

**From:** |  
**Sent:** Wednesday, June 01, 2016 2:37 PM  
**To:** |  
**Subject:** DCJIS regulation comments 803 CMR 2.00

Good afternoon,

Below please find comments submitted on 803 CMR 2.00.

Thank you,



Agapi Koulouris  
General Counsel  
Massachusetts Department of Criminal Justice Information Services  
Legal Department

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**From:** Quirion, Paulin  
**Sent:** Monday, May 30, 2016 11:38 PM  
**To:** Quirion, Pauline; dcjisregs comments (CHS)  
**Subject:** Fw: DCJIS regulation comments

RE: Comments on Proposed Regulations

Section 2.02 to 2.03. I am writing to urge your agency to clarify in sections 2.02 and 2.03 under that juvenile adjudications are not to be treated as convictions when the Department of Criminal Justice Information Services (DCJIS) disseminates CORI to a requestor unless: (1) the cases were tried in Superior Court or transferred from a juvenile session to an adult court; or (2) the requestor is specially authorized by statute to receive the juvenile case information.

### **Statutory Background**

The Juvenile Court and the juvenile session of certain District Courts have jurisdiction over juvenile delinquents from ages seven through sixteen who commit "any offense against a law of the commonwealth" or violate city or town ordinances or by-laws. G.L. c. 119, § 52. See also G.L. c. 119, § 74 (limiting criminal proceedings against children under age seventeen to murder and certain criminal motor vehicle cases). In 1996, the Legislature created a youthful offender category which is sometimes referred to as "aggravated juvenile delinquency." *Commonwealth v. Furr*, 58 Mass. App. Ct. 155, 158 (2003); *United States v. Peguero-Martinez*, 771 F.Supp. 2d 137, 140 n.2 (2010). This category includes juveniles age fourteen through sixteen who: (1) were previously in the custody of the Department of Youth Services and subsequently charged with offenses that if committed by an adult would carry a prison sentence, and (2) juvenilesome offenses committed by juveniles are tried in adult courts. Juveniles, who are at least age fourteen but under age seventeen, are tried as adults in Superior Court for first or second degree murder. G. L. c. 119, § 74. See also G. L. c. 119, § 72B. Cases involving a person age eighteen or older for offenses committed before age seventeen before Chapter 84 of the Acts of 2013 took effect (or before age eighteen once the Act took effect) may be transferred to the Superior Court or District Court for trial of the individual as an adult. G. L. c. 119, § 72A. See also G. L. c. 218, § 30. As with other cases tried in an adult court, these cases appear as part of the defendant's CORI disseminated by DCJIS.

While youthful offender hearings and the court file at the courthouse are open to the public under G.L. c. 119, § 60A, this does not mean the case becomes part of CORI disseminated by DCJIS. As illustrated by *Commonwealth v. Boe*, 456 Mass. 337, 340 n. 5 (2010), there are different categories of data—the probation file, the clerk's file at the courthouse, and data maintained and released by the Criminal History Systems Board (now known as DCJIS). The Massachusetts Commission Against Discrimination (MCAD), for example, warns employers that they may not inquire about juvenile offenses unless the person was tried as an adult. MCAD, Fact Sheet: Discrimination on the Basis of Criminal Record (2007); MCAD, Fact Sheet Criminal Offender Record Information Administrative Procedure Reforms (November 2010).

### **Juvenile Court Cases Are Not Criminal Cases**

If a delinquency or youthful offender case ends unfavorably, the child is adjudicated delinquent or a youthful offender, rather than convicted of an offense. Treating youthful offender adjudications the same as adult convictions for purposes of dissemination of CORI by DCJIS is at odds with well established case law and statutes that provide that youthful offender adjudications are not convictions.

The statute defining CORI provides that "**Criminal offender record information** shall be limited to information concerning persons who have attained the age of 17 and **shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 17; provided, however, that if a person under the age of 17 is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information.**" G. L. c. 6, § 167, as amended by St. 2010, c. 256, § 4. (Emphasis added). This is not to say that youthful offender information is always protected. Certain statutes expressly grant agencies and certain employers access to this information. See *e.g.* G.L. c. 6, § 172G (operators of children's camps have access to unsealed juvenile records); G.L. c. 276, § 100D (criminal justice agencies such as law enforcement have access to juvenile records, including sealed records).

