



SCHUBERT CENTER  
FOR CHILD STUDIES

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**Re: Procedures for Release on Parole – Comments on Proposed Rules OAC 5120:1-1-07**

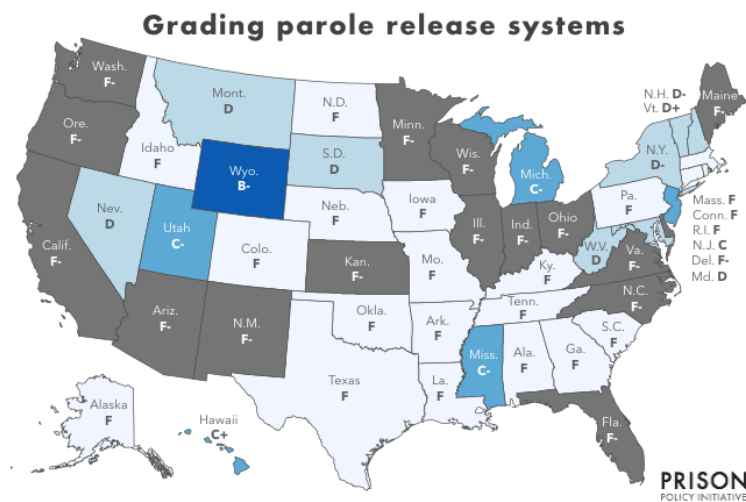
Dear Ms. Parriman:

Thank you for the opportunity to provide comment on the important issue of procedures for release on parole. The Schubert Center for Child Studies at Case Western Reserve University (CWRU) bridges research, education, policy and practice for the well-being of children and adolescents. In this capacity, we have engaged in a variety of policy and best practice efforts to improve outcomes for children and youth involved in and impacted by the criminal justice system. The following comments and concerns focus on how these changes may impact people under parole consideration who were incarcerated as a child or youth.

First, we want to acknowledge that the changes proposed for OAC Rule 5120:1-1-07 are a significant step forward by allowing Ohio inmates a chance to earn parole with consideration of important additional factors in the release hearing process. Improvements to the parole procedures are to be commended. A 2019 report by the Prison Policy Initiative evaluating the parole systems in all 50 states found that Ohio was among 15 states to receive the worse than failing ranking of F-, as the map below illustrates.<sup>i</sup> As such, we are encouraged by the effort to make changes in Ohio's parole procedures in order to facilitate appropriate release. We offer the following recommendations to better ensure that these changes reflect what research, caselaw and experience with children and youth suggests should be considered for a meaningful opportunity for release.

SCHUBERT CENTER FOR CHILD STUDIES in the College of Arts and Sciences at Case Western Reserve University bridges research, practice, policy and education for the well-being of children and adolescents.

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**1. The explicit acknowledgement of age and the status of youth in the proposed OAC 5120:1-1-07 is consistent with research and practice and should be preserved.**

There are sections of the proposed OAC 5120:1-1-07 rule changes that address the status of being a child or young person at the time of the initial offense and/or incarceration. Specifically, 5120:1-1-07(B)(12) notes that “age of the inmate at the time of offense” should be considered during parole hearings. This is essential as children and adolescents are developmentally distinct from adults cognitively, biologically, and social-emotionally. Brain research shows that the pre-frontal cortex, the region of the brain responsible for social interactions, emotion regulation, impulsivity, judgment and assessment of risk, is the last to develop.<sup>ii</sup> As such, adolescents differ from adults in at least three important ways that lead to differences in behavior: (1) they have less capacity for self-regulation in emotionally charged contexts; (2) they have a heightened sensitivity to proximal influences, such as peer pressure and perceived incentives and rewards; and, (3) they show less ability than adults to make judgments and decisions that require future orientation.<sup>iii</sup> These bio-psycho-social factors not only inform the circumstances surrounding the offense, but the behavior of a young person in the institutional setting until reaching more full maturity.

