



GOVERNMENT LAW CENTER

2016
Warren M. Anderson
Legislative Breakfast Seminar Series

*“Criminal Justice and Young Offenders:
Is raising the age a viable option?”*

February 23, 2016



ALBANY LAW SCHOOL

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SPEAKER BIOGRAPHIES

Sheriff Craig Apple started his career with the Albany County Sheriff's Office in 1987 as a Correction Officer. Sheriff Apple moved over to the Law Enforcement Division and attended the Zone 5 Law Enforcement Academy. He worked his way through the ranks to become the Acting Sheriff in 2011. He became Sheriff in January, 2012 after winning election. Over the last 29 years, Sheriff Apple has been recognized for his victim advocacy, particularly with children and his tenacity to protect our more vulnerable population. Sheriff Apple has been recognized by the United States Department of Justice for protecting children, Law Enforcement Officer of the Year by the NYS Attorney General's Office, Law Enforcement Officer of the Year by the VFW, and numerous other awards for his efforts in Public Safety. As Sheriff, he has created several progressive programs to help inmates lead a clean and healthy life after incarceration. He has created a SOLDIER ON program to help inmates fighting addiction. Sheriff Apple has also built an ambulance service for outlying areas in Albany County, has helped pass legislation to protect children, and has been a champion for preventing animal abuse.

Paul McDonnell is Deputy Counsel (Criminal Justice) for the Office of Court Administration. In that position, he serves as OCA's liaison to the Legislature for criminal matters and is Counsel to the Chief Administrative Judge's Advisory Committee on Criminal Law and Procedure. He is a frequent presenter for the Office of Court Administration on a wide range of topics concerning criminal law. He is also the upkeep author for "New York Pretrial Criminal Procedure, Second Edition." Prior to joining OCA, Mr. McDonnell served as the Principal Court Attorney to New York County Supreme Court Justice Daniel P. FitzGerald and an Adjunct Professor of Law at New York Law School. He currently serves on numerous state-wide committees in the field of criminal law. He is also a past chair of the Criminal Justice Operations Committee at the Association of the Bar of the City of New York. Mr. McDonnell received his Bachelor's degree from Hobart College in Geneva New York, and his law degree from Washington and Lee University School of Law.

Paige Pierce is the Chief Executive Officer for Families Together in New York State. Families Together is a non-profit, family-run organization that serves as a voice for

families involved in multiple systems including mental health, substance abuse, and juvenile justice. Pierce has been successful in shaping policy and implementing systems change at the state level. She also serves as a liaison between families and policy makers. Pierce served as the Chair of the Timothy's Law Campaign and the New York State Coordinated Children's Services Initiative (CCSI) Tier III, and is currently a Lead Group Member of the Raise the Age NY Campaign. She is dedicated to several other committees, boards, and coalitions. Pierce earned a Bachelor of Arts degree from Skidmore College in 1987. She is the mother of four children. Her son has social, emotional, behavioral, and mental health needs, and received special education services.

Today, New York State is one of two states in the nation that permits sixteen- and seventeen-year-olds to be charged as adults in criminal court.¹ This affects approximately 50,000 adolescents across the state, with a majority of the charges against such individuals arising from minor crimes.² Minors charged and convicted as adults are placed in a prison population filled with adults who have committed violent and non-violent crimes.³ Serving sentences with adults can be dangerous for imprisoned minors and negatively impact an adolescent's ability to re-enter society.⁴

In response to these concerns, New York's Governor Andrew Cuomo has implemented programs and initiatives providing support for youth offenders to provide a safer path for rehabilitation.⁵ One of the first of these initiatives created the Commission on Youth, Public Safety and Justice, which was created to create a strategic plan to raise the age of criminal responsibility in a way that would improve outcomes for youth while maintaining community safety.⁶ Citing psychological research, the Commission held that adolescents are more likely to grow out of their deviant behavior than adults.⁷ As a result, the Commission proposed that, "all but the gravest crimes of violence be customized to youth rather than adult sentencing guidelines."⁸ This would ultimately, "steer non-violent young offenders out of the [adult prison] system."⁹

The formation of the Governor's Commission and the Commission's findings generated the creation of a second program: the Raise the Age initiative. The Raise the Age initiative aims to bring together all stakeholders in the youth criminal justice system such as national and local advocates, youth affected by Raise the Age, parents, law enforcement and faith leaders to spread

¹ *Get the Facts*, RAISE THE AGE NY, <http://www.raisetheagency.com/get-the-facts>, (last visited Feb. 13, 2016)

² *Id.*

³ See N.Y. Exec. Order No. 131, N.Y. COMP. CODES R. & REGS. tit. 9 § 131 (2014).

⁴ See *COMM'N ON YOUTH, PUB. SAFETY & JUST., RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM IN NEW YORK STATE 30 (2015)* [hereinafter *Comm'n on Youth*] (explaining that youth offenders are more able to be rehabilitated because their cognitive functions have yet to develop completely; in other words, their behavior can be retrained if given the appropriate resources during rehabilitation). Explorative studies provide that placing adolescents in adult prisons makes them 80% more likely to recidivate than if they were placed in the juvenile system. GIUDI WEISS, *THE FOURTH WAVE: JUVENILE JUSTICE REFORMS FOR THE TWENTY-FIRST CENTURY 20* (Nat'l Campaign to Reform State Juvenile Justice Sys. For the Juvenile Justice Funders' Collaborative ed., 2015)

⁵ See N.Y. Exec. Order No. 150, N.Y. COMP. CODES R. & REGS. tit. 9 § 150 (2015).

⁶ N.Y. COMP. CODES R. & REGS. tit. 9 § 131.

⁷ *Comm'n on Youth*, *supra* note 4, at 18

⁸ See Press Release, Governor Andrew M. Cuomo, Recommendations on Reforming the Justice System's Treatment of Minors, Announced on Martin Luther King, Jr. Day (Jan. 19, 2015), <https://www.governor.ny.gov/news/2015-opportunity-agenda-ensuring-justice-perception-and-reality-0>.

⁹ *Comm'n on Youth*, *supra* note 4, at 1.

public awareness about raising the age of criminal responsibility. The initiative formalized as Raise the Age New York with a purpose to ensure that the legal process treats youth offenders as children and offers youth offenders a criminal justice system focused on rehabilitation.¹⁰

The New York criminal justice system today still prosecutes sixteen and seventeen year old offenders as adults. To date, there have been two attempts to reduce the adolescent presence in adult prisons. Senate bill 5175 directs adolescents to local probation departments to avoid incarceration.¹¹ Senate bill 1019 permits adolescents to be “waived down” into Family Court and have the opportunity to be subject to prosecution as “juvenile offenders.”¹² Neither bill made it to the floor of the Legislature for a vote. In response, the Governor signed Executive Order 150, which mandated the separation of adult and adolescent inmates currently within the prison population.¹³ Executive Order 150 has, in effect, instituted a Raise the Age policy at least in terms of the organization of the prisons and jails.

There are still several questions that surround the feasibility of the Raise the Age initiative. Currently, the state spends \$100 million annually to jail sixteen- and seventeen-year-old offenders.¹⁴ Raising the Age may increase those costs as separate facilities, or sections of currently opened facilities, must be opened and operated.¹⁵ The immediate and long-term effects of the Raise the Age effort on the criminal justice system are also unknown. Raising the age of criminal responsibility will divert litigants from Supreme Court and into Family Court for juvenile offenders. Opponents to Raise the Age worry that this shift will over burden the already taxed juvenile justice system.¹⁶ Other states that have instituted Raise the Age protocols have not faced these concerns,¹⁷ but despite this, it is still not clear if the same result would occur with New York’s demographic differences.

¹⁰ RAISE THE AGE NY, *supra* note 1.

¹¹ S. 5175, 2015-2016 S. Reg. Sess. (N.Y. 2015).

¹² S. 1019, 2015-2016 S. Reg. Sess. (N.Y. 2015).

¹³ N.Y. COMP. CODES R. & REGS. tit. 9 § 150.

¹⁴ David King, *Cuomo’s Executive Action on ‘Raise the Age’ Prompts Questions*, GOTHAM GAZETTE, July 8, 2015, <http://www.gothamgazette.com/index.php/government/5797-cuomos-executive-action-on-raise-the-age-prompts-questions>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Michele Deitch et al., *Seventeen, Going on Eighteen: An Operation and Fiscal Analysis of a Proposal to Raise the Age of Juvenile Jurisdiction in Texas*, 40 AM. J. CRIM. L. 1 (2012) (explaining that the Texas Raise the Age policy decreased the short-term criminal process budget as well as decreased crime rates, which decreased the amount of money necessary to budget for crime). See also *Justice for Kids Fact Sheet: Experience With Reforms in Other States*, RAISE THE AGE NY, <http://raisetheagency.com/wp-content/uploads/2011/08/Other-States-Fact-Sheet-FINAL.pdf> (last visited Feb. 13, 2016) (showing that when Illinois raised the age of criminal responsibility, violent

Further, it is also unknown how Raise the Age would play out with impacted youths. Would adolescents in adult prisons currently be affected by Raise the Age legislation? They are already impacted by Executive Order 150. How would the law accommodate those individuals? Would Raise the Age impact adolescents currently being charged and in the process of receiving a verdict or plea arrangement? If Raise the Age legislation passed, future offenders would have the opportunity to receive rehabilitative punishment, but what happens with those currently affected by standing criminal procedures?

Legislation has been introduced for the 2016 budget process that will attempt to address these and other issues implicated by the Raise the Age effort.

Research and writing contributed to:

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J.D. Candidate

crime rates dropped 14 percent despite the anticipation of increased juvenile offenses—low enough to close two incarceration facilities).



State of New York
APR 9 2014
Department of State
Secretary of State

State of New York

Executive Chamber

No. 131

EXECUTIVE ORDER

ESTABLISHING THE COMMISSION ON YOUTH, PUBLIC SAFETY AND JUSTICE

WHEREAS, the State of New York has taken significant steps to strengthen rehabilitation and provide support for young people in the juvenile and adult justice systems, including the Close to Home initiative, Regional Youth Justice Teams, detention risk assessment, increasing community-based services and alternatives to incarceration; and

WHEREAS, as the State made those investments, juvenile crime, violence and incarceration rates have substantially decreased to historic lows; and

WHEREAS, the State, despite leading the nation in an array of youth justice reforms, is one of only two states that continue to prosecute 16- and 17-year-olds through the adult criminal justice system, the vast majority of whom are youth of color; and

WHEREAS, youth incarcerated with adults are less likely to receive the services they need to succeed and are at increased risk of violent or sexual assault, mental health issues, and suicide; and

WHEREAS, analysis by the U.S. Centers for Disease Control and Prevention showed that the felony recidivism rate in one state was 34 percent higher for youth whose cases were handled in adult court compared to youth whose cases were handled outside of adult court; and

WHEREAS, leading brain research indicates that the cognitive skills of youth are not fully developed, rendering them more susceptible to peer pressure, less capable of mature judgment and consequential thinking, though highly responsive to interventions; and

WHEREAS, the State is committed to further reducing crime by implementing policies that both promote public safety and improve outcomes for court-involved youth;

NOW THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do order as follows:

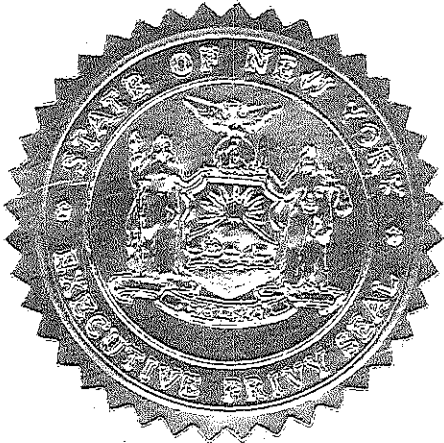
A. The Commission on Youth, Public Safety and Justice

1. There is hereby established the **Commission on Youth, Public Safety and Justice** (“the **Commission**”). The Commission shall provide recommendations to the Governor pertaining to youth in New York’s justice systems.
2. The Commission shall consist of voting members appointed by the Governor. In appointing members, the Governor shall make a reasonable effort to appoint members with a range of perspectives, interests, and specific knowledge concerning juvenile and criminal justice, including judges, law enforcement officials, probation administrators, child welfare professionals, advocates, service providers, local government officials and other critical stakeholders. The Governor shall also appoint the Commissioner of Children and Family Services; the Commissioner of Criminal Justice Services; the Director of Probation and Correctional Alternatives, and the Commissioner of Corrections and Community Supervision, who shall serve as ex officio non-voting members. All members of the Commission shall serve at the pleasure of the Governor.
3. The Governor shall designate the Chair or Co-Chairs of the Commission from among the members of the Commission. The Governor shall appoint an Executive Director of the Commission.
4. A majority of the total members of the Commission shall constitute a quorum, and all recommendations of the Commission shall require approval of a majority of the members.
5. Every agency, department, office, division or public authority of this State shall provide to the Commission such information, assistance and cooperation, including use of State facilities, which is reasonably necessary to accomplish the purposes of this Order. Staff support necessary for the conduct of the Commission’s work may be furnished by state agencies and authorities (subject, as necessary, to the approval of the board of directors of such authorities).
6. The Commission may draw upon the human resources, expertise and funding of private institutions, as consistent with all statutes and regulations regarding such assistance. Such assistance shall be provided without financial remuneration and shall not be provided under any circumstances that would create an actual conflict of interest, or the appearance of such a conflict.
7. The Commission shall commence its work immediately. On or before December 31, 2014, or such other time as may be specified by the Governor, the Commission shall complete its duties and activities described herein and provide its recommendations to the Governor, at which time the Commission shall terminate its work and be relieved of all responsibilities and duties hereunder.

B. Duties and Purposes

1. The Commission shall (a) develop a plan to raise the age of juvenile jurisdiction, and (b) make other recommendations as to how New York’s justice systems can improve outcomes for youth while promoting community safety. In carrying out this purpose, the Commission shall ensure that protecting communities and preventing victimization remains the top priority and shall:
 - a. Develop a plan, structure, process and timeline to raise the age of juvenile jurisdiction;
 - b. Identify any needed revisions to statutes, regulations, policies, programs and practices to achieve these goals, taking into account community safety, science, evidence, best practices most likely to reduce recidivism, cost-benefit analysis and other factors, including the service needs of court-served youth (including needs based on gender), and the implementation capacity and structure of the juvenile justice, criminal justice, child welfare and human services systems; and
 - c. Make additional short-, mid- and long-term recommendations to better serve youth, improve outcomes, protect communities, prevent victimization, address harm reduction among the small percentage of youth who repeatedly commit serious violent crime, and ensure New York’s place as a national leader in addressing youth justice and public safety.
2. In its report to the Governor, the Commission shall include a summary and explanation of its findings and recommendations. Each recommendation shall include an estimate of the fiscal impact, options

for cost savings to offset anticipated costs, and an analysis of current system capacity to accommodate the recommendation.



BY THE GOVERNOR

GIVEN under my hand and the Privy Seal of the
State in the City of Albany this ninth
day of April in the year two thousand
fourteen.

A handwritten signature in dark ink, appearing to be "Andrew Cuomo", written in a cursive style.

