, and how those differences counsel against irrevocably sentencing them to a life in prison.”³ Finally, in 2016, the Court decided *Montgomery v. Louisiana* which expanded its decision in *Miller*, holding that the decision was meant to be applied retroactively.⁴ Additionally, the Court stated that life without the possibility of parole for a

¹ *Roper v. Simmons*, 543 U.S. 551 (2005).

² *Miller*, 567 U.S. at 480.

³ *Id.*

⁴ *Montgomery*, 136 S. Ct. at 734.

child violates the Eighth Amendment where the crime reflects unfortunate yet transient immaturity.⁵ The *Montgomery* Court barred life without parole for all but the “rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.”⁶

Prior to 2012 more than 2,200 children had been sentenced to life without parole, 26 percent of which were convicted of “felony murder,” which holds that anyone involved in the commission of a serious crime during which someone is killed is also guilty of murder, even if he or she did not personally or directly cause the death.

The Court’s juvenile sentencing cases caution that “in imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.” This is especially true for children convicted under a theory of felony murder where the child does not kill or intend to kill another person. Imposing a mandatory 35 years to life sentence, as currently required under Vermont’s felony murder rule, “does not adequately serve legitimate penological objectives.”

Courts have repeatedly affirmed that retribution, as an underlying policy rationale when sentencing children, is an “irrational exercise” in light of children’s diminished culpability. The deterrence rationale is also much less applicable when the crime is committed by a child. Similarly, courts have found that “the rehabilitative objective can be inhibited by mandatory minimum sentences” for children. In the final analysis, given all that we know about children’s development, there is no strong penological justification for sentencing children to life imprisonment under the felony murder rule.

Human Rights Law

Sentencing practices that treat children the same way we treat adults in the criminal justice system violates the principles set forth in Article 40 of the U.N. Convention on the Rights of the Child (CRC) and is a human rights abuse. In 2018, the Inter-American Commission on Human Rights (IACHR) released a scathing report on *Children in the United States’ Adult Criminal Justice System* where it included, among others, the following recommendation: “The U.S. must ensure that no child is subjected to the adult criminal justice system or *sentenced by the same guidelines that would apply to adults*, regardless of the offense committed.” The application of the felony-murder rule to children is out of step with this recommendation and is a violation of children’s rights under the CRC.

Racial Disparities

The lack of regard for child status has been disproportionately felt by youth of color who make up the vast majority of children harmed by the justice system. Black children comprise 58 percent of all children confined in adult prisons.⁷ Roughly 83 percent of children prosecuted in the adult criminal justice system are racial minorities,⁸ where black children represent 87 percent of drug cases, 48 percent of property cases, and 63 percent of public order offense cases.⁹ Further, 60 percent of children sentenced to life without parole were black.

Adverse Childhood Experiences

In the vast majority of these 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

⁵ *Id.*

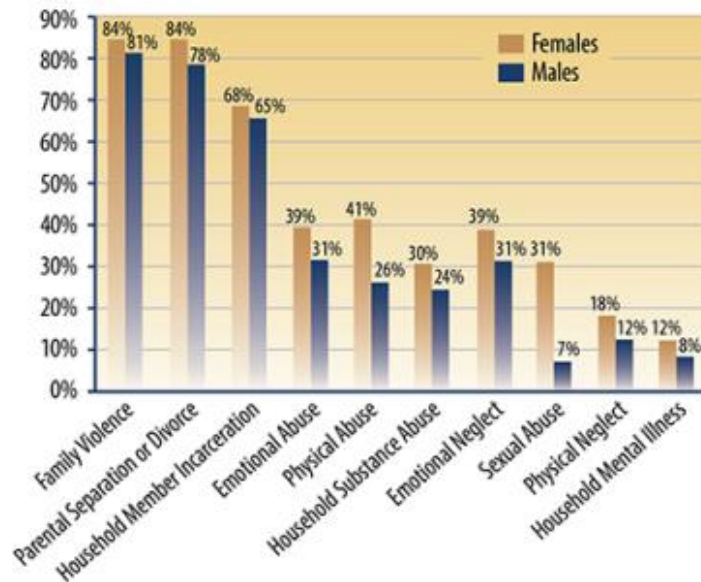
⁶ *Id.*

⁷ U.S. Department of Justice, OJJDP, Disproportionate Minority Contact (DMC).

