PROBATION INELIGIBILITY: A TIME FOR RECONSIDERATION IN KENTUCKY

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INTRODUCTION

In the United States, each state has the authority to shape its own criminal justice and juvenile justice systems.[2] With this regulatory power, states across the country have enacted statutes permitting youths under the age of 18 to be tried as adults for qualifying crimes.[3] In Kentucky, a youthful offender is placed in the jurisdiction of an "adult court" through a mandatory waiver or discretionary transfer. Under the mandatory waiver method, a youth, aged fourteen or older, at the time he or she allegedly utilized a firearm to commit a felony, may be transferred to the Circuit Court and tried as an adult.[4] Under the discretionary transfer method, upon motion of the county attorney, a youth satisfying prescribed statutory requirements may be transferred from the juvenile justice system and tried as an adult.[5] These youthful offenders not only face legal consequences; disruptions to academic development; and social stigma, but also various procedural hurdles.

In Kentucky, upon turning eighteen, youthful offenders still in Department of Juvenile Justice (DJJ) custody, must return to their sentencing court for an age-eighteen hearing to determine whether he or she will be paroled, released, placed in a treatment program or incarcerated within a facility operated by the Department of Corrections (Corrections).[6] However, the DJJ and Corrections may together decide to bypass a court ordered incarceration, allowing a youthful offender to remain in the DJJ's custody until his or her release, parole, or twenty-first birthday.[7] Those allowed to stay may petition the court for probation reconsideration *once*, upon "completion of a minimum twelve (12) months additional service of sentence."[8] Notably, some courts have declined to extend this amnesty to youthful offenders already barred from probation at their age-eighteen hearing due to the nature of their crime.[9] The

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[2] BUREAU OF JUST. STAT., *The Justice System: What is the Sequence of Events in the Criminal Justice System?*, (June 3, 2021), https://bjs.ojp.gov/justice-system [https://perma.cc/B8T3-Y3QM].

[3] NAT'L JUV. DEF. CTR., *Kentucky*, (July 2018), https://njdc.info/practice-policy-resources/state-profiles/kentucky/ [https://perma.cc/2827-JMPA].

[4] *Id.*; KY. REV. STAT. ANN. § 635.020(4) (West 2021).

[5] NAT'L JUV. DEF. CTR., *supra* note 3; KY. REV. STAT. ANN. §§ 635.020(2)–(7) (West 2021).

[6] KY. REV. STAT. ANN. § 640.030(2) (West 2006).

[7] KY. REV. STAT. ANN. § 640.075(1) (West 2002).

[8] KY. REV. STAT. ANN. § 640.075(4) (West 2002).

[9] Bloyer v. Commonwealth, No. 2019-CA-000890-MR, 2020 Ky. App. LEXIS 828, at *10–11 (Ky. Ct. App. Aug. 28, 2020), review granted, (June 9, 2021) and not published by operation of CR 76.28(4)(c) (unpublished decision). After examining this issue of first impression, the Kentucky Court of Appeals concluded that a youthful offender ineligible for probation at his age-eighteen hearing, remained ineligible

Supreme Court of Kentucky has not yet weighed in on the matter.[10] Due to recent developments in sociology and legal philosophy, youthful offenders seeking probation reconsideration should not be prohibited simply because of prior ineligibility at the time of their age-eighteen hearing.

This Note argues that the Kentucky Legislature should amend KRS § 532.045(2) to permit probationary release for youthful offenders during their probation reconsideration hearing, as prescribed under KRS § 640.075(4). With this modification, the court would receive discretionary latitude in its probation decision, rather than be statutorily mandated to deny the request. Although the crimes in question are extremely serious, the mounting evidence of the negative impact of juvenile incarceration warrants reevaluation of how youthful offenders are treated in Kentucky and the nation at large.

Section I will examine the historical background for youthful offenders in the U.S. and Kentucky; most advancements being quite recent due to increased research and public focus. Section II examines the negative societal impact of current law from a public policy perspective and the implicated federal and state constitutional issues. Last, Section III will propose a statutory solution and appropriate rehabilitation measures for Kentucky that could be adopted by jurisdictions throughout the nation.