A handwritten signature in dark ink, appearing to be "Lorne Schenck", written in a cursive style.
Secretary to the Governor

THE GOVERNOR'S COMMISSION ON YOUTH, PUBLIC SAFETY, AND JUSTICE

Summary of Recommendations for
Juvenile Justice Reform in New York
State

Our juvenile justice laws are outdated. Under New York State law, 16- and 17- year- olds can be tried and charged as adults...It's not right; it's not fair. We must raise the age.¹

Governor Cuomo, State of the State Address, January 8, 2014

Governor Cuomo signed Executive Order 131 on April 9, 2014, to establish the Commission on Youth, Public Safety, and Justice. He instructed this Commission to develop a concrete plan to raise the age of juvenile jurisdiction in the most effective and prudent manner possible, and to make other specific recommendations as to how New York State's juvenile and criminal justice systems could better serve youth, improve outcomes, and protect communities. The Commission was ordered to complete its work by December 31, 2014.

Why "raise the age" now? Numerous developments have converged in recent years to forge a growing consensus for this and related reforms to New York State's juvenile justice system. At least seven key developments have brought us to this point where reform is both necessary and possible.

First, experience in states like Connecticut and Illinois that have raised the age of criminal responsibility recently has demonstrated that recidivism and juvenile crime rates can be lowered through evidence-based interventions that steer non-violent young offenders out of the justice system and into family mental health or other needed services. These experiences have helped to reduce opposition to reform in this area by showing that public safety can actually be enhanced by such changes. In fact, analysis completed in support of this Commission found that implementation of the Commission's recommendations would eliminate *between 1,500 and 2,400 crime victimizations every five years*.

Second, extensive research on the significant negative impacts on adolescents of incarceration in adult jails and prisons has brought a sense of urgency for reform. Higher suicide rates, increased recidivism, and many other measures all suggest that both offenders and their communities are harmed by placing adolescents into adult jails and prisons.

Third, New York's unique history of juvenile justice has created a pressing reason for reform now. Despite a proud early history in this area, New York State now stands as one of only two states in the country that has set the age of criminal responsibility at age 16. That single fact has become a rallying cry for the current reform movement in this State, led the State's Chief Judge to urge legislative action, and inspired the Governor's initiative to appoint this Commission.

Fourth, the impacts of processing all 16- and 17-year-olds in the criminal justice system fall disproportionately on young men of color. Young men of color are substantially overrepresented among youth who are arrested at age 16 and 17 and who end up incarcerated as a result of the offense. Those impacts are felt not only by the young men themselves, but also by communities of color around the State.

Fifth, scientific research into brain development has revealed only very recently that portions of our brains, including that governing impulse control, develop far later than expected – after adolescence and as late as

¹ <http://www.governor.ny.gov/news/transcript-governor-cuomos-2014-state-state-address>

one's early to mid-20s. This research has demonstrated that adolescents do not have fully developed faculties of judgment or impulse control. It has also shown that adolescents respond more fruitfully to efforts to rehabilitate them and put them on the right track.

Sixth, that research has, in turn, undergirded several opinions from the United States Supreme Court and lower courts restricting the nature and scope of state and local governments' punishment of adolescent offenders on the ground that such offenders are both less culpable criminally and more susceptible to fruitful rehabilitation because of their still-developing brains. Those decisions have both resulted from and encouraged reform efforts across the country to improve the juvenile justice laws to reduce unnecessary incarceration and improve rehabilitative programming.

Finally, this shifting view of adolescent offenders has coincided with, and arguably been facilitated by, a steady and significant decrease in violent crimes committed by young offenders since the 1990s. That reduction in crime has replaced outsized fears of young "super predators" with a more thoughtful focus on targeted criminal justice interventions to reduce recidivism without simply expanding costly incarceration.

For all of these reasons, the Commission has the wind at its back in drafting this plan for raising the age of juvenile jurisdiction and reforming the juvenile justice system in other respects. The Commission's recommendations reflect a balanced approach that incorporates the wisdom and experiences of law enforcement, probation, criminal defense attorneys, policy advocates, service providers, local and State officials, and youth and their parents affected by the current system. Partly as a result of this balanced approach, the Commission's members support these recommendations unanimously and without reservation.

In order to facilitate passage of these recommendations and to ensure effective implementation, the Commission has concluded that the added investments and expenses necessary to implement these reforms should be borne by the State to the extent possible and appropriate.

After a thorough review of current New York State law and practice in both the criminal and juvenile justice systems; analysis of national practice and the raise the age experience in other states; consideration of input from hundreds of stakeholders across the State through focus groups, interviews, and public hearings; and site visits to current adult and juvenile confinement settings, the Commission recommends that New York State phase in an increase in the age of juvenile jurisdiction to age 18.

This one change should trigger a more comprehensive series of reforms in order to place New York as a national leader in youth justice policy. These reforms would ensure that interventions proven to be effective with adolescents are used for 16- and 17-year-olds; reserve confinement only for those who pose a significant risk to public safety; protect young people through the use of juvenile facilities regardless of the court system in which they are sentenced; create capacity for young people to avoid a lifelong criminal record for one adolescent mistake; and provide a rehabilitative response for all minors accused of committing a crime, thereby reducing reoffending and making communities safer.

The Commission recommends the following reforms:

RAISING THE AGES OF JUVENILE JURISDICTION:

1. Raise the age of Juvenile Jurisdiction to 18, consistent with other states.

New York stands as one of only two states that process all 16- and 17-year-olds in the criminal justice system, no matter their offense. Forty states provide juvenile court jurisdiction for youth up to age 18 and eight states draw the line of juvenile jurisdiction at age 17. Exclusion of 16- and 17-year-olds from the juvenile system denies them the rehabilitative interventions of that system – from parental notification at first contact with the police to confinement in facilities for youth instead of jails and prisons, the juvenile system is structured to intervene with adolescents in a manner that supports the adolescent brains' unique capacity for change.

New York's current structure provides some protections from a lifelong criminal record for 16- and 17-year-olds through Youthful Offender status. However, about 1,600 convictions of 16- and 17-year-olds do result in a lifelong criminal record annually. In addition, the protection from a criminal record does not translate into protection from incarceration in jails and prisons. On any given day, there are about 700 16- and 17-year-olds in jails across New York State and about 100 more 16- and 17-year-olds in State prison. Finally, even those 16- and 17-year-olds who are arrested for less serious offenses that do not result in a criminal conviction or incarceration are not provided access to the many community-based interventions proven to reduce reoffending among young people.

Connecting these young people with the evidence-based interventions of the juvenile system will avoid *between 1,500 and 2,400 crime victimizations every five years*. Providing these effective juvenile interventions will make New York's communities safer and support positive outcomes for young people.

Learning from lessons learned in other states that recently raised the age, the Commission supports phasing in the proposed reforms, with enough preparation time to support development of new community-based and residential service capacity. Juvenile jurisdiction should be expanded to include 16-year-olds in 2017 and 17-year-olds in 2018. This phased approach will allow for an initial infusion of the smaller population of 16-year-olds followed by full implementation.

2. Raise the lower age of juvenile jurisdiction to twelve, except for homicide offenses, which should be raised to ten.

Children as young as seven are currently arrested and processed as juvenile delinquents in New York. New York is among only three other states that formally set a lower age for juvenile jurisdiction at seven or younger. Most states do not set a formal age of lower jurisdiction. Instead, they rely on the lack of capacity that very young children have to meaningfully participate as a defendant in a trial to govern a practical standard for a lower age of delinquency jurisdiction. Very young children have been found to have impaired reasoning and poor understanding of trial matters. In fact, many states require juvenile competency determinations to try youth as old as 13 in juvenile court.

Very young children do not commit significant levels of crime across New York. Children under 12 account for only four percent of all the delinquency petitions in Family Court. The very young children who are coming into contact with the police should be targeted for intensive service provision within the context of their family and community through the social services system. Juvenile probation, detention and placement are not developmentally appropriate responses for very young children who do not have the capacity to

participate as a defendant in a trial. The lower age of juvenile jurisdiction should therefore be raised to 12, with a lower age of 10 for the extremely rare homicide cases.

3. The Governor should appoint one or more individuals with expertise in juvenile justice and a commitment to these reforms to help coordinate their implementation.

The Commission's research into other states' "raise the age" reform initiatives revealed that successful implementation of such reforms depends upon one or more government agencies or officials having clear responsibility for such implementation. In New York State, the Governor's commitment to these reforms provides an auspicious foundation for their success. Various State agencies must be involved in implementation of these proposed reforms, including OCFS, DOCCS, DCJS, and the Governor's Office itself. Services and interventions critical to the reform must be supported at local community-based providers and not-for-profit residential agencies across the State. County executives, district attorneys, county attorneys, and the various courts at issue must also be involved. Finally, the Chief Judge of the Court of Appeals and the Office of Court Administration would play a critical role in the reform process.

Coordination and leadership of efforts across these many entities is critical to successful implementation. Accordingly, the Commission recommends that the Governor appoint one or more individuals with expertise in juvenile justice and a commitment to these reforms to help coordinate their implementation. The responsible official(s) would need the support and cooperation of all of the agencies and entities involved.

ARREST & POLICE CUSTODY

Whether New York treats a youth as an adult or as a juvenile at the first stages of interaction with the justice system – at and immediately after arrest – has lasting consequences for effective law enforcement and to improve outcomes for the youth who are involved. The Commission analyzed other states' practices, as well as those used in New York State currently for juveniles and adults, to develop the recommendations below.

4. Expand to 16- and 17-year-olds the current juvenile practice regarding parental notification of arrest and the use of Office of Court Administration-approved rooms for questioning by police.

Research has shown that adolescents are much more likely to waive their right to remain silent and to confess to crimes quickly than adults during police interrogation. Their increased likelihood to comply with authority figures, to tell police what they think they want to hear, and to succumb to an impulsive decision to make a statement, even a false statement, if it will end an interrogation, places them and law enforcement at great risk for unreliable confessions. Unreliable confessions, in turn, create challenges in prosecution and can result in ongoing crime by the actual offender who remains in the community.

Juveniles have protection against this vulnerability through existing law that requires police to make reasonable efforts to notify a parent at the arrest of a youth age 15 and under and to question those youth only in a room that is specially designed for questioning in an office-like setting. However, 16- and 17-year-olds are not currently afforded these protections. Instead, they are arrested and processed as adults without notice to their parents and alongside other adult arrestees in secure areas of police stations. The protections of parental notification and use of questioning rooms for youth should be extended to 16- and 17-year-olds.

5. Expand the use of videotaping of custodial interrogations of 16- and 17-year olds for felony offenses.

Videotaping interrogations is widely viewed as an effective strategy for improving the reliability of interrogations. Broad support for this practice comes from academic and legal experts as well as from across the spectrum of legal practitioners and law enforcement professionals. This broad-based support rests on several benefits that come from the electronic recording of interrogations such as: increased quality of police interviews; reduced litigation regarding suppression of statements and reduced necessity to defend against claims of misconduct; reduced chance of proceeding against the wrong defendant, leaving the real perpetrator at large; and increased public confidence in the fairness and accuracy of the justice process.

Currently, more than one third of states and the District of Columbia have adopted electronic recording of interrogations as a statewide practice for some or all felony offenses. Within New York State, at least 43 counties, cities, or smaller jurisdictions already record police interrogations. By all accounts, the practice has proven valuable not only to protect defendants but also to protect police officers against accusations of coercion or other improper practices. The use of electronic recording should be expanded to all custodial interrogations of 16- and 17-year-olds for felony offenses.

PRE-TRIAL DIVERSION OF CASES

Research has demonstrated that diversion of appropriate cases before they reach the courts both improves outcomes for the youth involved and better protects public safety. In addition, the cost of diversion is much lower than that of juvenile detention or out-of-home placement. Fiscal modeling performed by the Commission suggests that diversion interventions can be provided for an average cost of \$3,000 per case while the cost of out-of-home placement can reach over \$200,000 per child annually. For these reasons, the Commission analyzed best practices in diversion across the country and the existing barriers within New York to effective diversion in appropriate cases.

The Commission's research also revealed reason for an important caveat: the current adult court system effectively weeds low-level cases against 16- and 17-year-olds out of the system before conviction and significant intervention, with 59% of such arrests not prosecuted at all or resulting in dismissal. Research has demonstrated that low-risk youth who are drawn into "deep end" interventions (like out-of-home placement or intensive community-based programming) actually are more likely to re-offend than if such interventions are not used. Accordingly, any reforms must not have the unintended consequence of keeping youth who do not commit serious offenses or otherwise present a significant risk to public safety in the "deep end" of the justice system.

The recommendations below arise from the Commission's comprehensive research and review.

6. Mandate diversion attempts for low-risk (per risk assessment) misdemeanor cases except where probation finds no substantial likelihood that youth will benefit from diversion in the time remaining for adjustment or if time for diversion has expired and the youth has not benefited from diversion services.

The opportunity for pre-court diversion through probation is unique to the juvenile system. This "adjustment" process requires use of a risk assessment instrument and provides for evidence-based services to reduce risk of

reoffending. New Adolescent Diversion Parts (ADP) piloted by the Office of Court Administration showed that a probation diversion process at the outset of a case of a 16- or 17-year-old can substantially improve outcomes for youth and for the justice system. The research on Nassau County's ADP demonstrated that, compared to the 2011 reference cohort, providing formal pre-court diversion or dismissal opportunities produced more frequent straight dismissals, reduced numbers of incarcerative sentences, and produced no increase in the rate of re-arrest. In addition, the provision of evidence-based services to youth reduces recidivism and the cost of these programs is likely to be recouped within five years due to the resulting decreases in crime.

7. Expand categories of cases eligible for adjustment to allow for adjustment in designated felony cases and Juvenile Offender cases removed to Family Court, with a requirement for court approval for all Juvenile Offender cases and if the youth is accused of causing physical injury in a designated felony case. Revise the criteria for determining suitability for adjustment to include risk level and the extent of physical injury to the victim.

Under current law, probation departments are barred from adjusting cases that have been removed from criminal court. While the universe of designated felony offenses and other offenses removed from criminal court to Family Court are extremely serious in nature, current system processing of 16- and 17-year-old violent felony offense cases shows that many violent felony arrests of 16- and 17-year-olds do not currently result in felony convictions. In fact, 47% of violent felony arrests of 16- and 17-year-olds disposed during 2013 did not result in indictment. Instead, half of those arrests that were not indicted resulted in no conviction at all and the other half resulted in a conviction on a misdemeanor or non-criminal violation. While the Commission expects that most of these cases may not be appropriate for adjustment, in those cases where the offender is determined by the risk assessment tool to have a low risk of re-offending, adjustment may be appropriate. The court and the probation department should have the option of adjustment in these cases.

In addition, the Family Court Act provides that local probation departments may adjust only those cases that are "suitable." Probation is directed to consider a range of factors when making suitability determinations including: age; elements of the offense; likelihood of cooperation and success in timeframe; risk of re-offense or victim harassment during adjustment; history of offending; need for court removal from home; and whether there is an allegation against anyone else for acting jointly with the youth. Reframing the considerations for a youth's suitability for adjustment to reflect objective risk assessment and severity of harm to the victim would shift the use of diversion to an evidence-based framework.

8. Create the capacity and a process for victims to obtain orders of protection without a delinquency case being filed in court.

Under current law, no mechanism exists for a victim to obtain an order of protection without a delinquency case proceeding in the Family Court. This means that even where the victim would consent to having a case adjusted without a petition being filed with the court as long as she could obtain an order of protection, the probation department cannot explore adjustment in appropriate cases. Forty-five percent (25 counties) of the 56 counties that responded to a survey conducted in support of the Commission reported the inability to obtain orders of protection was a barrier to adjusting cases. This change would allow a victim to obtain an order of protection without filing a delinquency petition in Family Court. Probation would thus be able to seek adjustment if the victim consents.

9. Allow two additional months for probation diversion (beyond 120 days) if a documented barrier to diversion exists or a change in service plan is needed.