The Legislature has left intact the philosophical underpinnings of the Juvenile Court which require a rehabilitative and non-criminal approach to juvenile offenders. Roderick L. Ireland, 44 Mass. Prac., Juvenile Law § 1.3 (2d ed. 2011). It is well established that juveniles who are found delinquent are not convicted of an offense because "[a]n adjudication concerning a juvenile is not, of course, a conviction of crime." *Dept of Youth Services v. A Juvenile*, 384 Mass. 784, 786 (1981). "Moreover, even as to the category of children adjudicated 'youthful offenders,' the statute does not label a 'youthful offender' proceeding as 'criminal.'" *Commonwealth v. Conner C*, 432 Mass. 635, 641-642 (2000). "The 1996 amendments [adding a youth offender category] did not alter that fundamental policy determination by the Legislature." 44 Mass. Prac., Juvenile Law § 1.3 (2d ed.), citing *Connor C*, 432 Mass. at 641-642.

Sections 52 through 63 of Chapter 119 govern delinquency and youthful offender cases tried in a juvenile session and make clear that neither type of case is a criminal case. Section 53 of Chapter 119, which remains unchanged since its enactment, provides that:

Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. **Proceedings against children under said sections shall not be deemed criminal proceedings.**

G.L. c. 119, § 53. (Emphasis added).

"The distinction our law recognizes between a child and adult adjudication exists partly to avoid the infringement of a child's constitutional rights, and partly to avoid the attachment of criminal stigma to children who may be amenable to rehabilitation." *Connor C.*, 432 Mass. at 642.

"The 'adjudication of a juvenile as a youthful offender subjects him to more severe penalties, including State prison sentences, . . . but it does not transform his illegal act from an act of delinquency into a crime, and does not change the statutory obligation to treat him 'as far as practicable' as a child 'in need of aid, encouragement and guidance' rather than as a criminal." *Commonwealth v. Anderson*, 461 Mass. 616, 630 (2012), quoting *Connor C*, 432 Mass. at 641-642. See also, *United States v. McGhee*, 651 F.3d 153, 158 (1st Cir. 2011) ("We conclude that Massachusetts has Iclassified'Iyouthful offender' adjudications differently from 'adult convictions'"); *United States v. Curet*, 670 F.3d 296, 302 (1st Cir. 2011) (same). Furthermore, the only juvenile statute that uses the term "conviction" as related to delinquent youth or youthful offenders committed to the DYS, provides that release from custody is deemed to "restore such person to all civil rights and shall have the effect of setting aside the conviction." G.L. c. 120, § 21.

### **A Juvenile Sentence Equivalent to an Adult Sentence Does Not Convert a Juvenile Disposition into a Criminal Case**

As part of CORI reform, Chapter 6 of the Massachusetts General Laws was amended to add a new definition entitled "all available criminal offender record information." The definition excludes juvenile delinquency cases, but includes any "adult and *youthful offender convictions*, non-convictions and pending criminal court appearances," except for s \_ tiled records. G. L. c. 6, § 167. (Emphasis added).

DCJIS takes the position that juveniles who receive the same punishment as adults could receive for an offense are "convicted" even if their cases were not tried in an adult court. We construe the new language to refer to juvenile cases transferred to an adult court and murder cases filed against juveniles age fourteen to sixteen in Superior Court.

The Juvenile Court may impose the same sentence on a youthful offender that an adult would receive after a conviction for the same offense. This includes incarceration in a house of correction or state prison. G. L. c. 119, § 58. Past juvenile adjudications for certain offenses may be treated as convictions for purposes of enhanced sentencing if the person is later found guilty as an adult of certain crimes. For example, where the Juvenile Court previously adjudicated a defendant as a juvenile delinquent or youthful offender for a "violent crime," the adjudication is treated as a "conviction" for purposes of enhanced sentencing under Sections 10(d) and 10(g) of Chapter 269 related to certain firearms violations. *Commonwealth v. Anderson*, 461 Mass. at 631; *Connor C.*, 432 Mass. at 635. However, the Supreme Judicial Court explained in *Connor C.* that a youthful offender adjudication is treated as a conviction only in very limited circumstances.