I. BACKGROUND

A. Juvenile Justice Reform for Youthful Offenders at the National Level

The juvenile justice system has been reactionary to the social and political concerns of the time.[11] The first U.S. juvenile court was established in 1889 due to the dangers of incarcerating children with adults, recognizing the two as being at different developmental stages with different needs.[12] In response to a surge in crime throughout the latter-half of the twentieth century, state governments enacted stricter laws that caused far more juveniles to be tried and sentenced as adults.[13] From 1985 to 2003, twenty-two youthful offenders, between the ages of twenty-three and thirty-eight, received the death penalty for their crimes.[14] Notably, a majority of those twenty-two put to death were members of minority groups.[15]

In 2005, the United States Supreme Court addressed the constitutionality of death penalty sentences imposed on juvenile offenders.[16] In *Roper v. Simmons*, an eighteen-year-old sentenced to death for a murder he committed while seventeen-

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at his probation consideration hearing. On June 9, 2021, the Supreme Court of Kentucky granted discretionary review.

[10] Bloyer v. Commonwealth, No. 2020-SC-0473-DG, 2021 Ky. LEXIS 204 (June 9, 2021).

[11] Lynn Cothern, *Juveniles and the Death Penalty*, COORDINATING COUNCIL ON JUV. JUST. AND DELINQ. PREVENTION 9 (Nov. 2000), https://www.ncjrs.gov/pdffiles1/ojjdp/184748.pdf [https://perma.cc/58JR-ZAPE].

[12] *Id.* at 1.

[13] *Id.*

[14] *Executions of Juveniles in the U.S. 1976-2005*, DEATH PENALTY INFO. CENTER, https://deathpenaltyinfo.org/policy-issues/juveniles/executions-of-juveniles-since-1976 [https://perma.cc/GPN3-7JHK].

[15] *Id.* From 1985 to 2003, twenty-two youthful offenders, consisting of eleven African-Americans, ten Caucasians, and one Latino, were executed.

[16] Roper v. Simmons, 543 U.S. 551 (2005).

years-old,[17] petitioned the court for postconviction relief, analogizing the execution of youthful offenders to that of the mentally disabled,[18] in violation of the Eighth Amendment of the U.S. Constitution under *Atkins v. Virginia*.[19] The Supreme Court agreed, identifying three key differences between juveniles and adults that preclude offenders under the age of eighteen from capital punishment.[20] The first is juveniles' lack of maturity and responsibility as compared to adults, causing impulsive decision-making.[21] The Court noted that states do not allow juveniles to vote or purchase alcohol for this "comparative immaturity."[22] The second difference is that juveniles have far less environmental control while adults have the power to avoid criminal activity.[23] The third difference is that juveniles hold malleable ethics and morality with the greater chance of rehabilitation.[24]

The next step was holding that sentencing youthful offenders to life without parole for a non-homicide violated the Eight Amendment. In *Graham v. Florida*, the Court reasoned that while states can prioritize different criminal justice goals, it is flawed to ignore age, as lesser incentive to demonstrate the rehabilitation ultimately discourages self-improvement efforts by those wanting to reenter society.[25] The most recent major reform is the prohibition of mandatory life-without parole sentences under the Eight Amendment for youthful offenders who committed homicide.

In *Miller v. Alabama*, the Court reasoned that a mandatory sentence precludes evaluating factors that contribute to culpability and improvement potential such as crime details, mental capacity, and dysfunctional life variables that led to criminal acts.[26] The Court places great importance on the role brain development plays in the legal process, recognizing that juveniles may not face such harsh punishment if they had the maturity to best deal with police and attorneys.[27] The key takeaway is the importance of exercising discretion based on individual factors, no matter the offense.[28] Without this measure, youthful offenders and adults are equally punished for the same crime, regardless of culpability and rehabilitation potential.[29]

While these landmark cases deal with the most serious offenses, the core principles are widely applicable. Society is not bettered by treating youthful offenders equal to adults, even during crime waves. With the social stigma of sexual offenses being arguably stronger than that of serious violent crimes, it is logical to project that reevaluation of youth sex offender treatment will follow from *Simmons-Graham-Miller* jurisprudence.

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[17] *Id.* at 556.
[18] *Id.* at 559.
[19] *Id.*; Atkins v. Virginia, 536 U.S. 304 (2002) (barring the imposition of capital punishment for the mentally disabled).
[20] *Simmons*, 543 U.S. at 569.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 570.
[25] Graham v. Florida, 560 U.S. 48, 82 (2010).
[26] Miller v. Alabama, 567 U.S. 460, 477, 489, (2012).
[27] *Id.* at 477–78.
[28] *Id.* at 476–77.
[29] *Id.* at 477.