If a probation department chooses to attempt adjustment in an eligible case and victim consent is obtained, the department is allowed only an initial two-month period and an additional two months upon judicial approval. Thirty-six out of the 56 local probation departments that responded to the probation survey identified this limited period for adjustment as a barrier to adjustment of eligible cases.

The review of comparable states revealed that many other states currently allow a longer period of time for pre-petition probation diversion in their juvenile justice system. Several states allow six months for diversion attempts with Florida and Illinois allowing a full year. Increasing the time for probation to use diversion services will allow greater opportunities to adjust cases successfully, especially for those cases with more intense service needs or where localities have waiting lists for services.

10. Establish a continuum of diversion services that range from minimal intervention for low-risk youth to evidence-based services for high-risk youth.

Use of probation diversion for 16- and 17-year-olds can only reap positive benefits if localities across New York have access to a range of responses proven to be effective with youth. Results from the survey of probation directors showed that, while most of the large counties have access to some evidence-based services at probation diversion, the majority of the smaller counties do not. In addition, while counties generally have access to psychiatric evaluation and psychological assessment, there are consistent waiting lists for those services throughout the state. Survey results also showed that the only restorative justice intervention that is widely available throughout New York State is community service. Given that restorative interventions provide rapid means for direct accountability to the victim or the community at a relatively low cost, expansion of these interventions holds significant promise.

Tremendous regional variation was reported in the survey results. For example, two counties reported fewer than five services available at probation diversion while the City of New York and four other counties reported over 20 different types of available services. All counties should have access to a continuum of intervention that meets their local needs, including low-cost, low-intensity responses such as restorative interventions (including juvenile accountability boards and youth courts), and more intensive services for smaller numbers of youth and families who pose a higher risk and have more intense needs. A comprehensive range of interventions across New York would provide access to services proven to reduce recidivism as well as rapid accountability measures that provide opportunity for youth to repair the harm they have caused without the need for more costly out-of-home placement. Creative solutions must be sought to create service capacity in more rural parts of New York to equalize access to services for youth in all parts of the state.

11. Establish family engagement specialists to facilitate adjustment.

Probation departments also identified family engagement as a significant barrier to the successful diversion of appropriate cases. Family engagement is critical in order to obtain the parental consent that is necessary for diversion services and to ensure that youth substantially engage in the services that may be needed. Support for family engagement specialists would strengthen system capacity to engage youth and their families in targeted services and maximize the benefits of adjustment services. Family engagement specialists have proven successful and extremely cost effective in those jurisdictions that have used them.

COURT PROCESSING OF 16- AND 17-YEAR-OLDS

One of the most significant questions addressed by the Commission is how 16- and 17-year-olds should be handled in the court system once the age of juvenile jurisdiction is raised. If these cases were simply shifted to the current juvenile model, all cases would be handled in Family Court under its juvenile delinquency jurisdiction, except those cases required to be charged in adult criminal courts as Juvenile Offenders. While that default outcome could work well for many cases, it would not take into account the critical public safety concerns that require certain of the most serious violent offenses, committed in more significant volume by those who are 16 and 17 than those 15 and under, to be handled in criminal court, at least in the first instance. The Commission considered this question in detail and recommends reforms to the current system designed to ensure that *every* young offender is handled in the most appropriate manner to improve their prospects for future productivity as well as the safety of their communities.

12. Expand Family Court jurisdiction to include youth ages 16 and 17 charged with non-violent felonies², misdemeanors, or harassment or disorderly conduct violations. Provide access to bail for 16- and 17-year-olds in Family Court and allow Family Court judges to ride circuit to hear cases, at the discretion of the Office of Court Administration.

The Commission found that Family Court would be the most appropriate court to handle misdemeanors and non-violent felonies against 16- and 17-year-olds. Family Court provides a range of youth-centered approaches that are not available in the criminal court. Family Court already has a well-developed system for probation departments to attempt to divert appropriate cases before they are filed in court and to provide diversion services designed to improve outcomes for youth. If a case reaches the court, youth are represented by attorneys who are specially trained in the unique role of providing counsel to children, judges are enmeshed in the cases of children full time, probation assessments and reports focus on issues unique to youth (such as academic and family supports and challenges), and dispositional decision making is rooted in the needs and best interest of youth as well and public safety. In addition, Family Courts have the capacity to order a range of services that are part of a larger portfolio of services to prevent out-of-home placement at the local level. None of these structures are currently incorporated into the criminal court context. While not insignificant, the projected additional case volume expected to materialize under this Commission's proposals would be manageable for the Family Courts. The Commission's modeling projects an additional 6,840 delinquency filings annually in Family Court once the new age of juvenile jurisdiction is fully implemented. With 20 new Family Court judgeships being established in January of 2015 and an additional five Family Court judgeships scheduled for January 2016, the Family Court will have adequate capacity to manage the influx of new 16- and 17-year-old misdemeanor and non-violent felony cases.

The Commission recommends providing the additional procedural safeguard of bail for 16- and 17-year-olds for those cases handled in Family Court. It also recommends that OCA be authorized to allow and facilitate Family Court judges in certain counties to "ride circuit" in different parts of the county to address the fact that certain cases that are now handled in towns or villages around the state would, under the Commission's reforms, be handled only in the county seat where the Family Court resides.

² Non-violent felonies would exclude all homicide offenses; class A felonies; Juvenile Offender crimes, Violent Felony Offenses, sexually motivated felonies, crimes of terrorism, felony vehicular assaults, aggravated criminal contempt; and conspiracy to commit or tampering with a witness related to any of the above offenses.

13. Begin judicial processing in criminal court for current Juvenile Offender crimes as well as all violent felony offenses; all homicide offenses; Class A felonies; sexually motivated felonies; crimes of terrorism; felony vehicular assaults; aggravated criminal contempt; and conspiracy to commit any of these offenses and tampering with a witness related to any of these offenses for 16- and 17-year-old offenders.

While nearly every state has an older age of juvenile jurisdiction than New York, every state also retains some capacity to try certain of the most serious offenses committed by young people in criminal court. New York has an existing Juvenile Offender structure that currently accomplishes that end for youth of ages 13 through 15. The Commission finds that retaining the initiation of serious crimes of violence in criminal court, with the option for transfer to Family Court as under current law, would best protect public safety. This structure will result in only 14 percent of 16- and 17-year-old arrests originating in criminal court. In addition, the recommendations that follow would substantially reform the criminal court processing of these offenses to address young offenders' specific needs and improve their outcomes through: the use of juvenile probation assessment and intervention while cases are pending, the opportunity for removal of cases to the Family Court (or for processing under the Family Court Act in the criminal court) with a new presumption of removal for violent felonies that are not Juvenile Offender crimes (see below), reduced sentencing for most youth offenses in appropriate circumstances, and use of youth facilities for confinement of minors. In addition, expansion of opportunity for Youthful Offender status and creation of a new capacity to seal one conviction if the young person turns away from crime would reduce any negative collateral consequences of criminal court processing.

14. Apply current standards for removal from criminal to Family Court of Juvenile Offender cases to those cases against 16- and 17-year-olds that would originate in criminal court, except for subdivision two of second degree robbery (a Juvenile Offender crime) and the Violent Felony Offenses that are not Juvenile Offender crimes. For these latter offenses, create a new rebuttable presumption for removal to Family Court. Such cases would be removed to Family Court unless the prosecutor demonstrates that criminal prosecution is in the interests of justice, considering the current criteria for removing a case to Family Court and whether the youth either played a primary role in commission of the crime or aggravating circumstances, including but not limited to the youth's use or handling of a weapon, are present.

While the Commission proposes originating the serious crimes of violence outlined above in criminal court, stakeholder feedback and the research into practices in other states support using a presumption for removal to Family Court for the violent felony offenses that are not current Juvenile Offender crimes. In addition, many stakeholders raised significant concern about the current second degree robbery offense that is a Juvenile Offender crime. Youth can find themselves charged with this offense because they were part of a group that committed a robbery that resulted in physical injury or involved use of a weapon even though that youth himself did not cause injury or brandish a weapon. New York should acknowledge that only the most serious crimes for 16- and 17-year-olds should be processed in criminal court by imposing a new presumption for removal to Family Court for the violent felony offenses that are not existing Juvenile Offender crimes and for the Juvenile Offender crime of second degree robbery.

Notably, under existing law approximately one third of all Juvenile Offender cases that are initiated in criminal court are later transferred to Family Court. Contrary to popular conceptions, Family Court is already handling some of the most serious cases against older adolescents. Under the Commission's recommendations, the

criminal court judge would make that transfer determination as it does currently and would retain those cases that are appropriately handled in criminal court.

15. Create new Youth Parts, with specially trained judges, in criminal court for processing those cases against 16- and 17-year-olds and other Juvenile Offenders who remain in criminal court.

Many stakeholders emphasized the need to build youth expertise for cases that are processed in criminal court. Consolidation of these cases under one judge with specialized training would build expertise in effective resolution of adolescent cases and reap the crime reduction benefit of this special expertise regarding evidence-based interventions that reduce recidivism among teenagers. While Youth Parts would be housed in the criminal court, they would provide distinct settings to focus on using youth-specific, community-based and residential interventions instead of the existing adult interventions.

16. Clothe judges in criminal court Youth Parts with concurrent criminal court and Family Court jurisdiction to allow Youth Parts to retain cases removed to Family Court under the new presumption for removal and to handle them under the Family Court Act where appropriate.

While the capacity for the removal of a case from criminal court to the Family Court building itself would be preserved under the Commission's proposal, court stakeholders and district attorneys emphasized the value of allowing the criminal court Youth Part to function as a Family Court in certain cases that are removed. Clothing the Youth Part criminal court judge with concurrent Family Court and criminal court jurisdiction would allow the Youth Part to retain the case and apply the Family Court Act after deciding to remove the case. In this way, the case could be readily transitioned to a Family Court model, overcrowded Family Court buildings would not be overtaxed, and District Attorneys should grow increasingly comfortable with having appropriate cases handled under the Family Court Act.

17. Provide juvenile probation case planning and services for cases pending in criminal court.

Criminal court processing for minors should also be improved by adding juvenile probation assessment and the potential for service intervention pending trial and sentencing for any minors whose case is being processed in criminal court. Provision of juvenile probation assessment and interventions prior to trial could significantly enhance case outcomes for youth cases retained in criminal court through successful intervention prior to sentencing. Youth who successfully engage in these evidence-based services have been shown to be less likely to reoffend.

REMOVING YOUTH FROM ADULT JAIL & PRISON FACILITIES

The harms to youth detained or incarcerated in adult facilities across the country are well documented. As a result, one of the most critical system changes to accomplish in raising the age of juvenile jurisdiction in New York State will be to remove young people under age 18 from adult facilities, including both local jails and state prisons. The Commission assessed and compared New York's adult and juvenile confinement systems, addressed the fiscal and logistical challenges to shifting minors out of adult jails and prisons, and provided recommendations to reduce unnecessary use of juvenile detention and placement.

18. Prohibit confinement of any minor in an adult jail or prison and, to the extent funding and operational considerations allow, permit youth to remain in youth settings until age 21.

Under current law, 16- and 17-year-olds can be held in the custody of either the local county jail or the New York State Department of Corrections and Community Supervision (DOCCS). Young people who are detained while their case is proceeding in court are held in local county jails, as are those who receive custodial sentences less than one year in length. Those who receive sentences greater than one year are committed to the custody of DOCCS and housed in state prison facilities. On any given day in New York State, there are approximately 700 16- and 17-year-olds held in local jails and about 100 more in State prisons.

The impact of incarceration of 16- and 17-year-olds in adult facilities falls primarily on youth of color: Black and Hispanic youth receive 82 percent of sentences to confinement statewide. In New York City, Black and Hispanic youth account for more than 95 percent of prison sentences for 16- and 17-year-olds.

Research has demonstrated that the use of adult prisons and jails as compared to juvenile facilities results in worse outcomes for juveniles and for community safety. A comprehensive study of youths processed in New York as adults and nearly identical youths processed in New Jersey as juveniles found that the percentage of re-arrest for youth charged with robbery and processed in adult court was 25% higher than those charged with robbery and processed in juvenile court. A follow-up study looking at the same comparison of youth further substantiated this outcome, finding a 26% higher likelihood of re-incarceration for youths adjudicated and sanctioned in the criminal court, including those that spent time in adult facilities.

Research has also shown that incarceration of minors in adult facilities places them at substantial risk of harm. Studies have found that youth under 18 represented 21 percent of all sexual violence victims in jails in 2005 and 13 percent in 2006 despite only making up 1 percent of the entire jail population. Congressional findings have concluded that juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration. Other forms of physical violence are also greater for youth in adult facilities, as they are twice as likely to be beaten by staff and 50 percent more likely to be attacked with a weapon than youth in juvenile facilities.

Current conditions of confinement for minors in New York State jails and prisons are substantially more correctional and less rehabilitative than youth facility settings. While local jails are required to house 16- and 17-year-olds separately from people 18 and older, minors generally have poor access to mental health services, are subject to potentially long periods in solitary confinement, and often do not have access to quality education services in jail. Minors in DOCCS facilities are currently housed together with older inmates, often share group showers, are likewise subject to potentially long periods in solitary confinement, and must often wait long periods of time to access vocational and therapeutic programming.

Removing minors from adult confinement settings presents challenges in terms of cost and capacity. Modeling conducted in support of the Commission suggests that there will be a need for 558 new secure detention beds, an additional 749 voluntary agency placement beds, and an additional 38 OCFS limited secure beds and 192 OCFS secure beds.

However, there is good reason to believe that this new detention and placement need may not materialize as expected. Counter to expectations prior to raising the age in Connecticut and Illinois, neither state experienced

the expansion in detention and placement that was expected. The average daily population in Connecticut's pretrial detention centers fell from 132 in 2006 to 94 in 2011; the year after 16-year-olds entered the juvenile system, allowing the state to close one of its three state-operated detention centers. Illinois likewise saw an 18 percent decline in its juvenile detention system following expansion of juvenile jurisdiction to 17-year-old youth who committed misdemeanors. Placement need also did not expand as predicted in either state. In Connecticut, total commitments to its juvenile placement settings began to decline prior to raise the age and continued to decline even after 16-year-olds were added. Placements in Illinois were down 22.4 percent from the time the age was raised in 2010 and the beginning of 2013. The recommendations below are designed to mitigate the need for new detention and placement capacity by reducing the current unnecessary use of those settings.

19. Reduce unnecessary use of detention and placement through:

a. Prohibition of detention and placement for youth adjudicated for first-time or second-time misdemeanors that do not involve harm to another person, and who are low-risk, except where the court finds a specific imminent threat to public safety.

Data analyzed by the Commission revealed that custodial interventions are often used for youth who commit low-level, non-violent offenses in New York. For example:

- ▶ About 2,200 minors receive sentences to jail or time served following a misdemeanor arrest, and 80% of those involved non-violent arrest charges.
- ▶ Last year more than 250 Juvenile Delinquent youth were sent to out of home placement as a result of a case that was initially petitioned as and adjudicated for a nonviolent misdemeanor.
- ▶ In New York City, 59 percent of detention admissions are for youth charged with misdemeanor offenses.
- ▶ Over half (53%) of youth in OCFS non-secure and limited-secure care were placed as a result of a misdemeanor-level finding.

Commission analysis revealed that several other states have placed restrictions on the use of out-of-home placement for misdemeanors. Specifically, Texas, Ohio, Georgia, Mississippi, Kentucky and Florida, have enacted legislation that bans custodial options for specific categories of youth, particularly misdemeanants. Similar restrictions on the use of juvenile placements for low-risk youth who have not committed significant crimes are warranted in order to reserve confinement for only the most serious young offenders.