⁸ Campaign for Youth Justice, “To Punish A Few: Too Many Youth Caught in the Net of Adult Prosecution”, 2007.

⁹ *Id.*

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.



Additionally, more than 80% of kids serving life witnessed violence in their homes and neighborhoods on a regular basis. More than 50% of boys and 80% of girls were physically abused; More than 20% of boys and 77% of girls were sexually abused.

Conclusion

Nelson Mandela once said, “*There is no keener revelation of a society’s soul than the way in which it treats its children.*” What does it say about our soul then if we allow children to be sentenced to a de facto life sentence when he or she did not kill or intend to kill anyone?

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. H. 594 does not seek to absolve children of culpability when someone dies during the course of a felony offense; instead, it seeks to hold them accountable for their intended conduct and ensure that sentencing policies better reflect children’s diminished culpability relative to adults who commit similar offenses.

Therefore, we strongly urge this committee to vote favorably upon H. 594 and to end the human rights abuse of sentencing children to de facto life without parole for felony murder. Thank you for your consideration.

With hope and love,

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

Below is an article from the Chicago Tribune demonstrating why the felony murder rule is so troubling for child offenders.

Chicago Tribune

Teens, including 3 siblings, allegedly told investigators they came to Lake County to commit burglaries. Now they're charged with murder in botched car theft.

By JIM NEWTON, ANGIE LEVENTIS LOURGOS and ROSEMARY SOBOL
LAKE COUNTY NEWS-SUN | AUG 15, 2019 | 6:15 AM

Teens from Chicago charged with murder after a 14-year-old was shot and killed by a homeowner with a gun told investigators they were in Lake County to commit burglaries and had stolen vehicles in the past, law enforcement officials said Wednesday.

Five Chicago teens, including four juveniles charged as adults, face charges after the fatal shooting at the home of a 75-year-old licensed gun owner who heard people on his property after 1 a.m. Tuesday and thought they were trying to steal his Audi, according to authorities.

Illinois law allows for authorities [to charge suspects with murder if someone dies during the commission of another serious crime.](#)

In this case, the teens were charged even though they were not holding the gun because 14-year-old Ja'quan Swopes, of Chicago, was killed during the suspected attempted car theft at a home in a remote area between Antioch and Gurnee called Old Mill Creek.

Lake County State's Attorney Michael Nerheim said Wednesday that the forcible felony laws in Illinois are similar to others across the country and have been upheld by courts nationwide.

"The felony murder law is in place to discourage people from committing forcible felonies, because if someone dies during the commission of a forcible felony, then it's first-degree murder," Nerheim said.

Illinois is among the minority of states with the broadest possible application of the felony murder rule, said Steven Drizin, clinical law professor at Northwestern University Pritzker School of Law. Drizin said the scope of the Illinois law can be problematic, especially when defendants are teenagers, who tend to commit crimes in groups and are more impulsive and less deliberate in their actions.

"The legislature needs to act to narrow the scope of Illinois' felony murder rule," he said, citing the Lake County case as an example. "Especially in light of the fact that the penalties for both the underlying felony and murder are severe — and in the case of murder, mandatory. There is more than enough room to adequately punish these teenagers by sentencing them within the range of sentences for the burglary charge."

Lake County sheriff's office spokesman Sgt. Christopher Covelli said Wednesday that investigators believe the teens were in Lake County to commit crimes.

"Interviews with the defendants indicated they have previously stolen vehicles and were in Lake County to steal property," Covelli said.

The 75-year-old homeowner told police he went outside to see why there were people near his parked 2011 Audi and yelled at the individuals to leave, but at least one male teen moved toward him with an unknown object in his hand, officials said in the release. The man could not be reached for comment. According to a sheriff's statement, an investigation found the six teenagers — ranging in age from 14 to 18 — traveled to Old Mill Creek in a stolen Lexus to commit a burglary.