B. An Issue of First Impression in Kentucky

Before its grant of discretionary review in *Bloyer v. Commonwealth*,[30] the Kentucky Supreme Court considered whether youthful offenders may be statutorily precluded from probation, despite its availability under KRS § 640.030.[31] In *Commonwealth v. Taylor*, a youthful offender convicted of first-degree sodomy and sexual abuse received a twenty-year sentence.[32] The offender was a teenager, while the victim, his younger sister, was a small child.[33] At sentencing, the court classified the youthful offender as a "juvenile sexual offender" and committed him to a treatment program until age twenty-one, as prescribed by state law.[34] Upon turning twenty-one, the youthful offender returned to court and was granted probation in light of his "excellent performance" in the court-mandated program.[35]

However, the Commonwealth appealed the trial court's decision to grant probation, arguing that KRS § 532.045(2) prohibits probation as a matter of law when the convicted offense is one of the enumerated crimes.[36] The Commonwealth cited KRS § 640.030, mandating that "youthful offenders[s] . . . convicted of a felony offense" receive "the same type of sentencing procedures . . . including probation," as adult felony offenders.[37] However, the juvenile contended that his classification as a "youthful offender," and subsequent treatment under KRS § 640.030(4), exempted him from the probation bar located within KRS § 532.045(2).[38] The court found the Commonwealth's position persuasive and reversed the trial court's grant of probation.[39] In its decision, the court viewed KRS § 640.030 as a "clear legislative pronouncement" of equal treatment between youthful felony offenders and adult felony offenders.[40]

It is difficult to see how the court could have reached a different conclusion. The statute is unambiguous and allows for a single logical interpretation.[41] However, equal treatment of youthful offenders and adults, as well as the disallowance of discretion, should be avoided. Whether or not granting probation based on treatment program participation was advisable, the trial court was so impressed that they thought it the appropriate time to reintegrate the offender into society.[42] In denying probation as a matter of law, there is far less incentive to make a strong rehabilitative effort.[43] With little incentive to self-improve, it is more likely that the system is releasing offenders back into society in equal or worse condition.[44]

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[30] Bloyer v. Commonwealth, No. 2020-SC-0473-DG, 2021 Ky. LEXIS 204 (June 9, 2021).
[31] Commonwealth v. Taylor, 945 S.W.2d 420, 423 (Ky. 1997).
[32] *Id.* at 421.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 421–22; KY. REV. STAT. ANN. § 532.045(2) (West 2014).
[37] *Taylor*, 945 S.W.2d at 423; KY. REV. STAT. ANN. § 640.030(5) (West 2006).
[38] *Taylor*, 945 S.W.2d at 423.
[39] *Id.*
[40] *Id.*
[41] KY. REV. STAT. ANN. § 532.045(2) (West 2014).
[42] *Taylor*, 945 S.W.2d at 421.
[43] *See* Graham v. Florida, 560 U.S. 48, 79 (2010).
[44] *See id.*

In *Bloyer v. Commonwealth*, the Kentucky Court of Appeals addressed an issue of first impression: whether youthful offenders statutorily barred from probation at their age-eighteen hearing are also barred at their probation reconsideration hearing.[45] At age sixteen, Bloyer pled guilty to multiple sexual offenses, including six counts of incest against his younger siblings, and was sentenced to fifteen years' imprisonment and placed in DJJ custody.[46] At Bloyer's age-eighteen hearing, the court denied probation and ordered he be transferred to Corrections until his twenty-first birthday.[47] However, the DJJ and Corrections mutually decided to allow Bloyer remain with the DJJ until he reached the age of twenty-one.[48] As this date approached, Bloyer unsuccessfully petitioned the court for probation reconsideration.[49] The trial court found Bloyer ineligible for probation as a matter of law under KRS § 532.045(2), as the offenses clearly met the statutory criteria.[50] On appeal, Bloyer argued that the court violated the Eighth Amendment and Section Two of the Kentucky Constitution, prohibiting absolute and arbitrary state power over life, liberty, and property.[51] Bloyer urged the court to consider his unfortunate childhood and substandard intelligence in its analysis.[52]