This balanced recommendation would prohibit out-of-home detention or placement of youth who (a) screen low risk on a validated risk assessment tool; (b) have been adjudicated for only one or two misdemeanor offenses; (c) have not caused physical harm to another person; and (d) in the court's view, pose no imminent risk to public safety. This approach would protect public safety while avoiding unnecessary, counter-productive, and costly use of confinement.

**b. Prohibition of placement for technical probation violations alone, except where
1) the court finds a specific imminent threat to public safety or 2) the youth is
on probation for a violent felony offense and the use of graduated sanctions
have been exhausted without successful compliance.**

Technical violations of probation supervision involve breaking rules set as a condition of probation supervision, but not commission of a new crime. For example, a youth may return home after curfew or skip school, violating terms of his probation. The use of out-of-home placement for these kinds of non-criminal rule violations was identified by stakeholders as an area ripe for reduction. Data on the number of New York State youth who are placed solely because of a technical violation of probation are inconsistently kept. However, in a survey administered to probation departments across New York State for this Commission, those that responded estimated that in 2013, 270 youth in the juvenile justice system were sent to placement solely as a result of technical violations of probation. Nationally, OJJDP reports that 16% of youth in juvenile placement had a technical violation of supervision recorded as their most serious offense leading to placement.

Several states have implemented the use of graduated sanctions to reduce the use of placement in response to technical probation violations. Hawaii, Kentucky, Kansas, and Florida all implemented formal sanctions as an alternative to placement to respond to technical probation violations. The Commission's recommendation would reserve placement only for youth who present a risk to public safety by limiting its use in response to technical probation violations. In most cases, graduated sanctions would instead be used to improve compliance with the terms and conditions of probation.

**c. Implementation of weekend arraignment for Family Court cases statewide
where adult arraignment already occurs.**

Adult system processing is currently structured to arraign adults over the weekend in courts across the state. However, this kind of court access is not available in cases against juveniles outside of New York City. Instead, youth arrested and detained as juveniles must wait until Monday to see a Family Court judge if they are arrested after the Family Court closes on Friday afternoon. Shifting 16- and 17-year-olds to Family Court without implementing weekend arraignment for Family Court cases would therefore leave these youth more subject to incarceration than they currently are. Twenty-three percent of youth detained outside of New York City spend one to three days in detention, many of them waiting over the weekend in detention only to be released as soon as they are before a judge. Weekend arraignment for juveniles was implemented in New York City in 2008, using the existing adult weekend arraignment structure to hear juvenile cases. This form of weekend arraignment for juveniles should be implemented statewide where ever adult weekend arraignment already occurs.

**20. Establish family Support Centers in high-PINS referral localities to provide more robust
community-based PINS services, and then eliminate detention and placement of PINS.**

PINS are youth ages 17 and under who have engaged in non-criminal "status offenses" such as truancy and running away. While these young people do not stand accused of any crime, they can be confined in non-secure detention and placement settings. In 2013, there were 1,574 PINS detention admissions and 627 admissions to out-of-home placement. The bulk of detention and placement for PINS occurs outside of New York City: in 2013, 89 percent of PINS placements and 83 percent of PINS detention admissions were ordered in counties outside of New York City.

Analysis completed by the Office of Children and Family Services in support of the Commission's work showed that New York State spends over \$100 million annually to hold PINS youth in detention and placement. This expensive practice is contrary to best practice standards for these youth who have not committed any offense. The most effective interventions for PINS youth have been shown to include: diversion from court, immediate response, a triage process, accessible services that engage the entire family, and ongoing quality assurance of program effectiveness.

Connecticut has developed a promising model that reflects these best practices to respond to the needs of families of status-offending youth who were previously served through the courts. In October, 2007, Family Support Centers (FSCs) opened in the four jurisdictions with the highest numbers of status offense complaints. In lieu of court referrals, those status-offending youth who are in crisis or deemed high-risk after being screened by a probation officer are referred to a FSC. The FSC multiservice model requires caseworkers to contact families within three hours of receiving a referral. They conduct an initial screening to determine the appropriate next step for families, including a comprehensive assessment and planning of services that can be offered within the center. FSC officials work to strengthen families, provide treatment services, reconnect youth with family and schools (in cases of truancy), and increase the skills of youth and family in managing status offense behavior. Services provided to youths and families diverted to FSC include counseling, mediation, mental health, and respite care.

During the first six months after the 2007 implementation of FSCs, the number of status offense court referrals fell by 41%, and more than one year later no youth charged with a status offense had been securely detained. From 2007 to 2009, 81% of youths who successfully completed an FSC program had no further involvement in the juvenile justice system.

The Commission recommends that New York reinvest some of the resources currently used for PINS out-of-home detention and placement to support this robust model of effective community-based intervention. As this service capacity is developed, the detention and placement of PINS youth should be prohibited, reserving these costly settings only for youth who present a significant risk to public safety.

EFFECTIVE SENTENCING, PLACEMENT, & PROBATION SERVICES

Providing access to effective interventions for 16- and 17-year-olds whose cases result in either an adjudication of delinquency or a criminal finding is critical to successfully raising the age of juvenile jurisdiction. The Commission's recommendations below address the need to shift to a determinate sentencing structure for minors who are sentenced in the criminal courts, recommend community-based supervision and custodial settings that would provide the most effective interventions for 16- and 17-year-olds, and identifies a continuum of effective interventions for those youth who may age into the DOCCS system.

21. Use statutory Juvenile Offender and Youthful Offender sentences for offenses committed at ages 16 and 17 that are sentenced in criminal court, except for Class A felony offenses that are not Juvenile Offender crimes. For Class B violent felony offenses, the court should have statutory discretion to impose a longer adult sentence if the prosecution shows aggravating circumstances, including severity of injury or gravity of risk to public safety.

Supreme Court jurisprudence has established that the most extreme adult sentences are rarely, if ever, appropriate for youth under age 18. Through a ban of the juvenile death penalty as well as a ban on automatic

life without parole for minors, the Supreme Court has applied a developmental approach to sentencing of minors for the most egregious offenses. Reform of New York's sentencing structure for 16- and 17-year-olds would enshrine in law the reality that sentences in the upper range of adult sentencing are rarely appropriate for a teenager who retains a real capacity for rehabilitation. In addition, sentences for violent felony offenses that are not Juvenile Offender crimes for 16- and 17-year-olds should not be longer than existing Juvenile Offender sentences that would apply to 16- and 17-year-olds under these reforms.

At the same time, however, stakeholders consulted in support of the Commission's work pointed to those very rare, but egregious cases where a 16- or 17-year-old presented a major, ongoing threat to public safety. To account for those cases, the Commission concluded that it makes sense to retain the current sentencing structure solely for Class A felonies that are not Juvenile Offender crimes and to provide an option for longer sentences if a 16- or 17-year-old commits a Class B violent felony and the prosecution can make a showing of aggravating circumstances, including severity of injury or gravity of risk to public safety.

22. Use determinate sentencing for youth sentenced under Juvenile Offender or Youthful Offender statutes, including 16- and 17-year-olds.

Stakeholder interviews and focus groups, as well as extensive discussions with experts in this area, identified serious concerns about the impact of the current *indeterminate* Juvenile Offender and Youthful Offender sentences on youth. In particular, stakeholders highlighted the uncertainty that results from indeterminate sentencing and the challenges that such uncertainty creates for effective programming and re-entry planning during placement. Because youth can be released by the Board of Parole at different points over a period of years, or not at all, under the indeterminate sentencing structure, there is no capacity to know when release will occur, to create an institutional case plan structured to complete programming in a timely manner, or to develop a strong plan for re-entry supports.

It is also difficult to help youth serving indeterminate sentences to set personal goals and motivate them to focus on their education and training when the timing of their release is so uncertain. Under the determinate sentencing structure, good behavior is guaranteed to reap the benefit of an early release and therefore provides strong motivation for completing programming and following rules while confined. However, under the indeterminate structure, youth may do everything required of them while confined and still not be released by the Board of Parole. This inability to tie good behavior to certainty of an early release can serve as a disincentive for good behavior and, at times, leave youth feeling that there is no reward for following the rules and completing programs. This is particularly inapt for adolescents who are otherwise often more susceptible to rehabilitation than adults.

Shifting to a determinate structure would facilitate certainty in release planning and create motivation for youth to behave while in custody, as they would know with certainty when they can be released if they follow the rules. The Sentencing Commission recently completed several years of analysis on how to best shift from an indeterminate to a determinate sentencing structure and their recommendations should be considered when developing a determinate range in Juvenile Offender and Youthful Offender sentencing.

23. Develop a continuum of effective community-based services at the local level to be used by probation, including expansion of JRISC, to maintain more high-risk youth in the community and reduce recidivism.

Community-based supervision provided to 16- and 17-year-olds, whether adjudicated in Family Court or sentenced in the criminal court, should provide supervision with evidence-based interventions individually

tailored to reduce the risks and address the needs presented by the youth. While some counties have a robust continuum of evidence based interventions for youth on probation, the survey of probation departments conducted for the Commission showed that service capacity varies greatly across county lines, both in terms of range of services and current capacity to expand services to a new population of youth. For example, while all counties that responded to the survey reported access to psychological evaluation, nearly half of them also reported a waiting list to access that service. In addition, while probation departments in larger counties tended to report access to evidence-based therapeutic interventions, over half of the 52 localities that provided information on these services reported fewer than three evidence-based services and six counties reported no evidence-based services for use during probation supervision.

The Juvenile Risk Intervention Services Coordination (JRISC) Program is an existing State initiative that links enhanced probation supervision with evidence-based programs, providing an effective model designed to reduce recidivism among high-risk youth and, in turn, reduce the need for detention, placement, and incarceration. The program began in 2010 and, in its first four years, has served just almost 1,000 youth across the seven participating counties at a total cost of about \$3.5 million. Outcomes of the program are promising, with a 71% rate of program completion in 2013, and within those cases, a 74% rate of risk reduction. JRISC has been shown to maintain high-risk youth in the community effectively and the Commission recommends that these services should be expanded beyond the seven participating counties.

Availability of these kinds of evidence-based services is critical to the success of any justice system for youth, as they reduce recidivism, produce better outcomes for youth in terms of education and substance abuse, and even result in a positive preventive impact for other youth in the family. Expanding access to these kinds of effective programs for 16- and 17-year-old youth is necessary to improve outcomes for youth and the community.

24. Develop residential facilities using best practices models to support the needs of older adolescents, including:

a. For newly required placement capacity, establish a network of new, small facilities with staffing and programming consistent with the Missouri approach;

Development of juvenile residential capacity to meet the new demand that would result from raising the age provides New York a unique opportunity to create new residential programs from the ground up. The Commission's review of the most promising models for residential placement of older adolescents brought focus to the model implemented in Missouri. In 2001, the American Youth Policy Center identified the Missouri approach as a "guiding light" for reform in juvenile justice. Over the past two decades, Missouri's Division of Youth Services (DYS) has developed a model of care deeply rooted in rehabilitation with extraordinary results. Key components of the model include: smaller facilities located near the youths' homes and families; closely supervised small groups and a rigorous group treatment process offering extensive and ongoing individual attention; emphasis on keeping youth safe not only from physical aggression but also from ridicule and emotional abuse through constant staff supervision and supportive peer relationships; development of academic, pre-vocational, and communications skills that improve their ability to succeed following release; involvement of parents and family members as partners in the treatment process and as allies in planning for success in the aftercare transition; and considerable support and supervision for youth transitioning home from a residential facility. Over two-thirds (67.1 percent) of youth discharged from the Missouri facilities remain law-abiding. In addition, an overwhelming majority of youth exiting custody were productively engaged in

school or employment at discharge. New York should replicate this model in developing new placement capacity for 16- and 17-year-olds in different regions across the state.

b. Expansion of the August Aichhorn RTF model for justice-involved youth with serious mental health disorders; and

The current model of care provided by the August Aichhorn Center for Adolescent Residential Care is a promising model that should be expanded to meet new need for 16- and 17-year-old youth with serious mental health disorders who are sent to juvenile placement. A partnership between the Office of Mental Health (OMH) and the Office of Children and Family Services (OCFS), August Aichhorn operates a Residential Treatment Facility (RTF) for youth in OCFS custody. The RTF provides the highest level of mental health care available in the State system and is reserved for youth with serious mental health disorders. The program provides a kind of care and supervision that is significantly different than traditional correctional settings. The model does not use room seclusion or mechanical restraints, provides full-day education in a classroom setting, engages youth in positive activities in a community room or outdoors when school is not in session, houses youth in rooms that resemble a dormitory setting, offers the constant support of therapists, and operates on the philosophy that the program cannot achieve success by excluding, transferring, or discharging the most troublesome youth on the basis of their special needs. The model has produced promising outcomes in terms of public safety as well as positive outcomes for youth. The recidivism rate for youth who completed the program is only 39 percent compared to a recidivism rate of 60 percent among a control group. The program has accomplished this with no transfers to psychiatric centers or other hospitals, no run-aways from the building, no sexual assaults or deaths and only one serious self-inflicted injury in 23 years.

c. Programs that meet the specialized needs of LGBTQ youth.

Like all youth, LGBTQ youth also need access to appropriate programs and services prior to placement through all phases of system involvement. A continuum of appropriate programs and services should be available from initial system contact through re-entry. If justice systems do not simultaneously assure that community-based alternatives and diversion programs are affirming environments, LGBTQ youth may be set up to fail, leading to placement. The Commission supports careful consideration of the needs of LGBTQ youth in development of community-based and institutional programming to meet the needs of 16- and 17-year-olds.

25. Reduce recidivism among the 18 – 24 population in the criminal justice system by:

a. Using data-driven, risk-based methodology to prioritize DOCCS inmates aged 18-24 for effective programs;

While the Commission recommends use of juvenile facilities for all minors and supports retention of youth in those facilities until the age of 21 to the extent resources allow, some youth would inevitably still shift into the adult prison system as a result of their age at sentencing and their sentence length. In addition, there is currently a substantial population of 18- to 21-year-olds at DOCCS (1,982 inmates as of 8/1/14), the vast majority of whom committed their offenses when they were over 17. These young people screen exceptionally high risk, with the majority of 18- and 19-year-olds at DOCCS scoring at the highest level of risk on the COMPAS risk instrument used in the adult system. However, research has also shown this population to be particularly amenable to intervention. New York State-specific analysis found high-risk offenders and offenders under the age of 25 have larger decreases in recidivism upon receipt of many types of effective programming, and consistently show larger reductions in victimization, than those over 25. DOCCS should therefore prioritize effective interventions for this population.

b. Using technology to expand educational opportunities for 18-21-year-olds in DOCCS custody; and

General education and vocational education have been shown to significantly reduce recidivism among the high risk prison population, with general education producing a 13 percent reduction in recidivism and vocational education producing a 12 percent reduction in recidivism. DOCCS should expand capacity to provide the crime-reducing interventions to their youngest population through the use of technology and distance learning.

c. Considering use of discrete housing units for youth transitioning from juvenile facilities to DOCCS and for older adolescents at DOCCS.

Because a small subset of youth are likely to transition from a juvenile setting to a prison setting, it is important to draw attention to programmatic continuity that supports this transition. Because DOCCS is currently building discrete units to come into compliance with PREA's separation requirements for 16- and 17-year-olds, unique discrete housing capacity may be available within selected DOCCS facilities after minors are removed as a result of raising the age. These discrete units could provide an opportunity for specialized programming and structure for older adolescents at DOCCS and to target transition services to older adolescents moving from juvenile to adult confinement.