5120:1-1-07(B)(13) notes the importance of the “diminished culpability of youth” as a factor for consideration. Again, culpability is related to the underdevelopment of the adolescent brain, especially in areas integral to the decision-making process. The reliance upon adolescent brain development literature is well-established in U.S. Supreme Court jurisprudence<sup>iv</sup>, as well as Ohio courts, concerning the legal culpability of juveniles and the necessity of considering youth as a mitigating factor. This reliance is also supported in the age-crime curve research finding that crime peaks during adolescence and early-adulthood where it drops to near zero for the remainder of the life-course.<sup>v</sup> Longitudinal research on incarcerated youth shows that even serious juvenile offenders grow up and out of crime as they mature to adulthood, and how they are treated by the justice system and during their incarceration impacts likelihood of future offending.<sup>vi</sup>

**Recommendation:** In addition to preserving (B)12 and (B)(13) as mitigating factors, add the additional factor of youth development: “The developmental immaturity of youth as seen in decreased capacity for emotion regulation, impulsivity, judgment and assessment of risk.”

**2. The use of a risk assessment tool to measure an “inmate’s risk to reoffend” should be validated for a youth population incarcerated in childhood and be reliable for measuring risk of actual offending, and should not perpetuate racial inequities in the system.**

5120:1-1-07(B)(1) refers to the use of risk assessment tools in the determination of an inmate’s potential to reoffend. Risk assessment is a process for predicting the probability that a person will offend in the future. These tools generally use a combination of static risk factors (characteristics that cannot be changed, such as age of first arrest) and dynamic risk factors (things that a person may change, i.e. having anger problems), group them into domains (i.e. family, education, etc.) and score them by certain weights, ultimately identifying risk levels (i.e. low and high).<sup>vii</sup>

Ensuring that the risk tool is validated on a sample population that matches closely the characteristics of youth, in this case youth incarcerated at length in adult prisons, is essential for predictive reliability.<sup>viii</sup> Depending on the tool, factors considered may disadvantage people incarcerated in childhood by virtue of the fact that they had less opportunity than people incarcerated as adults to engage in education, employment or even meaningful relationships and other prosocial development. Thus, any risk assessment should give more weight to dynamic factors, rather than static ones that cannot be changed, particularly given the significant potential growth still ahead for youth incarcerated in childhood.

Furthermore, only a current risk assessment, or risk re-assessment, should be used for purposes of release consideration to better increase reliability. A person’s risks and needs can change, so it is important to view risk assessment as an ongoing practice.<sup>ix</sup> This is especially the case for youth but is also true for adults. In a sample of adult probationers, for example, Labrecque, Smith, Lovins, and Latessa (2014) found that risk re-assessment scores were a better measure of re-arrest than the initial risk assessment scores.<sup>x</sup>

Finally, despite the intent of risk assessment tools to reduce potential racial bias in justice system decision-making, some research has found that such tools are more likely to misclassify youth of color as high-risk than their white counterparts and thus disproportionately impact youth of color.<sup>xi</sup> This is in part attributed to the fact that these tools generally don’t measure offending based on actual youth behavior, but by the justice system’s *response* to youth (i.e. arrests, parole violations, etc.), which has been shown to reflect societal and institutional bias. For example, while age of first arrest can be an important predictor of offending, if police are more likely to arrest youth of color, then using age of first arrest will build in racial bias.<sup>xii</sup> CWRU researchers Butcher and Kretschmar recently wrote about research on risk assessments in the juvenile justice system: “[a]s risk assessments are designed to use data to best predict recidivism, they are likely to reflect systemic inequalities.”<sup>xiii</sup> Their preliminary research of a sample of Ohio justice-involved youth found that risk assessments may disproportionately identify black youth as higher risk, and thus, introduce bias into the decision-making process.<sup>xiv</sup> While bias in decision-making is not limited to risk assessment tools, potential bias should be

considered when relying upon such assessments in parole hearings. Butcher and Kretschmar suggest that risk assessments be used in conjunction with developmentally-appropriate behavioral health, trauma, and resilience data to make more informed decisions.

**Recommendation:** Revise language in (B)(1) to clarify and improve predictive use of risk assessments for youth. “The inmate’s risk to offend as measured by a recently administered (within six months), reliable and racially equitable ~~the applicable~~ risk assessment tool validated on the appropriate target population.”