As to Bloyer's background, the court believed these factors caused psychological distress but deemed them irrelevant to the issue.[53] The court stated that if Bloyer was legally competent, outside factors do not excuse crime and are immaterial to the question.[54] The constitutional claims were rejected in an equally emphatic fashion.[55] The Eighth Amendment prohibits "cruel and unusual" punishment:[56] punishment extremely disproportionate to the offense.[57] The court acknowledges reform trends around youthful offenders, citing *Roper*, *Graham*, and *Miller*, the court refused to view Bloyer's fifteen-year sentence as an unreasonably severe punishment in violation of the Eighth Amendment.[58] As Bloyer's fifteen-year sentence was lower than the statutory maximum for his offenses, the court found no disproportion between Bloyer's crime and subsequent sentence, thus rejecting his Eighth Amendment argument.[59]

Bloyer's state constitution claim was met with further skepticism. Section Two of the Kentucky Constitution, a broad-sweeping provision prohibiting arbitrary use

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[45] Bloyer v. Commonwealth, No. 2019-CA-000890-MR, 2020 Ky. App. LEXIS 828, at *2 (Ky. Ct. App. Aug. 28, 2020), review granted, (June 9, 2021) and not published by operation of CR 76.28(4)(c) (unpublished decision).
[46] *Id.* at *3.
[47] *Id.* at *7.
[48] *Id.*
[49] *Id.* at *8.
[50] *Id.*
[51] *Id.* at *24–25.
[52] *Id.* at *9–10.
[53] *Id.*
[54] *See id.*
[55] *Id.* at *24–31.
[56] U.S. CONST. amend. VIII.
[57] *Bloyer*, 2020 Ky. App. LEXIS 828 at *25 ("Though [the Eighth Amendment] does not mention proportionality, [it] nonetheless encompasses a proportionality requirement") (citation omitted).
[58] *Id.* at *27.
[59] *Id.* at *28.

of state power,[60] requires state actions be "reasonably within the scope of a legitimate public purpose."[61] Using a rational basis test, the court reasoned that the enumerated offenses were heinous and the legislature had a legitimate purpose in denying probation to protect the public from additional threat, even if assuming youthful offenders are less prone to recidivism than adults.[62] The court concluded its analysis and affirmed the lower court judgment, holding that youthful offenders statutorily ineligible for probation at their age-eighteen hearing, remain ineligible at a hearing for probation reconsideration.[63] Under this ruling, there is no room for judicial discretion or individual consideration at a youthful offender's probation reconsideration hearing. While this lack of offender-specific analysis is easier to apply uniformly, the potentially positive impact of greater flexibility regarding youthful offenders outweighs this administrative ease.

II. CONCERNS WITH CURRENT APPROACHES DESPITE STEPS IN THE RIGHT DIRECTION

Jurisprudence gradually evolves over time, especially when controversial, as change must occur within the general population and political process. The technical details of criminal procedure can be difficult to understand, especially with each state having its own unique body of law. Though recent years have put greater focus on the treatment of different classes within the justice system, laws on probation eligibility do not command headlines, and violent offenders are not the subjects of public sympathy.

However, advancements in the perception of youthful offenders over past decades have been substantial and in quick succession, placing an increased focus on resolving criminal inequalities and finding efficient, fair solutions that match the goals of today's society.[64] However, these modifications cannot depend solely on Supreme Court action, as criminal justice statutes are the making of state legislatures.[65] Kentucky should amend the current law by including a youthful offender exception at reconsideration hearings, allowing for judicial discretion regarding probation, as the constitutional issues and public policy concerns render the matter-of-law prohibition outdated and threatening to individual liberty.