RE-ENTRY TO THE COMMUNITY

Implementation of the reforms already discussed to raise the age will fail to reach their full potential for crime reduction and youth success if re-entry planning and services are not central to the effort. The Commission focused on reforms to re-entry planning and implementation that would best foster successful returns to the community for 16- and 17-year-olds. The Commission recommends several actions to move New York State practice closer to the best practice model.

26. Establish and implement new OCFS regulations requiring evidence-based risk-needs-responsivity (RNR) framework for case planning and management in private- and State-operated placement.

Research has shown that specific practices and interventions designed to address criminogenic risk and needs are highly effective in reducing recidivism among youth after they return to the community. Existing juvenile placement settings do not use the kind of risk assessment and case planning central to targeting and reducing criminogenic risk. Regulations and policies should be changed to require this effective case assessment and intervention model in order to reduce recidivism among youth returning from placement.

27. Require that youth sentenced in the criminal courts and released from an OCFS facility receive post-release supervision from OCFS, instead of DOCCS, to facilitate better re-entry planning and implementation.

Continuity of care is critical for effective reentry. However, the current system for Juvenile Offenders bifurcates responsibility for residential care (OCFS) and community supervision (DOCCS), creating enormous challenges for continuity of care. The Commission recommends reform to ensure that planning for and supervision of community-based interventions are provided by the agency responsible for residential care.

28. Replicate the Monroe County juvenile reentry task force in counties with highest juvenile case volume.

Best practice in adolescent reentry calls for coordination of reentry supports and services beginning during placement and continuing after youth return home. The Monroe County Reentry Task Force is a promising model for the complex coordination needed for successful reentry and should be replicated. The Task Force has a wide range of reentry services – substance abuse, mental health, housing, literacy, employment skills, education, etc. – as formal members or partners to ensure youth returning to Monroe County get the services they need. Task Force members come together with the family before youth are released to set up a supportive plan for reentry and youth continue to be supported by the Task Force after returning home. In the first 19 months of the initiative, the Task Force served over 90 youth and families, and youth who participated in the program had a recidivism rate of 20%, compared to a norm of 63%.

29. Require reasonable efforts to establish at least one connection between placed youth and a supportive adult in the home community before leaving placement.

Providing youth a different set of connections in their home communities than those they left can sometimes be the key to a successful return. Whether it is a relationship with a faith-based community, a neighborhood recreation center, a community garden, a center for the arts, or another positive local resource, supports from peers or adults with positive attitudes who engage in law-abiding activities can provide youth critical support once they are no longer in a program. Placement settings should be working during placement to foster these relationships for youth in order to strengthen their attachment to positive supports at home and increase likelihood that youth will connect with them after they return to the community.

30. Expand availability of supportive housing for older youth at release.

Many stakeholders emphasized the unique need that older adolescents have for supportive housing when they return to the community. As 16- and 17-year-olds become 18- and 19-year-olds while in placement, their capacity to return to their family of origin may change. In addition, return to the home they left may not be the best plan to support successful reentry as families may be experiencing housing instability or the youth may need to return to a neighborhood with more positive supports than those he had in the neighborhood he left. Further, some youth do not have a family to whom they can return. Supportive housing is an important resource to provide a community-based residential option for older adolescents who need a housing resource at reentry as it combines permanent, affordable housing with services supports to achieve housing stability and independence in the community.

ADDRESSING THE COLLATERAL CONSEQUENCES OF A CRIMINAL RECORD

Every society must strike a balance between, on the one hand, affording young people a “second chance” to rebound from transgressions to become productive adults and, on the other hand, ensuring that offenders can be prosecuted and sentenced effectively for their crimes against a community. At present, New York is essentially failing on both counts.

Unlike many states, except for the Youthful Offender statute discussed below, New York has no other meaningful way for someone who committed a non-violent felony or misdemeanor at a young age to have that conviction expunged or sealed even after a lifetime free of any other crimes. The negative collateral consequences that result from a criminal record are serious. From opportunities for education and employment

to barriers in housing and public benefits, people with criminal histories can face a myriad of challenges that compromise their capacity to maintain stability in the community. That is a problem not only for the individual in question, but also for the community itself that suffers mightily when a former offender cannot get an education, serve in the armed forces, or find gainful employment. The Commission found this to be one of the areas in most pressing need for change.

At the same time, the current laws deprive law enforcement officials and judges of the information they need to charge and sentence properly the few repeat violent offenders that can plague a community. In particular, if a minor commits a violent felony offense and receives a Youthful Offender adjudication, that information cannot be used in sentencing if that person commits subsequent violent felony offenses. This information gap undermines capacity to protect public safety by recognizing the significant threat posed by such a rare, persistent violent offender.

The Commission recommends reforms to make New York a leader instead of a laggard in the efforts to reduce collateral consequences of a criminal record while more effectively protecting public safety against persistently violent offenders.

31. Create a new presumption to grant Youthful Offender status in criminal cases against offenders who are under 21 if the youth has no previous felony finding. Allow the presumption to be rebutted by the district attorney in the interest of justice. While Youthful Offender eligibility should be extended to 19- and 20-year-olds, current adult sentencing should be retained for 19- and 20-year-old Youthful Offenders.

The Youthful Offender statute provides the opportunity for any youth under the age of 19 to have a criminal conviction substituted with a non-criminal adjudication at sentencing. It allows for reduced sentences and provides confidentiality to the record of adjudication. Youthful Offender status is currently used extensively in cases of 16- and 17-year-olds – converting 75 percent of criminal convictions to Youthful Offender adjudications. There is currently no opportunity for 19- and 20-year-olds to receive Youthful Offender status and Youthful Offender status does not have to be granted on first-time felony cases. This tool should be expanded to all people under age 21 and should be presumptive for all first offenses (other than for Class A felonies, armed felonies, first degree rape, criminal sexual act in the first degree, and aggravated sexual abuse cases – which are currently restricted from Youthful Offender status) in recognition of the solid research showing that people under 21 are all in a developmental stage that makes them amenable to change. In appropriate cases, that new presumption could be rebutted upon a showing by the district attorney.

32. Require all accusatory instruments in Youthful Offender eligible cases, except sex offenses, to be filed as sealed instruments prior to trial.

Modern technology has compromised the capacity for Youthful Offender status to provide true confidentiality for youth. The advent of internet search engines has resulted in a functional record of criminal involvement for youth whose names are in the press regardless of the subsequent confidentiality of the official record. While the current Youthful Offender statute provides for sealed accusatory instruments in apparently Youthful Offender-eligible misdemeanor cases, there is no analogous protection for felony level offenses. Therefore, a youth who is ultimately granted confidential Youthful Offender status at sentencing, or whose case ends in dismissal or acquittal, may still be readily connected to the offense through an internet search. Accusatory instruments should be filed as sealed in all Youthful Offender-eligible cases, except for sex offenses, in order

to preserve the intended confidentiality of the Youthful Offender status and protect those defendants whose cases end in dismissal or acquittal.

33. Allow youth who receive Youthful Offender status on a drug offense to be eligible for conditional discharge as those adults who are convicted of these offenses are so eligible.

The current Youthful Offender structure prohibits youth who receive Youthful Offender status for drug offenses to receive a conditional discharge while adults convicted of the same offense are eligible for a conditional discharge. Youthful offenders should not be penalized for their status through prohibition of the possibility of a conditional discharge.

34. Allow violent felony Youthful Offender adjudication for anyone 16 or over to be used as a predicate in sentencing for subsequent violent felony charging and sentencing only.

As currently structured, the Youthful Offender law can prevent appropriate intervention in the wake of repeated violent crimes committed by an offender. New York State Law allows for enhanced sentencing for repeat violent felony offenders. But because these sentences require a previous conviction for a violent felony offense, a Youthful Offender adjudication for a violent felony offense does not count as a predicate at sentencing on a subsequent violent felony. Analysis of the 10-year reconviction rates for 3,088 youth who received Youthful Offender status for a violent felony offense in 2002 and 2003 showed that 19 percent of those youth were convicted for a new violent felony offense within 10 years. For that small but dangerous group of offenders, the current law prevents law enforcement agencies and courts from protecting public safety by using the knowledge of prior violent felony offenses to inform charging and sentencing decisions.

35. Create the capacity to seal one conviction (excluding violent felonies, Class A felonies, homicides, and sex offenses) for crimes committed under age 21.

Youth under 21, convicted in criminal court, who do not get the benefit of a Youthful Offender status at sentencing, have no capacity to get relief from their criminal record for the rest of their lives. Similarly, youth convicted as Juvenile Offenders and those over the age of criminal responsibility with an adult conviction have no capacity to obtain relief from their criminal record, even if they never commit another offense. A criminal record often results in a variety of negative collateral consequences, including detrimental effects on housing, employment, education, public benefits, and family rights. At the same time, research has shown that if a first-time offender goes three to four years without recidivating, the likelihood that he will recidivate in the future is actually lower than the general population.

When compared with national practices on criminal record sealing, New York State's policies appear very restrictive. Thirty-one states provide some capacity to seal misdemeanor records and 27 states provide some capacity to seal felony records. The Commission recommends that New York allow for sealing after two years without a conviction (or after release from probation supervision without a new conviction if the term of probation was beyond two years) for a misdemeanor conviction. The waiting period for a felony conviction should be five years. The nature of the seal would prevent disclosure of the conviction for any civil purpose, but would continue to allow law enforcement and the courts to have access to the record solely for law enforcement purposes.

Significantly, the process for obtaining these seals would be a simple administrative application to the Division of Criminal Justice Services (online or via mail), eliminating the need for people to obtain counsel or engage in a judicial process. If, however, the judge decides at sentencing that it is in the interests of justice to require the

youth to return to court to request the seal, the sentencing judge could mandate use of a judicial process with district attorney notice to request the seal. This comprehensive sealing regime would place New York at the forefront of efforts to help young offenders to get back on the right track while protecting the safety of the community.

36. Create the capacity to seal one Juvenile Offender conviction (excluding Class A felonies, homicides, and sex offenses) upon application to the court, if the person remains conviction-free for 10 years after release from confinement.

Record relief should also be available to youth who receive a criminal conviction for a Juvenile Offender crime. However, given the severity of those offenses, a ten-year waiting period should be required. In addition, because of the severity of Juvenile Offender crimes, the Commission concluded that requests for the seal of a Juvenile Offender conviction should be made through the sentencing court. A very small number of youth receive a criminal conviction as Juvenile Offenders (2,992 between 1979 and 2013), and of those youth, only 20% do not reoffend. Therefore, adding capacity to seal Juvenile Offender records through a judicial process would not generate a significant new case load in the criminal courts.

37. Allow any person whose conviction occurred prior to the effective date of the law passed to implement these reforms, and who would be otherwise eligible for a seal as described above, to apply to the Division of Criminal Justice Services to obtain that seal, with notice of that application to the district attorney and opportunity for the district attorney to require the seal request to be considered by the court in particularly egregious cases.

The Commission considered carefully the wisdom of applying this new sealing policy retroactively to those who would otherwise be eligible but who committed their offenses prior to the proposed date for raising the age of criminal responsibility (*i.e.*, January 1, 2017 or 2018). Data analysis revealed 102,901 individuals who received one criminal conviction in New York State for a non-violent felony (excluding Class A felonies, which are not classified as violent felony offenses) or a misdemeanor between the ages of 16 and 20 and who have no subsequent conviction and no arrests that are pending. This number likely overestimates the number of people who would actually apply for a seal as it does not take into account people who have not yet reached the end of the required waiting period as well as those who may no longer reside in New York, aged out of the workforce, or simply do not feel the need to have their conviction sealed.

The Commission concluded that there is no sound reason not to apply the proposed sealing policy to those whose convictions occurred prior to the passage into law of the reforms proposed in this report. Indeed, the same compelling reasons for making the proposed seal available to future offenders apply equally to those whose offenses have occurred already. Nor are there insurmountable barriers to retroactive implementation in this manner. Retroactive application of the opportunity to seal one criminal conviction during adolescence should be an administrative process handled by DCJS that does not require people to obtain counsel or to petition the court. However, it is important to establish an orderly system to notify the applicable district attorney when a request for a retroactive seal is received and to provide the district attorney the opportunity to require particular requests to be made through the court in particularly problematic cases. Implementation of a process to provide this kind of criminal record relief should not await implementation of the other reforms proposed by the Commission and should be put in place as soon as is administratively practicable.

38. Automate information exchanges between entities necessary to ensure that juvenile records are destroyed as required by statute

Accuracy of juvenile delinquency records is dependent on many different entities that may dispose of a youth's case timely providing such case processing outcomes to DCJS. Local probation departments, presentment agencies, the courts, OCFS and local departments of social services all play a role in providing the information necessary for destruction of juvenile records in various circumstances. There are currently no automated systems in place to facilitate these notifications. While these processes have been sufficient to maintain the current volume of delinquency records, the Commission's proposed expansion of delinquency case volume will demand an automated delinquency record maintenance process to ensure that juvenile records are destroyed as currently required by the Family Court Act and accurate information is maintained.

Link to Final Report of the Commission

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReportofCommissionYouthPublicSafetyandJustice_0.pdf

Link to Budget Bill

Link to Budget Bill - S6406A/A9006A

http://assembly.state.ny.us/2016budget/20160113executive/amendedbills/ELFA%20S6406A_A9006A.pdf

Link to Memorandum of Support – 2016-17 New York State Executive Budget
Education, Labor and Family Assistance
Article VII

https://www.budget.ny.gov/pubs/executive/eBudget1617/fy1617artVIIbills/ELFA_ArticleVII_MS.pdf

Amend Senate S.6406, Assembly A.9006, AN ACT to amend the education law, in relation to contracts for excellence and the apportionment of public moneys; to amend the education law...

| Page | Line | Amendment |
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| Page 2, | Unnumbered line 25 (AN ACT CLAUSE), | After "to amend" strike out "the education law," |
| Page 2, | Unnumbered line 27 (AN ACT CLAUSE), | After "program," insert "in relation to the effectiveness thereof; to amend part V of" |
| Page 2, | Unnumbered line 30 (AN ACT CLAUSE), | After "program," strike out "and" and insert "in relation to the effectiveness thereof; to amend" |
| Page 2, | Unnumbered line 32 (AN ACT CLAUSE), | After "professions," insert "and to amend the education law," |
| Page 3, | Unnumbered line 6 (AN ACT CLAUSE), | Before "to utilize" strike out "and" |
| Page 3, | Unnumbered line 7 (AN ACT CLAUSE), | After "(Part P)" insert "; and to amend part D of chapter 58 of the laws of 2011 amending the education law relating to capital facilities in support of the state university and community colleges, procurement, and the state university health care facilities, in relation to the effectiveness thereof (Part Q)" |
| Page 3, | Line 4, | After "through" strike out "P" and insert "Q" |
| Page 20, | Lines 39 and 40, | After " <u>paid to the</u> " strike out " <u>character</u> " and insert " <u>charter</u> " |
| Page 22, | Lines 31 and 32, | After " <u>paid to the</u> " strike out " <u>character</u> " and insert " <u>charter</u> " |
| Page 26, | Line 14, | Before "be construed" strike out "should" and insert "shall" |
| Page 37, | Line 41, | After " <u>interior,</u> " strike out " <u>schools</u> " and insert " <u>school</u> " |
| Page 37, | Line 56, | After " <u>minimum</u> " insert " <u>„</u> " |
| Page 87, | Line 3, | Before "S.722.10 Youth part of superior court established" insert <u>"5. The probation service shall not transmit or otherwise communicate to the district attorney or the youth part any statement made by the juvenile offender to a probation officer. However, the probation service may make a recommendation regarding the completion of his or her case plan to the youth part and provide such information as it shall deem relevant.</u> <u>6. No statement made to the probation service</u> |