We emphasize that our holding is a narrow one, limited to these specific statutory provisions. We adhere to our long-standing jurisprudence that an "adjudication" that a child has violated a law generally is not a "conviction" of a crime. *Connor C.*, 432 Mass. at 646.

The distinction our law recognizes between child and adult adjudication exists partly "to avoid the attachment of criminal stigma to children who may be amenable to rehabilitation." *Id.* at 642. Thus, construing "all available criminal offender record information" or "standard access" to include youthful offender adjudications rather than just cases involving juveniles tried in Superior Court or cases transferred to an adult court, is at odds with the law that provides that juvenile session adjudications are not convictions. Furthermore, DYS custody and options available to children are not available to adults which means children are never tried as adult in Juvenile Court.

## **Youthful Offender Adjudications Are Only Treated as Convictions in Criminal Prosecutions**

Treating a youthful offender adjudication as tantamount to an adult criminal conviction is inconsistent with the rules of evidence. Youthful offender adjudications cannot be used for civil purposes, including impeachment of a witness in civil cases absent a special statutory authorization. G.L. c. 119, § 60 provides that:

An adjudication of any child as a delinquent child under sections fifty-two to fifty-nine, inclusive, or any disposition thereunder of any child so adjudicated, or any evidence given in any case arising against any child under said sections fifty-two to fifty-nine, or **any records in cases arising against any child under said sections fifty-two to fifty-nine shall not be received in evidence or used against such child for any purpose** in any proceedings in any court **except in subsequent delinquency or criminal proceedings against the same person;**. . . . (Emphasis added).

Accordingly, the Massachusetts Guide to Evidence, § 609 (5) provides that adjudication of a child as a "youthful offender may be used in subsequent delinquency or criminal proceedings in the same manner and to the same extent as prior criminal convictions." Providing employers, housing screeners and others access to juvenile records without any special statutory grant of authority is inconsistent with the inadmissibility of youthful offender records in civil matters.

### **Inclusion of Youthful Offender Cases in CORI Undermines the Juvenile Justice System**

Having a criminal record carries great personal stigma. People with criminal records are denied jobs, housing, and other opportunities for economic stability and social mobility. Indeed, even a mere criminal charge that ends in dismissal or acquittal can harm a person's reputation and job prospects. The inclusion of youthful offender records as part of adult CORI by DOIS undermines the rehabilitative nature of the juvenile justice system. As the United States Supreme Court acknowledged in barring the death penalty for juveniles, "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

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Research supports that young people have a greater potential for change and rehabilitation than adults who commit crimes. For most teens, risky or antisocial behaviors are "fleeting" and cease as the individual becomes more mature. *Id.* at 570, quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 598 Am. Psychologist 1009, 1014 (2003). "Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Id.* In sum, they possess "a lack of maturity" and are more susceptible to negative influences. *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (internal citation omitted). Studies have shown that brain development is not complete until early adulthood and into a person's mid-twenties. See e.g. Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults*, 9 Quinnipiac Health L.J. 1, 23 (2005) (internal citations omitted), Individuals whose last arrest or police contact was from ages eighteen to twenty compare favorably with those with no criminal records at all. Megan Kurlychek et al, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 Crime & Delinq. 64, 75 (2007). Thus, the Commonwealth's public policy appropriately provides that delinquency and youthful offender cases "shall not be deemed criminal proceedings." G.L. c. 119, § 53.

### CONCLUSION

For all of the above reasons, we urge the exclusion of youthful offender cases from CORI disseminated to requesters other than without a special statutory grant of access to youthful offender cases tried in Juvenile Court or a juvenile session. Your time and effort in considering these comments are greatly appreciated. Please feel free to call me directly at 617-552-1111.

Sincerely,

Pauline Quirion  
Greater Boston Legal Services  
CORI & Re-entry Project