A. Constitutional Issues

The Eighth Amendment guarantees freedom from "cruel and unusual punishment."[66] This means that no citizen shall be punished excessively. To determine if a punishment meets constitutional muster, courts look to society's "evolving standards of decency," weighing the crime's resulting harm against the

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[60] KY. CONST. § 2.
[61] Moore v. Ward, 377 S.W.2d 881, 883 (Ky. 1964).
[62] *Id.* at *31–32.
[63] *Id.* at *32.
[64] *See generally* Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting the imposition of capital punishment on youthful offenders); Graham v. Florida, 560 U.S. 48 (2010) (prohibiting the imposition of life imprisonment without parole on youthful non-homicide offenders); Miller v. Alabama, 567 U.S. 460 (2012) (prohibiting the imposition of life imprisonment without parole on all youthful offenders regardless of crime).
[65] BUREAU OF JUST. STAT., *supra* note 2.
[66] U.S. CONST. amend. VIII.

sentence's possible restrictions of life, liberty, and property.[67] Due to this balancing analysis, the figurative line separating unconstitutional, "cruel and unusual punishment[s]" from those that considered proper, may shift with every offense.[68] While harsher punishments may have stronger deterring and incapacitating effects, an individual's constitutional rights and protections must take precedence.[69]

However, the severity of the punishment imposed should not simply be measured in proportion to the severity of the offense. Especially, as we have come to a greater understanding of the impact a juvenile's incomplete mental development and emotional maturity, lack of personal identity, peer pressure, and other individualized circumstances, may have on his susceptibility to criminal behavior.[70] Instead, the severity of the punishment should be measured against the offense *and* the particular perpetrator.[71] These underlying circumstances contribute to one's self-perception, dominion over their personal environment, ability to understand the consequences and harm of their actions, self-perception, and overall feelings of desperation that results in the offense and "nothing to lose" mentality if caught and punished.[72]

Because some people have been dealt circumstances that make their criminal behavior more understandable, it would be inequitable to judge them on an even plane with those who had all of the power in the world to avoid criminal activity yet chose not to. For example, youthful offenders are severely limited in their capacity to leave crime-ravished neighborhoods or move out of abusive homes.[73] In addition, scientific advancements have shown stark neurological differences between youthful offenders and adult offenders regarding "behavior control."[74] Unlike adult offenders, youthful offenders are more prone to impulsive action and risk-taking, making them less culpable for their actions and more likely to reform upon reaching mental maturity.[75] Further, several sociological studies previously conducted demonstrate that only a small percentage of youths involved in criminal activity actually develop any lingering pattern of criminal behavior.[76]

It is here that the separation in reasoning between the Supreme Court over the past two decades and the courts in *Taylor* and *Bloyer* expands exponentially. An automatic prohibition of probation for offenders convicted of enumerated offenses removes the judicial discretion surrounding a probation determination.[77] For example, KRS § 532.045(2) requires a court to deny probation to any offender,

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[67] *Roper*, 543 at 560–61 (citations omitted).
[68] *See* Weems v. United States, 217 U.S. 349, 367–78 (1910) (examining differing judicial opinions on what constitutes excessive punishment).
[69] *See Graham*, 560 U.S. at 59.
[70] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1010–14 (2003).
[71] Miller v. Alabama, 567 U.S. 460, 469 (2012).
[72] *See Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569–70.
[73] *Miller*, 567 U.S. at 471 (citations omitted).
[74] *Graham*, 560 U.S. at 68 (citations omitted).
[75] *Miller*, 567 U.S. at 472.
[76] Steinberg & Scott, *supra* note 70, at 1014.
[77] Nancy J. King & Brynn E. Applebaum, *Alleyne on the Ground: Factfinding that Limits Eligibility for Probation or Parole Release*, 26 FED. SENT'G REP. 287, 291–92 (2014).

regardless of age, convicted of a crime as prescribed by the statute.[78] This result may also be mandated in probation reconsideration hearings of youthful offenders, held under KRS§ 640.075(4), regardless of whether the court believes that the individual has been successfully reformed and warrants the probationary release.[79] This lacks the common sense of giving wide deference to the finder of fact and allowing judicial discretion in an area where it is otherwise dominant.

Ultimately, the equal treatment of youthful and adult offenders mandated by KRS § 532.045(2) renders the statute unconstitutional as cruel and unusual punishment. Although youthful offenders are less culpable, receive far more benefits with probationary release, and are less likely to return to criminal activity upon release, they are mandatorily subject to the same prohibitions as adult offenders. Both youthful and adult offenders operate with the same numerator, but very different denominators. This disproportionality disregards the principles set forth by the Supreme Court in *Roper*, *Graham* and *Miller*.