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| | | <u>during the risk and needs assessment or while the juvenile offender is following his or her case plan may be admitted into evidence at a fact-finding hearing at any time prior to a conviction."</u> |
| Page 89, | Between lines 4 and 5, | Insert " <u>5. Notwithstanding the provisions of subdivision two, three, or four, if a currently undetermined felony complaint against a juvenile offender is pending in the youth part, and the defendant has not waived a hearing pursuant to subdivision two of this section and a hearing pursuant to subdivision three has not commenced, the defendant may move in the youth part, to remove the action to family court. The procedural rules of subdivisions one and two of section 210.45 of this chapter are applicable to a motion pursuant to this subdivision. Upon such motion, the superior court shall proceed and determine the motion as provided in section 210.43 of this chapter; provided, however, that the exception provisions of paragraph (b) of subdivision one of such section 210.43 shall not apply when there is not reasonable cause to believe that the juvenile offender committed one or more of the crimes enumerated therein, and in such event the provisions of paragraph (a) thereof shall apply.</u> " |
| Page 104, | Between lines 47 and 48, | Insert "\$ 40-a. Subdivision 5 of section 70.00 of the penal law, as amended by chapter 482 of the laws of 2009, is amended to read as follows: 5. Life imprisonment without parole. Notwithstanding any other provision of law, a defendant sentenced to life imprisonment without parole shall not be or become eligible for parole or conditional release. For purposes of commitment and custody, other than parole and conditional release, such sentence shall be deemed to be an indeterminate sentence. A defendant may be sentenced to life imprisonment without parole upon conviction for the crime of murder in the first degree as defined in section 125.27 of this chapter and in accordance with the procedures provided by law for imposing a sentence for such crime. A defendant <u>who was eighteen years of age or older at the time of the commission of the crime</u> must be sentenced to life imprisonment without parole upon conviction for the crime of terrorism as defined in section 490.25 of this chapter, where the specified offense the defendant committed is a class A-I felony; the crime of criminal possession of a chemical weapon or biological weapon in the first degree as defined in section 490.45 of this chapter; or the crime of criminal use of a chemical weapon or biological weapon in the first degree as defined in section 490.55 of this chapter; provided, however, that nothing in this subdivision shall preclude or prevent a sentence of death when the defendant is also |

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| | | convicted of the crime of murder in the first degree as defined in section 125.27 of this chapter. <u>A defendant who was seventeen years of age or younger at the time of the commission of the crime may be sentenced to life imprisonment without parole upon conviction for a crime of terrorism as defined in section 490.25 of this chapter, where the specified offense is a class A-I felony; the crime of criminal possession of a chemical weapon or biological weapon in the first degree as defined in section 490.45 of this chapter; or the crime of criminal use of a chemical weapon or biological weapon in the first degree as defined in section 490.55 of this chapter.</u> A defendant must be sentenced to life imprisonment without parole upon conviction for the crime of murder in the second degree as defined in subdivision five of section 125.25 of this chapter or for the crime of aggravated murder as defined in subdivision one of section 125.26 of this chapter. A defendant may be sentenced to life imprisonment without parole upon conviction for the crime of aggravated murder as defined in subdivision two of section 125.26 of this chapter." |
| Page 105, | Line 31, | After " <u>offense,</u> " insert " <u>or was fourteen or fifteen at the time of such offense and the sentence is for an offense specified in subdivision three of section 125.25 of this chapter,</u> " |
| Page 105, | Line 33, | Before " <u>where the defendant was</u> " insert " <u>except as specified in paragraph a, of this subdivision</u> " |
| Page 105, | Line 43, | Before " <u>For a class B felony,</u> " insert " <u>Except as provided for in subparagraph (ii) of this paragraph,</u> " |
| Page 105, | Line 43, | After " <u>felony,</u> " strike out " <u>other than a class B violent felony as defined by section 70.02 of this article,</u> " |
| Page 105, | Line 48, | After " <u>article,</u> " insert " <u>where the defendant was sixteen years old, and commencing January first, two thousand nineteen, where the defendant was sixteen or seventeen years old at the time of such offense,</u> " |
| Page 105, | Line 49, | After " <u>exceed</u> " strike out " <u>twenty-five</u> " and insert " <u>twenty</u> " |
| Page 105, | Line 55, | After " <u>years;</u> " insert " <u>(iii) For a class B violent felony as defined by section 70.02 of this article, where the defendant was fourteen or fifteen years old at the time of such offense the determinate term shall be fixed by the court, and shall be at least one year but shall not exceed seven years;</u> |

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| Page 106, | Between lines 28 and 29, | Insert " <u>4. A sentence imposed for a misdemeanor or violation committed by a juvenile offender shall be in accordance with section 70.15 of this chapter.</u> " |
| Page 109, | Line 49, | After " <u>four years</u> " insert " <u>whenever a determinate sentence of imprisonment is imposed upon a conviction of a class B violent felony offense where the defendant was sixteen, and commencing January first, two thousand nineteen, seventeen years old at the time of the offense</u> " |
| Page 118, | Line 50, | After " <u>least</u> " strike out " <u>twelve</u> " and insert " <u>sixteen</u> " |
| Page 118, | Line 51, | After " <u>nineteen,</u> " insert " <u>at least sixteen but</u> " |
| Page 151, | Line 3, | After "effect on the" strike out "sixtieth" and insert "one hundred and eightieth" |
| Page 151, | Line 7, | After "forty-nine," strike out "fifty," |
| Page 157, | Between lines 10 and 11, | Insert Part Q (LBD #72024-01-6) |
| Page 157, | Line 22, | After "through" strike out "P" and insert "Q" |

Families Together in New York State

Raise the Age Talking Points

The Issue at a Glance - New York is one of only two states in the nation that continues to process, prosecute and incarcerate 16-year olds as adults. By contrast, 37 states and the District of Columbia set their respective ages of criminal responsibility at 18; 11 states set at 17; and the one state that shares New York's distinction as a hold-out for criminal prosecution of 16-year olds, North Carolina, has begun a process leading toward increasing its age of criminal responsibility to 18. Research across the spectrum, overwhelmingly supports raising the age and iterates that our current system does not work, leads to higher recidivism rates, and re-arrests.

While the Governor did enact a stop gap measure through an Executive Order in late 2015 that directs the Department of Corrections and Community Supervision, in collaboration with the Office of Children and Family Services, to implement a plan to remove minors from adult prisons in the state, the order only impacts youth in prisons not jail. Weeks after he issued the order, he again showed his commitment to the issue by including a comprehensive bill to Raise the Age in his executive budget proposal.

The Numbers - In one of many studies completed on the topic of juvenile offenders in adult courts, the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice examined the effectiveness of prosecuting teens as adults by comparing such New York teens with their cohorts in the border state of New Jersey. Findings have many questioning the effectiveness of New York's system. In New York City, juveniles as young as 13 can be charged in adult court, while in New Jersey, most juvenile offenders under the age of 18 are processed in juvenile court. When comparing youth arrested for the same felony offenses in New York City and New Jersey, data showed that "adolescents processed in the New York adult courts were more likely to be rearrested, they were re-arrested more often and more quickly and for more serious offenses, and they were re-incarcerated at higher rates than those in the New Jersey juvenile courts."

The Dollars - Connecticut, the most recent state to Raise the Age through enactment of legislation commissioned the Urban Institute to examine the costs and potential cost benefits related to shifting the age of adult prosecution from 16 to 18. The results showed that Connecticut would save \$3 for every \$1 it spends moving older teens to juvenile jurisdiction. In addition, The Vera Institute of Justice reported on a similar cost-benefit analysis for the state of North Carolina (the only other state outside of New York to prosecute 16 year old nonviolent offenders in adult jurisdiction). The report concluded that "Raising the age of juvenile jurisdiction from 16 to 18 for alleged misdemeanants and low level felons will generate \$52.3 million in net benefits, per annual cohort of youth aged 16 and 17, from the combined perspectives of taxpayers, victims, and youth. The Governor of Connecticut is now seeking to raise the age to 21.

The Science - Considerable advances in neuro-scientific teenage brain development research also yields support for raising the age of criminal responsibility. Such evolving analysis, drawn in part from functional magnetic resonance imaging tests (showing that the pre frontal cortex - the seat of reasoning - is not fully developed in teen years), played a significant role in the Supreme Court case of Roper vs. Simmons whereby the Court held that it was cruel and unusual punishment to employ the death penalty for crimes committed before age 18. Justice Anthony Kennedy, who wrote the majority opinion, recognized that “juveniles have a lack of maturity and sense of responsibility compared to adults and are also more vulnerable to negative influences and outside pressures, including peer pressure. They have less control, or experience with control, over their own environment. They also lack the freedom that adults have, in escaping criminogenic settings.”

The MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice has also closely examined the development of teenage brains and report’s findings consistent with that of Baird’s research. Particularly noteworthy of such research are findings that iterate “intellectual abilities stop maturing around age 16, while psychosocial capability continues to develop well into early adulthood.” Such factors play a key role in decision making abilities, impulse control, and vulnerability to peer pressure.

Raise the Age gained significant support in 2015 from a wide variety of sectors, groups, organizations (such as elected officials from both sides of the aisle, child advocates, labor, attorneys, clergy, law enforcement and editorial boards). As a result, RTA was subject to serious negotiations between the Governor, Senate, and Assembly. However, it did not come together by the end of the 2015 legislative session.

The safety and future of our communities, as well as the well-being of our children hurt by our criminal justice system depend upon the enactment of a comprehensive Raise the Age proposal that treats children appropriately.

It is imperative that the Governor and Legislature make RTA the number one priority in 2016. It cannot be lost to negotiation on other issues or pushed aside for other priorities.

What we need in a comprehensive Raise the Age Policy

The Raise the Age NY campaign is calling for a comprehensive Raise the Age policy that:

- Raises the overall age of juvenile jurisdiction to 18, which is consistent with other states.
- Ensures no youth who is 16 or 17 years old is placed in an adult jail or prison.
- Amends the law to ensure parental notification upon the arrest of a 16 or 17 year old and ensure 16 and 17 year olds are interviewed using practices employed for youth, including parental involvement prior to waiving Miranda rights.

- Better addresses the collateral consequences of court involvement and help youth become successful adults by sealing records and expanding YO status to age 21 and to additional non-violent crimes.
- Increases investments in the front-end diversion services that keep youth in their communities rather than incarceration. These alternative to detention, placement and incarceration services are less expensive and more effective at reducing recidivism.
- Originates as many cases of 16 and 17 year olds in Family court as possible; create Youth Parts in adult court for remaining cases, and apply the Family Court Act to as many as possible, regardless of which courthouse in which the case is heard.
- Raises the lower age of juvenile delinquency from age 7 to age 12 (except for homicide offenses, which should be raised to 10).

We support an adequate phase-in period to ensure that there is time for planning and smooth implementation.

Treating children as adults in the criminal justice system is short-sighted and ineffective; youth incarcerated in adult facilities are more likely to suffer physical and emotional abuse, and to recidivate – realities that are at odds with the goal of rehabilitating youth and protecting public safety.

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March 19, 2015

Hon. Michael F. Nozzolio

Chair, Senate Budget Subcommittee for Public Protection

188 State Street, Room 503

The Capitol Building

Albany, New York 12247

Terence J. O'Leary

Deputy Secretary for Public Safety

Executive Chambers

NYS Capitol, Room 257

Albany, New York 12224

Re: Juvenile Justice Act

Dear Sirs:

On behalf of the District Attorney's Association of the State of New York (DAASNY), I write to you today to express the concerns of many in our association regarding the Juvenile Justice legislation which was introduced in the Governor's budget and as such is on an accelerated schedule for possible enactment into law.

Our concerns are essentially two-fold. First, the legislation's proposed treatment of 16 and 17 year old-offenders who commit violent felonies and serious but non-violent felonies changes the law to such an extent that serious questions are raised regarding fundamental criminal justice issues, including offender accountability, victim's rights and public safety. Secondly, the narrow budget timeframe fails to provide the necessary time needed to understand and intelligently discuss the consequences, both intended and unintended, of this radical transformation of the Penal Law, Criminal Procedure Law, Family Court Act, Correction Law and Executive Law.

We do not doubt the enormous amount of effort the drafters of the proposed juvenile justice legislation, as well as the underlying commission report, expended in crafting this scheme. Nor do we oppose the concept of raising the age of criminal responsibility per se and providing more services to teenage offenders. We are, however, deeply troubled by the prospect of attaching the Juvenile Justice Act to the Budget Bill without the necessary study, informed discussion and public debate that such a complex and transformative set of laws so obviously requires.

The Juvenile Justice Act: A Broad Overview

The chief justification for the proposed legislation and the report upon which it relies is the claim that New York's teenage criminals are victims of an embarrassingly regressive juvenile justice system. Proponents of this narrative repeatedly emphasize the "fact" that New York and North Carolina are the only two states that prosecute 16 and 17 year-old defendants as adults. This claim is misleading.

In reality, every state has laws that mandate and/or regulate the adult criminal prosecution of 16 and 17 year-olds, as well as those even younger, in adult criminal courtrooms. The difference between the various states is the portal or door through which the teenage offender enters. For example, many states may initiate a charge against a 16 year-old in a juvenile court or a family court, but allow for removal to an adult criminal court for the more serious cases.

Whether the defendant enters through the juvenile/family court door or the adult/criminal court door is largely irrelevant. What is important is (1) whether mechanisms are in place for the prosecution of appropriate crimes, like violent felonies and serious non-violent felonies in adult criminal court and (2) whether younger defendants, especially those who have committed relatively minor offenses, are treated less harshly than adults. In New York, such mechanisms are in place and, as a result, younger defendants rarely face the same repercussions as adult criminals.

It is true that the age of criminal responsibility in New York is 16 years. It is also true that 95% of 16 and 17 year-old defendants have their cases sealed. In other

words, 95 out of every 100 cases results in outright dismissal, an adjournment in contemplation of dismissal (“ACD”), a plea to a non-criminal violation offense, or a Youthful Offender (“Y.O.”) adjudication. In New York, prison is usually a last resort, reserved for the worst of the worst.

There is another truth, much more unpleasant but well-known to nearly all law enforcement professionals: some of the most dangerous, violent and sociopathic criminals are under the age of 18. The proposed legislation is frightening because it would allow removal (i.e. transfer) of violent offenders to Family Court over prosecutorial objection, creates a new presumption for the finding of youthful offender status, dramatically reduces criminal court sentencing ranges and fails to explain where and for how long the Office of Child and Family Service (OCFS) will house and monitor the most violent offenders.

What follows is a non-exhaustive listing of some of the major problems with the Juvenile Justice Act, including its provisions regarding (1) removal (2) adjustment (3) youthful offender eligibility (4) reduced sentencing and (5) offender housing. We have also suggested practical and effective solutions to these problems. Indeed, we believe these potential solutions better preserve the delicate balance between offender rehabilitation and offender accountability/public safety.

Removal

Current Law

The age of criminal responsibility in New York is 16 years-old, which means a 16 year-old defendant can be prosecuted in adult criminal court for misdemeanors, non-violent felonies and violent felonies. Younger defendants have their cases adjudicated in Family Court, unless they commit certain designated violent felony offenses. In that event, they can be prosecuted as an adult in a criminal court or adjudicated as a juvenile offender pursuant to a removal to Family Court in the discretion of the District Attorney.