Deputies responded to a 911 call in the 17600 block of West Edwards Road in Old Mill Creek about 1:15 a.m. Tuesday, in which the caller told dispatchers he shot at the defendants before they fled, according to the Lake County sheriff's office.

The suspects left the area with Ja'quan, who had been shot in the head while standing outside the vehicle. The wounded teen was dropped off with another one of the defendants at a Gurnee accident scene. The 14-year-old was pronounced dead after being transported to Advocate Condell Medical Center in Libertyville.

The incident culminated in a high-speed chase between the remaining defendants and police from Lake County to Chicago, where the teens were apprehended when the car they were driving ran out of gas. A knife was recovered from the man's driveway at the shooting scene, authorities said.

Lake County Coroner Dr. Howard Cooper said preliminary autopsy results show Ja'quan died as a result of a gunshot wound to the head.

The man who fired the shots, who was a licensed gun owner, has not been charged with any violations or crimes.

"That ultimately will be a decision made by the (Lake County) state's attorney's office, after they have an opportunity to review all of the investigative notes and reports," Covelli said.

Earl Betts, 53, Ja'quan's great-uncle, said the teen suffered without a solid father figure.

"There's a bigger picture. ... Yeah, it's a sad thing," Betts said. "He was a baby with no direction. ... A child wasn't given a chance to have any direction."

No matter what the teen was dealing with, however, Betts said Ja'quan shouldn't have been shot.

"He wasn't given a chance. He was taken out like a damn dog. He was shot. Over a f----- car. ... That's sad."

Covelli said Wednesday that evidence in the case does not include images from home video surveillance systems that might have been in the area.

"Surveillance cameras did not capture the shooting," he said.

On Tuesday, the surviving teens were charged with first-degree murder, including three 17-year-olds and a 16-year-old who were charged as adults.

The names of the four juveniles who were charged were released Wednesday afternoon. According to a spokesman for the Lake County circuit clerk's office, they are Stacy Davis, 17; Steven Davis, 17; Curtis Dawson, 16; and Kendrick Cooper, 17. All are from Chicago. The fifth teen charged was identified Tuesday as 18-year-old Diamond C. Davis of the 5700 block of South Bishop Street in Chicago. Diamond, Stacy and Steven Davis are siblings, according to authorities.

In bond court Tuesday, bail for each defendant was set at \$1 million, with preliminary court dates set for Sept. 5 in Lake County Circuit Court.

Officials said the four younger teens are being held in juvenile detention in Vernon Township rather than in Lake County jail.

Nerheim said age is taken into consideration both at the time charges are filed and when the cases are eventually resolved.

He said the components in the decision to charge the defendants as adults in this case included the seriousness of the incident and prior criminal history of the defendants, some of whom he said have spent time in the Illinois Department of Juvenile Justice.

The Lexus the teens drove to Old Mill Creek had been reported stolen in Wilmette, police said. Covelli said no charges have been filed in that case yet as investigators attempt to determine who stole the car. Covelli said after the defendants were apprehended, items reported stolen in previous burglaries were found in the trunk of the Lexus.

Known as the felony murder rule, the statute that allowed the teens to be charged with murder has proved controversial, particularly when it is used to charge juveniles.

Drizin said the felony murder rule helps fuel mass incarceration by increasing the sentences for nonviolent felons to punishments designed for violent felons.

"The deterrence rationale of felony murder also doesn't work when you're dealing with impulsive teenagers," he said. "These young people never imagined in their wildest dreams that they were going to confront a homeowner with a gun."

The felony murder rule was recently used in Lake County when, according to authorities, a Lindenhurst man, who had set up a meeting to sell a gun to two men from Chicago from his house, shot and killed one of the men who attacked him with a hammer in October 2018.

Michael J. Zachery, 23, was charged and pleaded not guilty to two counts of felony murder for the shooting death of Joseph McHaney, 34 of Chicago, his partner in an alleged attempt to steal the unnamed Lindenhurst man's guns. Zachery is currently scheduled for trial in November.

Source: <https://www.chicagotribune.com/suburbs/lake-county-news-sun/ct-1ns-old-mill-creek-shooting-chase-update-st-0815-20190814-gc4ftbkmsnfijeworh6tyh442u-story.html>