While opponents of this contention argue that the probation prohibition is perfectly proportional in light of the seriousness of the offenses which trigger it, the fact remains that youthful offenders receive punishments equal to that of adult offenders, despite the fact they are of lesser capacity, lesser culpability, and are lesser threats to the public upon release.[80] The disproportion may be slight, the punishment is still excessive when considering the circumstances of the youthful offender. Proportionality can easily be restored by the Kentucky Legislature amending KRS § 532.045, permitting probationary release for youthful offenders seeking it during their probation reconsideration hearing, as prescribed under KRS § 640.075(4).[81] With this statutory leeway, courts may then utilize its judicial discretion in determining whether the youthful offender would be better served by being released on probation.

The probation prohibition for youthful offenders also violates Section Two of the Kentucky Constitution, forbidding the arbitrary and absolute power of the state over life, liberty, and property, absent a compelling state interest.[82] The word "arbitrary," as relating to government function, is simply defined as a "ruling by

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[78] KY. REV. STAT. ANN. § 532.045(4) (West 2014); Commonwealth v. Taylor, 945 S.W.2d 420 (1997).
[79] Bloyer v. Commonwealth, No. 2019-CA-000890-MR, 2020 Ky. App. LEXIS 828 (Ky. Ct. App. Aug. 28, 2020), review granted, (June 9, 2021) and not published by operation of CR 76.28(4)(c). (unpublished decision). On June 9, 2021, the Supreme Court of Kentucky granted discretionary review to determine whether a youthful offender statutorily exempt from probation at his age-eighteen hearing, was also exempt at his probation reconsideration hearing. As of December 29, 2021, no decision has been rendered.
[80] Steinberg & Scott, *supra* note 70, at 1010.
[81] *See* Aldon Thomas Stiles, *Come July, California Will Swap Juvenile Jails for Reform-Minded Rehab Centers*, L.A. SENTINEL (Mar. 18, 2021), https://lasentinel.net/come-july-california-will-swap-juvenile-jails-for-reform-minded-rehab-centers.html [https://perma.cc/H6JM-3XXF]; Otiena Ellwand, *Breaking the Youth Crime Cycle: New Strategies Aiming to Rehabilitate Young Offenders Have Mixed Results*, EDMONTON J. (Aug. 18, 2016), https://edmontonjournal.com/news/insight/breaking-the-youth-crime-cycle-new-strategies-aiming-to-rehabilitate-young-offenders-have-mixed-results [https://perma.cc/GR4Q-SDCN].
[82] KY. CONST. § 2.

absolute authority."[83] Under KRS § 532.045(2), the *absolute authority* of the state deprives youthful offenders of their liberty, through its statutory ban on probation.[84]

Opponents of this contention will likely argue that the statutory probation bar for those convicted of deplorable crimes fails to constitute an arbitrary state action that results in an inequity "exceed[ing] the reasonable and legitimate interest of the people."[85] In their view, a statute enacted to prevent offenders convicted of heinous crimes from reentering society is an appropriately tailored state action to achieve the interest of keeping the public safe from youthful offenders. Therefore, KRS § 532.045(2) does not violate Section Two of the Kentucky Constitution. While this belief may hold true regarding adult offenders, it is not the case for youthful offenders.

While it is likely a reasonable and legitimate state interest to keep this class of adult offenders away from the people due to their greater likelihood of recidivism, no genuine interest exists with respect to youthful offenders. Youthful offenders are considerably less prone to recidivism when given the opportunity to begin rehabilitation before fully maturing.[86] By keeping youthful offenders incarcerated, a greater danger is imposed on the society by the inverse: reducing the likelihood of meaningful rehabilitation, while increasing the chance of recidivism upon post-maturity release.[87]

B. Public Policy Considerations

From a public policy standpoint, the goals of society are more effectively met by pursuing the rehabilitation of youthful offenders during the development of their psyche. During this period, they are more susceptible to rehabilitative efforts. At its conclusion, the possibility of true reform is greatly reduced. Additionally, public policy dictates society encourage the self-improvement of youthful offenders. As it currently stands, a youthful offender, subject to the probation prohibition, has little incentive to better himself while incarcerated due to the lengthy sentences upon conviction and absence of behavior-based early release. This perpetuates a greater threat of continued criminal activity inside and out of prison confines.