**3. Despite the addition of age at offense and diminished culpability of youth, the proposed OAC 5120:1-1-07 does not adequately incorporate an understanding of adolescent development throughout which disadvantages those incarcerated as children or youth.**

In addition to the issues raised above, OAC 5120:1-1-07(B)(2)-(5) and (B)(11) as written do not reflect an understanding of adolescent development and how the status of youth impacts consideration of these various factors. Specifically:

- (B)(2) identifies “early onset” of criminal history “with a pattern of increasing severity” as a factor which, in addition to the example of bias in first arrest discussed above, is by definition any person incarcerated during their childhood and, as such, disproportionately disadvantages youth. This factor also undermines US Supreme Court jurisprudence noted earlier which requires the consideration of “youth” as a modifying factor for diminished culpability, rather than the aggravating factor as it is used here.

**Recommendation:** Revise (B)(2) to read, “...whether the inmate’s criminal history demonstrates ~~early onset with a pattern of increasing severity~~;...In evaluating an inmate’s criminal history and supervision history, the Board shall consider the extent to which age and developmental immaturity may factor into the criminal history and: (a)...”

- (B)(3) identifies “ability to control the inmate’s behavior, and degree to which the inmate demonstrates impulsivity...” as a factor. However, as discussed above, brain research explains how these are predictable characteristics of youth which lessen with brain maturation and thus should not be used as aggravating factors. In addition, impulsivity and ability to self-regulate could be worsened by contact with the criminal justice system. The risk of harm to children and youth in adult prison is significant; they are more likely than adults to be victims of violence and sexual abuse and have significantly higher rates of suicide and solitary confinement.<sup>xv</sup> As such, long-term imprisonment could further traumatize youth, leading to more impulsivity and lack of self-control. Indeed, research shows that those younger than 18 at entrance to prison are far more likely than adults to be involved in various levels of prison misconduct and violence.<sup>xvi</sup>

**Recommendation:** Add the following to (B)(3), “...In evaluating an inmate’s ability to control the inmate’s behavior, the Board will consider the extent to which age and developmental immaturity may factor into the inmate’s behavior and (a)... (b) Any reports prepared...relating to the inmate’s personality, trauma and social history.”

- (B)(4) identifies successful completion of programming “consistent with the inmate’s assessed needs and risk to reoffend” as a factor. While this may be an appropriate consideration, particularly if developmentally-appropriate programming is provided, it should be only be assessed in light of programming actually *available* to the inmate. Lack of access to programming should not be determinative of an inmate’s release consideration.

**Recommendation:** Add the following to (B)(4), “...including, but not limited to, whether the inmate has successfully completed available programming...”

- (B)(5) concerns the “inmate’s institutional behavior”, which again should be viewed with a developmental understanding of youth for those incarcerated in their childhood. It is also unclear what the basis is for the assertion that this “is predictive of an inmate’s risk to reoffend in the community.”

**Recommendation:** Revise (B)(5) to read, “..., ~~which is predictive of an inmate’s risk to reoffend in the community.~~ In evaluating an inmate’s institutional behavior, the Board will consider any reports generated by institutional staff, including conduct reports, that reflect upon the inmate’s institutional adjustment, as well as the extent to which age, developmental immaturity and trauma may factor into the inmate’s behavior and such reports.”

- (B)(11) considers the adequacy of the reentry plan and prospects on release, based upon some factors, including employment history, occupational skills, and education. However, inmate’s incarcerated since childhood are hindered in their ability to demonstrate this type of history. They simply do not have as many years to accumulate this kind of experience and should not be given less consideration for factors that are beyond their control once incarcerated. Likewise, these factors do not take into account how youth increasingly mature and can show significant social-emotional development and personal growth over time.

**Recommendation:** Revise (B)(11) to read, “...or prospects on release ~~to~~ may include, where appropriate: (a) ... (e) The inmate’s demonstrated personal development and improvement over time during their period of incarceration.”

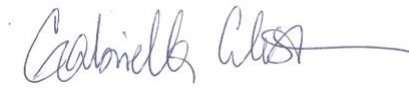
#### **4. The proposed OAC 5120:1-1-07 should include an explicit consideration of “meaningful opportunity for release” for minors incarcerated under life sentences.**

Consistent with the U.S. Supreme Court’s decision in *Miller v. Alabama*, the revised rule should also include guidance for the Parole Board to offer inmate’s incarcerated as juveniles a “meaningful opportunity for release” in considering the release factors.