Proposed Law

Under the proposed law, most crimes committed by 16 and 17 year-olds would automatically be adjudicated in Family Court. The removal provisions in the proposed legislation are, moreover, less than a model of clarity. Indeed, the confusion and ambiguity embedded in the dense language of the removal provisions, creates tremendous uncertainty as to the legal standard that should be applied when a request for removal of a violent case is made.

What is clear is that the proposed legislation raises the age of criminal responsibility to 18 years of age and adopts a model of judicial waiver/judicial discretion that would allow 16 and 17 year-old defendants who commit violent felony offenses, or even the more serious juvenile offender offenses, to be removed to Family Court over the objection of the District Attorney. The proposed legislation also creates a presumption in favor of removal for a violent felony offense to Family Court.

The universe of cases for which prosecutorial consent is needed for removal to Family Court, if the confusing legislative language is even requiring it at all, would be dramatically reduced to a smaller number of crimes, namely: Murder in the 2nd Degree, Rape in the 1st Degree, Criminal Sexual act in the 1st Degree, as well as and any armed felony (i.e. a violent felony offense that includes as an element the displaying or possession of a firearm). Many violent felonies (where a firearm was not used but a knife, for example, was) that are presently prosecuted in criminal courts, including the following, would be subject to removal to Family Court over the District Attorney's objection:

- Predatory Sexual Assault
- Attempted Murder in the 2nd Degree
- Manslaughter in the 1st Degree
- Attempted Rape in the 1st Degree
- Aggravated Sexual Abuse in the 1st Degree
- Kidnapping in the 1st and 2nd Degrees
- Arson in the 1st and 2nd Degrees
- Assault in the 1st and 2nd Degrees

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- Robbery in the 1st and 2nd Degrees
- Burglary in the 1st and 2nd Degrees

It also should be noted that a litany of non-violent, but otherwise serious felonies, such as Manslaughter in the 2nd Degree, Strangulation in the 1st and 2nd Degrees, and Intimidating a Victim or Witness in the 1st, 2nd and 3rd Degrees, could also be transferred to Family Court, regardless of the District Attorney's opposition.

In sum, many violent felonies as well as serious but non-violent felonies, and even hate crimes, would fall under Family Court jurisdiction should this proposal be enacted into law.

Problems

The forum for the prosecution of many crimes is of critical importance not only for offender accountability and public safety, but also for public confidence in the integrity of the criminal justice system.

Criminal courts are open to the public and a criminal court judge is called upon to evaluate many factors, including the nature of the crime, the background and criminal history of the defendant, deterrence of future criminal behavior, the concerns of the victim, and the impact upon public safety.

When a violent felony case or serious but non-violent felony case is transferred to Family Court, where many proceedings may be closed to the public, the primary focus is upon "the needs and best interests of the child" with little regard for the victim or public safety. Additionally, in most counties the prosecution of those who have committed serious criminal offenses would be left to assistant county attorneys, instead of professional prosecutors, answerable to the elected District Attorney.

Solutions

Prosecutorial consent for the removal of all violent felonies and some non-violent felonies from criminal court to Family Court, and/or categorical exclusions of

these crimes from Family Court jurisdiction and adjudication, are the only ways to ensure that the rights of victims are adequately protected and criminals are held responsible, in a meaningful manner, for their crimes.

Violent felonies allegedly committed by 16 and 17 year-olds should be categorically excluded from removal to Family Court. Selected non-violent felony offenses, to be designated as “serious non-violent felonies -- such as Manslaughter in the 2nd Degree, Strangulation in the 1st and 2nd Degrees, and Intimidating a Victim or Witness in the 1st, 2nd and 3rd Degrees (this listing is illustrative and not exhaustive) -- should only be removed to Family Court with the consent of the District Attorney.

Adjustment

Current law

The Family Court Act mandates that the adjustment process, defined as the “the informal consensual resolution of a case under probation service auspices,” occur in every case. A case is referred to a presentment agency for possible petitioning to Family Court only when adjustment has failed. In Family Court, “respondents” are treated in accordance to what is the least restrictive available alternative to placement consistent with the needs and best interest of the juvenile and the need for the protection of the community. Adjudicated juvenile delinquents can be placed in the custody of OCFS for up to 18 months for a felony offense with a limited ability for a longer restrictive placement.

Juvenile offender offenses removed from criminal court to Family Court are categorically excluded from possible adjustment.

Proposed law

16 and 17 year-olds who commit a violent or even juvenile offender offense can be adjusted. The categorical exclusion has been removed. The underlying report from the Governor’s commission even declares that the Department of Probation should not consider the severity of the offense in determining whether adjustment is appropriate.

Problems

As if the removal of these cases to Family Court over prosecutorial objection was not alarming enough, offenders who commit the worst crimes may not ever have to appear in Family Court to experience the already dramatically diluted consequences for their violent criminal conduct.

Solution

Violent felonies and serious non-violent felonies should not be eligible for adjustment, when allegedly committed by 16 or 17 year-old defendant.

Youthful Offender (Y.O.) Eligibility

Current law

Eligibility -- which brings reduced sentencing exposure and sealing of the offender's record -- extends to eligible youth who have committed a crime when the offender was at least 16 and less than 19 years of age.

Proposed law

The age of Y.O. eligibility in criminal court is expanded to 19 and 20 year-old offenders and a new presumption is created in favor of the court granting Y.O. status to all who would now be eligible for it. The Y.O. adjudication can be effectively vitiated and serve as predicate for a subsequent violent felony conviction if the offender commits additional violent felony offenses.

Problems

Allowing for prior Y.O. adjudications to serve as predicates, as many states have long allowed, is most welcomed. This latter provision is, however, not nearly enough to counter the damage caused by the removal provisions, the criminal sentencing reductions, and the uncertainty of the role of OCFS, all of which fail to

adequately safeguard victim's rights and protect the public from the most violent and dangerous 16 and 17 year-old offenders.

Furthermore, the expansion of Y.O. eligibility will needlessly endanger the public and the ability of law enforcement to solve future crimes when committed by the "youthful offender." Specifically, Y.O. adjudications are not registry eligible under the Sexual Offender Registration Act (S.O.R.A.). Violent and non-violent felons who receive Y.O. adjudications are also not subject to a DNA sample being collected from them and submitted to the DNA databank.

The practical effect for the defendant is to make him the eligible for two more years of non-accountability. Between juvenile delinquent adjudications, adjustments, two additional years of Family Court eligibility, and two additional years of Y.O. eligibility, a career criminal's 21st birthday could be the first time he could be held truly responsible for his crimes.

Solutions

The newly created presumption in favor of granting Y.O. status to offenders who have committed a either a violent felony or a serious non-violent felony, should be eliminated if Y.O. eligibility is be extended beyond the age of 18. In other words, the new presumption for granting Y.O. status should apply only to misdemeanors and the remaining class of non-violent felony offenses.

The newly created and long overdue proposal to vitiate a Y.O. adjudication and use it as a predicate for a subsequent conviction for a violent felony offense should be retained.

Y.O. status should no longer be a bar to either registration under the Sexual Assault Registration Act or to being subject to a DNA sample being collected and submitted to the DNA databank.

Reduced Sentencing

Current law

When Y.O. treatment is denied, 16 and 17 year-old defendants face adult sentencing. For all 16 and 17 year-olds convicted of murder, for example, the sentencing range is a mandatory minimum of 15 years and maximum 25 years-to-life. For those convicted of a “B” violent felony the range is a mandatory minimum sentence of 5 years to a maximum sentence of 25 years. For a “C” violent felony, the range is a minimum of 3 ½ years to a maximum of 15 years.

Proposed law

For 16 and 17 year-olds convicted of murder the sentencing range is reduced to a minimum of 10 years and reduced maximum of 15 years-to-life.

For those convicted of a class “B” Violent felony, such as Rape in the 1st Degree or Manslaughter in the 1st Degree, the sentencing range is reduced to a new minimum of only 1 year and a new maximum of a mere 7 years. Thus, for example, a 16 year-old serial rapist who abducted and sexually assaulted three women (as occurred in a recent Western New York case) could be sentenced one year in jail for his heinous crimes.

There is under the proposal for “B” violent felony convictions alone, an opportunity for the court to sentence the defendant to the existing adult sentencing regime but only upon a finding of aggravating circumstances based upon the severity of injury to the victim and the gravity of risk to the public.

For those convicted of a “C” violent felony the sentencing range is reduced to a new minimum of 1 year and a new maximum of 5 years. Sentencing ranges for “D” and “E” violent felony convictions are also greatly reduced.

Problems

As if denuding prosecutors of their powers, routinely removing dangerous

criminals to Family Court -- assuming they have not first been adjusted -- and a new statutorily created presumption in favor of granting a Y.O. adjudication for those offenders not removed were not dreadful enough, dramatic sentencing reductions are envisioned for those few defendants -- most likely the most dangerous and violent ones -- whose cases were not removed and who were denied youthful offender status.

Under the proposed legislation, the sentencing ranges for most felonies, including violent ones, are dramatically reduced. As just mentioned, there is a carve-out, limited to "B" violent felonies, permitting the court to impose an adult sentence on an offender if it finds aggravating circumstances based upon the severity of injury to the victim and the gravity of risk to the public. This vague and uncertain standard would likely place, for example, the onus upon a rape victim to somehow quantify her trauma and suffering. The carve-out is also likely unconstitutional under *Apprendi v. New Jersey*, 530 US 466 (2000),

Apprendi held that a defendant's sentence may not be enhanced beyond what would otherwise be its maximum term on the basis of facts that are not found by a jury beyond a reasonable doubt. In other words, the carve-out and its theoretically increased sentencing exposure would be unconstitutional and thus unenforceable because a judge would be making factual findings reserved for a jury. Accordingly, the notion that a 17 year-old serial rapist, for example, could receive an adult sentence, is illusory.

Solutions

For 16 and 17 year-olds convicted of Murder in the 2nd Degree pursuant to PL 125.25-1(intentional murder) or Predatory Sexual Assault, the current adult sentencing range should remain intact. The current sentencing ranges could then, potentially, be reduced one degree for those 16 and 17 year-olds convicted of violent felonies or serious non-violent felonies. For example, the sentencing range for a "C" violent felony (a 3 ½ to 15 year determinate) would become the sentencing range for a 16 or 17 year-old defendant convicted of a "B" violent felony.

Non-Secure Housing

Current law

The Executive Law currently provides that OCFS shall maintain secure facilities for the care and confinement of juvenile offenders committed to the office pursuant to the sentencing provisions of the penal law.

Proposed law

The legislation eliminates the requirement that juvenile offenders sentenced under the Penal Law, let alone those who have been adjusted or adjudicated in Family Court, be kept in a secure facility. The report from the commission declares that youth who commit offenses under the age of 18 should be allowed to remain in youth facilities until the age of 21 to the extent permitted by resources.

Problems

Beyond the reckless elimination of secured facilities, the proposed legislation is also vague and unclear as to exactly where, how, and for how long OCFS will monitor the most violent offenders. Moreover, when an offender is adjudicated in Family Court and sentenced to a “facility” or “placement setting,” it appears will OCFS have the ability to release the offender from placement prior to the time specified by the court. Shockingly, there is no clear description regarding how the public will be adequately protected from dangerous, violent criminals.

Solution

Sentenced 16 and 17 year-old offenders convicted of violent felonies or serious non-violent felonies must be placed in secure facilities, under the supervision of the New York State Department of Corrections, until such time as they complete their sentence or turn 21 years of age, whichever event first occurs.

Conclusion

Because of its complexity and transformative nature, as well as the fact that it was made public only a short time ago, DAASNY has assigned no less than twelve attorneys to study the proposed legislation.

This correspondence is an attempt to list and address some of our more significant concerns. It is not exhaustive, as there are other proposals embedded in the legislation, such as an expansion of the use of sealing, creation of new youth parts of court which will require prosecutors to become practitioners of Family Court law, and new requirements for parental notification before interviewing 16 and 17 year-old suspects, to name just a few, that are of legitimate concern.

New York's juvenile justice system is not, in fact, regressive and it bears repeating that 95 out of every 100 criminal cases involving 16 and 17 year-old defendants do not result in imprisonment and a permanent record. Instead, they result in outright dismissal, an adjournment in contemplation of dismissal ("ACD"), a plea to a non-criminal violation offense, or a Youthful Offender ("Y.O.") adjudication.

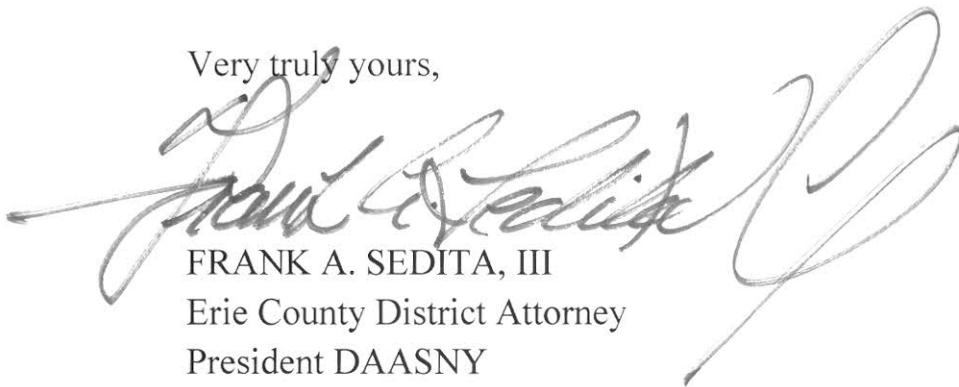
DAASNY recognizes that some of the 95% of teenagers who have their records sealed would likely have brighter futures if more services, including government funded services, were made available to them. We would likely support initiatives designed to achieve such laudable goals, especially since most of them could be achieved administratively and within the current legal framework, without the need for complex and transformative changes in the Penal Law, Criminal Procedure Law, Family Court Act, Correction Law and the Executive Law.

DAASNY stands poised to support reforms that create a mechanism for 16 and 17 year-old offenders who commit misdemeanor and some non-violent felony offenses to have their cases adjudicated in Family Court, especially if the necessary services were available only in Family Court and not in criminal court. We cannot, however, ignore the fact that the proposed removal provisions, criminal sentencing reductions, elimination of secured facilities and uncertainty of the role of OCFS, all fail to safeguard victim's rights and protect the public from violent and dangerous 16 and 17 year-old criminals.

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It is precisely because we support clearly understood, measured and effective criminal justice reform, that DAASNY is so troubled by the prospect of attaching the Juvenile Justice Act to the Budget Bill without the necessary study, informed discussion and public debate that such a complex and transformative set of laws so obviously requires.

Very truly yours,

A large, stylized handwritten signature in dark ink, likely belonging to Frank A. Sedita, III. The signature is fluid and cursive, with a prominent 'F' and 'S'.

FRANK A. SEDITA, III
Erie County District Attorney
President DAASNY

FAS/dms

c: Hon. Patrick M. Gallivan
Hon. Michael H. Ranzenhofer
Hon. Timothy Kennedy
Hon. Marc Panepinto
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Position on Raise the Age

New York has the opportunity to be a nationwide leader for real, lasting, and comprehensive juvenile justice reform. But real reform takes time. The planning process that preceded the Governor's proposal did not include all the stakeholders in the criminal and family justice systems. Although by all means an excellent beginning of a very important conversation, the 300 pages of legislation cannot be seen as a finished product. The results of passing this legislation without further conversation and vetting by dozens of agencies around New York State will be dire—for the systems that are already stretched to their limit and for the young people this legislation is intended to help and protect. This is not the kind of legislation that can be rushed.