By amending KRS § 532.045(2) to permit probationary release for youthful offenders seeking probation reconsideration pursuant to KRS § 640.075(4), judges are given the discretion to make their determination on whether the individual has demonstrated commitment and responsiveness to rehabilitating themselves, to the point that they are capable and deserving of reintegrating with society. With this statutory modification, the state would both encourage youthful offenders to devote their time spent incarcerated to self-betterment, while also disincentivizing further unlawful behavior while imprisoned and upon eventual release.

Opponents of the proposed amendment will likely argue that public policy demands heinous criminal activity be disincentivized through probation prohibition, regardless of the offender's age. Furthermore, they note that the state's legitimate

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[83] *Arbitrary*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/arbitrary [https://perma.cc/HRX5-Z26K].
[84] KY. REV. STAT. ANN. § 532.045(2) (West 2014).
[85] Kentucky Milk Mktg. and Antimonopoly Com'n v. Kroger Co., 691 S.W.2d 893, 899 (Ky. 1985).
[86] Steinberg & Scott, *supra* note 70, at 1014–15.
[87] *See id.* at 1015–16.

interest in public safety should be prioritized and pursued through deterrence and incapacitation.

However, due to a youthful offender's incomplete mental development and lack of emotional maturity, youthful offenders are less likely to fully appreciate the consequences of their actions and long-term decision making, rendering a punishment's deterrence efforts futile and incapacitation efforts temporary at best. A better, more permanent solution can be found in the encouragement of rehabilitation. Under this method, youthful offenders stand a greater chance of reentering society with the faculties necessary to avoid further criminal activity, accomplishing utilitarian goals of betterment to society through youthful offenders thus improving their post-release lives and society as a whole.

III. RESTORING THE BALANCE IN KENTUCKY BY ALLOWING A FIGHTING CHANCE

With the possible rigid judicial interpretation of KRS § 532.045(2),[88] the Kentucky Legislature now has the opportunity to further evolve the way in which youthful offenders are treated by the criminal justice system. Reforming KRS § 532.045(2) to exempt youthful offenders from its application at probation reconsideration hearings, legislators can rectify the statute's harmful effects by allowing judicial discretion in whether or not to grant probation based on the circumstances of the individual's life, the commitment the individual has shown to self-improvement, and the probability that probation would best serve the individual towards living a meaningful life as a contributing member of society.

A probation system, appropriately tailored to the needs of youthful offenders and their communities, seems to be the puzzle that every state is looking to put together. Unfortunately, despite the greater push by many states on this front, jurisdictions have various, inconsistent methods for the collection and publication of empirical data regarding the success of their respective juvenile justice programs, with sparce mention of program success rates for youthful offenders.[89]

For instance, the Kentucky Juvenile Manual, a publication by the Kentucky Department of Public Advocacy focused on juvenile justice law throughout the state, includes a section on the parole of youthful offenders but provides no layout of how the program operates or its success rate.[90] However, the "Classification and Placement Manual", published by the Kentucky Department of Juvenile Justice, explains juvenile probation more fully, including the use of placement tiers based on a youthful offender's ability to function in school, the resources the community is able to provide for their treatment, and the ability of the caregiver to participate in and assist with the program.[91]

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[88] Bloyer v. Commonwealth, No. 2019-CA-000890-MR, 2020 Ky. App. LEXIS 828 (Ky. Ct. App. Aug. 28, 2020), review granted, (June 9, 2021) and not published by operation of CR 76.28(4)(c) (unpublished decision).

[89] *See Juvenile Justice Services*, JUV. JUST., GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/juvenile-justice-services [https://perma.cc/HFD9-Q5L7].

[90] KENTUCKY DEP'T OF PUB. ADVOC., JUV. ADVOC. MANUAL 29–32 (2013), https://dpa.ky.gov/Public_Defender_Resources/Documents/JuvenileManualFINAL060513.pdf [https://perma.cc/J5ME-6FHZ].

[91] KENTUCKY DEP'T OF JUV. JUST., CLASSIFICATION AND PLACEMENT MANUAL (2019), https://djj.ky.gov/200%20Policy%20Manual/Classification%20and%20Placement%20Manual%20040519.pdf [https://perma.cc/3FWM-E4JB].