**Recommendation:** This may be accomplished either by adding a separate factor or by adding language to OAC Rule 5120:1-1-07(C) to read, “The consideration of any single factor, or....The parole decision need not expressly address any of the foregoing factors, except where the inmate was incarcerated as a minor, the parole board must offer a meaningful opportunity for release.”

For all these reasons, we urge that this rule be revised as proposed, consistent with the recommendations provided herein in order to ensure both safety and fairness in the consideration of release for those inmate's incarcerated as children. Thank you for your consideration of these comments and suggestions. Please know I am available should there be any questions or need for further information or assistance.

Respectfully,



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<sup>i</sup> Renaud, J. Grading the parole release systems of all 50 states. *Prison Policy Initiative* (Feb, 26, 2019). Retrieved at [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html)

<sup>ii</sup> Arain M, Haque M, Johal L, Mathur P, Nel W, Rais A, Sandhu R, Sharma S. Maturation of the adolescent brain. *Neuropsychiatr Dis Treat.* 9:449-461. (April 3, 2013) Retrieved at <https://doi.org/10.2147/NDT.S39776>

<sup>iii</sup> Bonnie Richard, J., Johnson Robert, L., Chemers Betty, M., Schuck Julie, A., & National Research Council. Committee on Assessing Juvenile Justice Reform, editor. *Reforming Juvenile Justice: A Developmental Approach, Summary.* (2013). Committee on Law and Justice, Division of Behavioral and Social Sciences and Education.

<sup>iv</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2403 (2011); *Miller v. Alabama*, 567 U. S. 460 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). See also, Kellogg, S.A. (2014).

<sup>v</sup> Hirschi, T., and Gottfredson, M.R. Age and the explanation of crime. (1983) *American Journal of Sociology*, 89, 552–584. <https://doi.org/10.1086/227905>; Sweeten, G., Piquero, A.R. & Steinberg, L. Age and the Explanation of Crime, Revisited. *J Youth Adolescence* 42, 921–938 (2013). <https://doi.org/10.1007/s10964-013-9926-4>

<sup>vi</sup> Steinberg, L., Cauffman, E. and Monahan, K. Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders. *USDOJ OJJDP Bulletin* (March 2015). Retrieved at <https://www.ojjdp.gov/pubs/248391.pdf>

<sup>vii</sup> St. John, V., Murphy, K. Liberman, A. Recommendations for Addressing Racial Bias in Risk and Needs Assessment in Juvenile Justice System. *Child Trends* (January 2020). Retrieved at [https://www.childtrends.org/wp-content/uploads/2020/01/Duke-Risk-Assessment-FAQ\\_ChildTrends\\_Jan2020-1.pdf](https://www.childtrends.org/wp-content/uploads/2020/01/Duke-Risk-Assessment-FAQ_ChildTrends_Jan2020-1.pdf)

<sup>viii</sup> Ibid.

<sup>ix</sup> Andrews, D., Bonta, J. and Wormith, J.S. The Recent Past and Near Future of Risk and/or Need Assessment. *Crime & Delinquency* 52(1):7-27 (January 2006).

<sup>x</sup> Labrecque, R., Smith, P., Lovins, B. and Latessa, E. The Importance of Reassessment: How Changes in the LSI-R Risk Score Can Improve the Prediction of Recidivism. *Journal of Offender Rehabilitation* 53(2): 116-128 (February 2014).

<sup>xi</sup> St. John, V., Murphy, K. Liberman, A. at 5-6.

<sup>xii</sup> Ibid at 5.

<sup>xiii</sup> Butcher, F. & Kretschmar, J. How Juvenile Justice Systems Must Balance Risk Assessment with Racial Equity. *Juvenile Justice Information Exchange.* (February 4, 2020). Retrieved at <https://jjiie.org/2020/02/04/how-juvenile-justice-systems-must-balance-risk-assessment-with-racial-equity/>

<sup>xiv</sup> Ibid.

<sup>xv</sup> Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* (Nov. 2007). Retrieved at [http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing\\_Juveniles\\_Report\\_2007-11-15.pdf](http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf)

<sup>xvi</sup> Kuanluiang, A., Sorensen, J.R., Cunningham, M. Juvenile Inmates in an Adult Prison System: Rates of Disciplinary Misconduct and Violence. (Sept. 2008) <https://doi.org/10.1177/0093854808322744>