In our opinion, the one aspect of the budget proposal that should be passed now is the allocation of resources to enable New York to move 16- and 17-year-olds from adult prisons to age appropriate facilities. This can and should be separated from the remainder of the Governor's program bill. Even if passed, none of the substantive provisions of the Governor's bill will be effective until 2017. It would be better to use this time to thoroughly vet the best proposal, much as Connecticut did when they Raised the Age a few years ago. Connecticut's process and eventual result have been extremely successful because of the inclusive nature of the planning process. New York has many talented and dedicated people in hundreds of agencies affected by this comprehensive change in its criminal and juvenile justice structure. It is important that these people are able to work together to create a new structure that works and that they are able to support from the planning stages through implementation.

Reasons to allow for more thoughtful discussion and input before passage of comprehensive juvenile justice legislation:

- **The proposed reforms may exacerbate existing racial disparities in the criminal justice system** – There are particular aspects of the legislation, such as the inclusion of Disorderly Conduct, a violation, as a prosecutable offense, that will have a drastic racially disparate impact. This charge, not currently prosecutable in Family Court, would become so for 16- and 17-year-olds under both the Governor's and Assembly one-house proposals. Since these are mostly related to incidents that begin with street encounters initiated by police, it is clear that mostly young teens of color will be affected by the choice to include these provisions. The potential ramifications of a Family Court case are also much harsher for this allegation than they currently are in adult court. There is also a stark racial disparity in the choice to increase the number and types of crimes that can be prosecuted in adult court. There has to be a thorough racial impact analysis completed on every provision of this type of comprehensive criminal

justice legislation. Given the documented disproportionate representation of people of color in both the adult and juvenile justice systems and the stated goal of Raising the Age as equalizing some of this impact, it is improper to go forward without ascertaining whether this goal has been achieved. *In our assessment, there will be a **greater** racial disparity under the new proposal than there is currently, not less.*

- **16- and 17-year-olds will lose constitutionally protected rights** – The right to jury trials currently afforded these young people will be lost when young people’s cases are transferred to Family Court. In addition, the right to counsel currently provided in Family Court is inadequate and reduces the rights of this age cohort. Within the last week, the Department of Justice filed a “Statement of interest” in a case in Georgia on the precise issue of providing fundamental constitutional rights to young people in juvenile proceedings.¹ New York should seriously consider these fundamental rights before passing a bill, as well as the risk of scrutiny by DOJ for a new bill intended to improve things for young people. In particular, the adjustment process, which is intended to assist the young person, is fraught with landmines for kids and families regarding statements made to probation officers and the legal ramifications of various aspects of the adjustment process. At this time there is no right to counsel at adjustment but there should be—after all, people make statements that can and will be used against them during these encounters.
- **The legislation is very complex** – Combined, the Governor’s Program Bill and the Assembly one-house bill contain over 300 pages of legislation and involve over 100 different statutes from the Penal Law, Criminal Procedure Law, Family Court Act and the Executive Law.
- **Implementers of any new statutory scheme need time to consider its impact on the court system and all the agencies that work in the courts** – All of the stakeholders impacted by the legislation (county attorneys, prosecutors, defenders, judges, probation, sheriffs, foster care systems, clerks of court, etc.) will be impacted by this legislation. They have not had the chance to weigh-in on the logistics and implementation, or on their capacity to absorb the changes.
- **Family Court Capacity** - Family Court only recently obtained 20 new judges across the state to deal with the backlog of child welfare cases, a condition that has reached crisis proportions for families in that system. As of today, the duration of these cases continues to increase every month; meaning that it takes at least two years, and up to 7 years, for a family’s issues to be resolved. A large portion of that delay is caused solely by court backlog. With the implementation of this proposal, the same court is expected to handle up to 20,000 new juvenile delinquency cases. This will certainly set back the delays even further. Backlog contributes to enormous costs to localities, especially foster care costs. The human and social costs are also quite troubling considering the fact that the vast majority of child welfare cases involve people with mental illness, drug or alcohol abusers, and victims of domestic violence who could have the potential to safely reunify their family but are deprived of that opportunity only because of court overcrowding. Family Court simply cannot accommodate an additional 20,000 delinquency cases before the child welfare backload is evaluated and addressed, and this proposal should not be ratified until a qualified group of stakeholders can plan for the impact of the surge of cases that can be expected.
- **Infrastructure for 16/17 year-olds** – The proposed reforms provide “sight/ sound” separation of 16- and 17- year olds from adult defendants, at the time of arrest through placement. Creation of this infrastructure by all relevant agencies includes every police precinct in the state, every holding area in court, and every pre-trial detention and post-sentence local and state facility.

¹ Statement of Interest of the United States at 1, N.P., et al. v. Georgia, No. 2014-CV-241025 (Fulton Co. Sup. Ct. filed March 13, 2015).

The ability of these agencies to accomplish this has not been ascertained nor have the attendant costs been adequately accounted for.

If passage cannot be delayed, these are our preliminary observations about current proposals being discussed as part of the budget process:

1. Youthful Offenders (YO)

- a. The Governor's bill makes YO a predicate offense for future felonies. This defeats the purpose of the YO protection that allows for the correction of mistakes made during adolescence. For instance, if a youth who was previously adjudicated a Youthful Offenders is convicted of another B violent crime (for example), that youth could be sentenced to 10-25 years. Furthermore, all youth previously granted YO protection will now have their adolescent mistakes held against them for all time.
- b. *Neither bill extends YO to include 21 year olds*, despite brain science research that recognizes that the adolescent brain continues to develop throughout a person's early twenties.

2. Juvenile Offenders (JO)

- a. The Governor's bill expands the list from 18 to over 60 criminal acts committed by juveniles that would now be prosecutable in adult court.
- b. A cursory examination of data on arrests and prosecutions of this expanded list of crimes suggest that the expansion of the list will likely have a disparate impact on 16- and 17-year-olds of color.
- c. There is no reason to exclude from the Raise the Age proposal youth, who, for example, are charged with snatching phones from other youth or who face contempt charges for incidents within the family. In fact, these are the precise charges most likely to reap the benefit of Family Court's extensive services and alternative dispositional options. Yet under the Governor's current proposal, such young people will be charged and prosecuted in adult court and their opportunity to be removed to Family Court has been significantly curtailed.

3. Removal

- a. The Governor's proposal eliminates defense counsel's right, pre-indictment, to file for removal; thereby, making it more difficult to remove cases of 14 and 15 year olds than it currently is. The proposal also makes it more difficult to remove cases of 16 and 17 year olds charged with robbery in the second degree and violent offenses to family court. Although it is tempting to assume that violent charges should be treated in adult court, in fact the vast majority of young people facing legally "violent" charges have not committed an act of violence. Many have gone along with an older person and did nothing themselves. Others have made threats but never had an actual weapon. Most of these cases for this age group consist of matters than can easily be seen as bullying rather than criminal behavior. These types of allegations belong in Family Court where the resources and oversight can result in the outcomes endemic to the Raise the Age campaign.
- b. We believe that Family Court should have original jurisdiction for all cases involving all young people under the age of 18 years old. If necessary, there should be an option to "bump up" certain cases to criminal court, as is the practice in many other states.
- c. In the event that the Governor's proposal prevails and a large portion of felony matters begin in adult court, we believe that the suggestion of cross-designating the same judge to keep the matter if it is removed could result in better outcomes for youth assuming

that court is properly resourced. We believe that an individual judge who will be keeping the case may be more willing to consider removal because he or she will be knowledgeable about the options available once the status of the case is changed. This is particularly important for young people because removal has an enormous impact on collateral consequences, such as immigration, public records of their case, employment, and education opportunities.

4. Violations

- a. Currently Family Court has no jurisdiction over violations; thus the police cannot currently arrest juveniles for disorderly conduct, harassment, and other violations. *Both proposals now expand the list of offenses covered by the Family Court Act and now authorize arrest and prosecution for typical adolescent behavior that should not rise to the level of criminal conduct.*
- b. This will affect thousands of teens and would make them and their families subject to the jurisdiction of the Family Court, which will last for at least a few months for cases that would likely result in an ACD in adult court and for matters that do not rise to the level of criminal behavior.
- c. Police are able to find better solutions for these types of cases when they cannot arrest the teenager. Currently for 15 year olds, they use the age old techniques of calling parents, chastising the child or bringing them to the precinct for their parents to get them.

5. Jury trial

- a. Neither bill preserves the existing right to a jury trial for 16- and 17-year-olds.
- b. Jury trials are a vital tool for protecting the rights of young people. They also provide a powerful incentive for both defense and prosecution to plea bargain.
- c. Public jury trials foster transparency and community accountability.
- d. Teens are aware of the Constitution and are cognizant that they are not getting the benefit of the promise of an impartial jury. This further marginalizes poor young people who are mostly from communities of color that are already disenfranchised in very profound ways.

6. Early intervention of counsel

- a. Neither bill provides for early assignment of counsel to protect juveniles' rights at the precinct and during the probation adjustment process; both times at which statements are elicited that later impact punishment and can have very serious consequences to the youth and family.
- b. The Governor's task force cited research on the adolescent brain that explains why juveniles so frequently incriminate themselves or make false statements. The presence of counsel protects against this danger.
- c. The Governor's bill allows probation to seek an Order of Protection from the court without the need to file a petition and proceed in Family Court. It is essential that an attorney be representing the teen at that time, particularly given that Orders of Protection can have an impact on the education, housing, and family situation of the teen. There should also be an enunciated standard for granting such orders as they place the teen at significant risk if the complainant chooses to have them arrested.

7. Disposition at first appearance

- a. Neither bill creates a mechanism for disposition at first appearance in Family Court as is a common suitable resolution in adult courts. Instead, they rely on the existing Family Court system, which requires intrusive interventions and delays prior to any possibility of disposition. Brooklyn has a DAT-Y program that has reduced the rate of re-arrest by

50% by using a quick and targeted programmatic strategy for 16- and 17- year-olds. It has been documented that kids this age respond very well to programs that focus on problem-solving and consequential thinking as well as positive self-expression. In fact, overly intrusive programs have been shown to increase the likelihood of re-arrest for low level offenses. For kids that are not adjusted, there should be a method of quickly assessing the appropriateness of a one-time classroom-based program that could accomplish the goals of helping to avoid re-arrest and avoid long-drawn-out court proceedings and interventions that work against those goals. The current use of existing Family Court procedures would not allow for this type of resolution as it requires evaluations and assessments that involve delays of at least two months.

- b. The overcrowding in Family Court and the enormous impact of the surge could also be ameliorated with such a provision.

8. Police diversion

- a. Neither bill incentivizes police diversion programs like the successful program in Wyoming County. These programs support what we know about adolescent brain development and effective methods to change behavior and reduce costs. They also minimize the risk that further involvement in the court system will cause more problems for the child than it will help.

9. Risk Assessment Instruments (RAIs)

- a. Both bills allow RAIs to dictate outcomes based on risk of re-offense rather than risk of committing a felony or physical injury.
 - i. Currently, in NYC there are 5 opportunities for “risk assessment”: at the precinct to determine whether a youth ticket should be issued; at probation during the adjustment process; at intake for determining the appropriateness of pre-trial detention; at sentencing; and finally at placement.
 - ii. RAIs appear in numerous separate locations in the proposed reforms: Agency Review of Police Decision to Detain; Adjustment of Cases; Release Before Petition-Judicial Determination; and Disposition; additionally RAIs are mentioned 16 times regarding OCFS funding.
- b. Neither bill specifically addresses the norming of RAIs specifically designated for 16- and 17-year-olds
- c. The mandated use of RAIs has been the subject of controversy. Researchers have challenged their reliability, validity, and applicability. Aside from the questionable scientific validity of risk assessment, in the case of older teens there are additional concerns because they rely on static factors and immutable characteristics-like education, socioeconomic background, or neighborhood-and thus may exacerbate unwarranted and unjust disparities. See NACDL 2014 remarks of the US Attorney General.

10. Rap Sheet errors

- a. Neither bill holds the state responsible for fixing rap sheet errors, especially the failure to seal cases for which YO was granted.
- b. Neither bill holds reporting agencies responsible for disclosing information that was intended to be sealed from public view.

11. Videotaped interrogations

- a. Neither bill mandates videotaped interrogations for juveniles charged with felonies as the Governor’s Task Force recommended.

12. Detention

- a. Both bills provide too many exceptions (and exceptions to exceptions) to preventing pre-court detention.
- b. We recommend *de novo* review of bail and pre-trial detention decisions based on factors that were unknown at the time bail was set, things that occur in jail, and simply for kids whose family cannot afford to post bail. With a few days to prepare and contact family and friends, attorneys will be able to present a bail package, as is often done in Federal Court, and more young people will be released.

Important Principles in Current Proposals That Must Remain Included in Any Reform Legislation

1. Prohibit the detention of young people up to the age of 18 in adult jails and prisons
2. Fund the creation of new close to home facilities to house 16- and 17-year-olds
3. Provide for weekend arraignment for juveniles in adult courts when Family Court is not in session
4. Create and fund Family Support Centers for Persons In Need of Supervision (PINS), most specifically including respite centers that are very much needed for kids and families in crisis.
5. Eliminate all-or-nothing pre-trial detention.

Positive attributes about the Assembly one-house bill that should be preserved

1. Does not make Youthful Offender (YO) cases a predicate for future offenses.
2. Increases the number of Juvenile Offender (JO) eligible charges by 5 new crimes involving terrorism, as compared to the Governor's proposed inclusion of 40+ new crimes.
3. Has shorter timelines for subsequent sealing of past crimes committed before the age of 20
 - a. 1 year for a misdemeanor; 3 years for a non-JO felony; 5 years for a JO felony.
 - b. Also allows for sealing of more than one offense if all offenses took place as part of the same criminal transaction.
4. Mandates adjustment for all misdemeanors and non-violent felonies, not limited to just "low-risk" youth, as measured by invalid Risk Assessment Instruments, as in the Governor's bill.
5. Originates Juvenile Offender cases involving 13, 14, and 15-year-olds in Family Court, with the possibility of removal to adult courts. Puts the burden on prosecutors to prove that it is in the interest of justice not remove the case. (However, does not go far enough in that it does not provide the same opportunity for 16- and 17-year-olds).
6. Grants judges greater discretion in transferring cases from adult court to Family Court.
7. Does not increase prison sentences for JOs.
8. Vehicle and traffic laws (VTLs) are heard in Family Court as opposed to the Governor's bill which retains those crimes in adult court.
9. Leaves intact indeterminate sentencing for juvenile offenders, which allows for juvenile facilities to determine release rather than reliance on parole.
10. Has better standard for preventing detention than Governor's bill (e.g. exception for violent felonies, Governor's bill makes exception for all felonies.).
11. Does not make exception for JO's convicted of VTL-related offenses to stay in adult prison (the Governor's bill seems to have such young people stay in adult facilities).

Positive attributes about the Governor's bill that should be preserved

1. Creates youth parts with cross-jurisdiction for judges which allows judges to remove a case to Family Court while retaining jurisdiction thus providing greater and flexible access to tools contained in both the adult and juvenile justice systems.
2. Mandates specialized training for youth part judges.
3. Makes 16- and 17-year-olds eligible for bail release in Family Court.
4. Prohibits the detention of PINS.
5. Doesn't add a third violation – using a fake ID to buy alcohol – as prosecutable in Family Court as the Assembly bill does.