There are, however, a few states that keep progressive recidivism data regarding their juvenile justice programs run by the state. For example, in Florida, the Florida Department of Juvenile Justice reported a fifteen percent recidivism rate in 2015.[92] This figure includes juveniles that successfully completed probationary releases, diversion releases, and community programs.[93] While the data on the matter is surprisingly limited, it does seem to indicate a general level of success for state probation programs with natural variation that can be expected from different states with unique problems and resource limitations. Traditional state programs appear to be of adequate quality but given the sensitive nature of the offenses that currently prohibit youthful offenders from probation at age-twenty-one hearings, it is possible that the offerings by the adult and juvenile probation programs will not quite fit the unique needs of youthful offenders.

Following a startling increase in the incarceration rate of minority youth, California shifted incarcerated youthful offenders from state-run juvenile prisons to local rehabilitation centers.[94] A decision made possible after the state was awarded several grants aimed at providing counseling services for trauma, families, substance abuse, situational awareness, and mental health.[95] This reform could serve as an example for other states' juvenile justice systems, placing the betterment of the youthful offender at the forefront.

In addition, Canada has enacted legislation geared at the rehabilitation and reintegration of youthful offenders.[96] For example, the Youth Criminal Justice Act requires police officers contemplate "extrajudicial measures," such as referrals to community programs or agencies, before criminally charging a juvenile.[97] However, the social stigma of these programs, in conjunction with their post-imprisonment restrictions, have led to mixed reviews from participants and their families.[98] For example, youthful sexual offenders sentenced to a term of home confinement may be barred from leaving their home, interacting with people below a certain age, or using the internet.[99] Those who violate these restrictions may be detained at the "Young Offender Centre" and placed into isolation for up to seventy-two hours.[100] The province of Alberta has experienced statistical drops in the total youth accused of crimes, total convictions, and the "Youth Crime Severity Index", in recent years.[101] Those who have found success in these programs attribute it to the

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[92] *Juvenile Justice Services*, *supra* note 89.
[93] *Id.*
[94] Stiles, *supra* note 81.
[95] *Id.*
[96] Government of Canada, The Youth Criminal Justice Act Summary and Background, Government of Canada, https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html (last modified July 7, 2021) [https://perma.cc/9MB7-Z3C2].
[97] Government of Canada, The Youth Criminal Justice Act Summary and Background, Government of Canada, https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html (last modified July 7, 2021) [https://perma.cc/9MB7-Z3C2].
[98] *See* Ellwand, *supra* note 81.
[99] *Id.*
[100] *Id.*
[101] *Id.*

programs' structure, focus on rehabilitation, and the identities of the participants are kept from publication.[102]

The Canadian juvenile justice system's use of rehabilitative programs for youthful offenders should influence its American counterpart. While this approach may require a significant amount of time and resources from a variety of state actors, the statistical evidence of Alberta's reduction in total youth crime and serious youth crime should make these contributions worthwhile.[103] The Canadian system has legitimized the goals of youthful offender probation and rehabilitation, which should manifest confidence from American jurisdictions seeking to reform in similar ways.[104]

IV. CONCLUSION

In conclusion, KRS § 532.045(2), prohibiting probationary release for youthful offenders seeking probation reconsideration pursuant to KRS § 640.075(4), violates the Eighth Amendment of the United States Constitution, by imposing cruel and unusual punishment, as well as Section Two of the Kentucky Constitution, by authorizing arbitrary state action without a reasonable and legitimate interest. These constitutional violations, at both the federal and state level, present a significant threat to the liberty of an already vulnerable population, and it is this population of at-risk youth that needs protection and separate consideration the most.

To protect juveniles from this injustice, the Kentucky Legislature must amend KRS § 532.045(2) to permit probationary release for youthful offenders seeking it during their probation reconsideration hearing under KRS § 640.075(4). This amendment would better serve public policy by incentivizing self-betterment and rehabilitation while incarcerated. By prioritizing rehabilitation and allowing the fighting chance for probation, the state will be providing powerful motivation for youthful offenders to take full advantage of the opportunities to better themselves with the goal of early release, reintegration into society, and living meaningful, contributing lives from that point forward. With these benefits in mind, it is clear that the Kentucky Legislature must take this step. This amendment places the question of probation squarely in the hands of the presiding judge. Under this new method, judges exercise their discretion, weighing the youthful offender's individual circumstances and propensity for rehabilitation, before determining whether the youthful offender and surrounding community would benefit more from the offender's reintegration into society or further incarceration.

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[102] *Id.*
[103] *See Id.*
[104] *Id.*