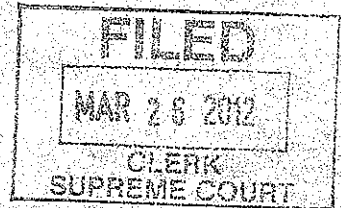


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
FILE NO. 2010-SC-000770



ANTHONY EDWARDS

APPELLANT

V.

Appeal from Franklin Circuit Court  
Hon. Phillip J. Shepherd, Judge  
Case No. 08-CI-01955

MELISSA HARROD, ADMINISTRATOR  
OFFENDER INFORMATION SERVICES;  
LaDONNA THOMPSON, COMMISSIONER,  
DEPARTMENT OF CORRECTIONS

APPELLEE

\*\*\*\*\*

*BRIEF FOR APPELLANT*

\*\*\*\*\*

*La Mer Kyle-Griffiths*

La Mer Kyle-Griffiths  
Assistant Public Advocate  
Department of Public Advocacy  
100 Fair Oaks Lane, Suite 302  
Frankfort, Kentucky 40601  
(502) 564-8006

Respectfully submitted,

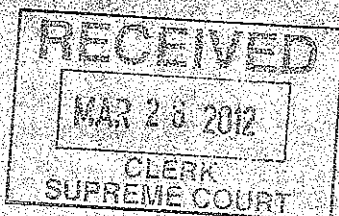
*Renée VandenWallBake*

Renée VandenWallBake  
Assistant Public Advocate  
Department of Public Advocacy  
100 Fair Oaks Lane, Suite 302  
Frankfort, Kentucky 40601  
(502) 564-8006

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2012, a true and accurate copy of this Brief was served by state messenger mail or by first class mail, postage prepaid to Hon. Todd Henning, Justice and Public Safety Cabinet, Office of Legal Services, 125 Holmes Street, Second Floor, Frankfort, Kentucky 40601 and Hon. Jack Conway, Attorney General, 1024 Capital Center Dr., Frankfort, Kentucky 40601.

*Renée VandenWallBake*



## **INTRODUCTION**

Anthony Edwards is a young man who is serving a ten year sentence as a youthful offender for a crime the he committed when he was a juvenile. The Department of Corrections has classified Anthony as a violent offender pursuant to KRS 439.3401, thereby denying him the opportunity to prove to the Kentucky Parole Board that he has been rehabilitated. In so doing, the Department of Corrections has failed to adhere to the Juvenile Code's provisions for youthful offenders and the legislature's intent to treat juvenile offenders differently than adults. Our system of justice recognizes that juveniles are less culpable and more amenable to treatment than adult offenders by requiring that youthful offenders be provided with every opportunity to receive treatment and earn early release.

## **STATEMENT CONCERNING ORAL ARGUMENT**

This appeal presents the issue of whether the parole restriction found in KRS 439.3401, the violent offender statute, applies to youthful offenders so as to preclude the possibility of parole prior to 85% of their sentence despite their unique ability to rehabilitate. The Court has not yet addressed the full import of the interrelation of KRS 439.3401, KRS 640.030, and KRS 640.080. Because of the complexity of this issue compounded by the many amendments to these statutes, the appellant believes that oral argument would be helpful to this Court.

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## STATEMENT OF THE CASE

Anthony Edwards was born on February 18, 1986. He is twenty-six years old. He has spent the majority of his young adult life incarcerated for a single, non-violent crime that he committed when he was seventeen years old.<sup>1</sup> Anthony Edwards is only one of hundreds of young boys and girls who are spending the prime of their life in prison for a mistake they made as a child.

On May 27, 2003, at only three months past his seventeenth birthday, Anthony was arrested and charged with three counts of robbery in the first degree,<sup>2</sup> a class B felony. (Transcript of the Record [hereinafter "TR"] p.5). His case began as all cases do when the accused is a child- in juvenile court. However, because Anthony's offense involved a firearm, he was automatically transferred to the adult court system as a youthful offender. He stood before the Jefferson circuit court in the unique legal position as both a child and an adult. On September 15, 2003, Anthony pled guilty to his charges in exchange for an agreement that he would receive the minimum on each count and that the Commonwealth would not object to probation when he returned to court for his eighteen year old hearing. (TR p.22).

For approximately six months, Anthony received treatment with the Department of Juvenile Justice. Nearing his eighteenth birthday, Anthony was once again brought before the Jefferson circuit court for a hearing pursuant to the youthful offender statute in the Juvenile Code. (TR p.14). The circuit court was tasked with deciding whether to send Anthony to the adult prison system, or to give him a chance in the community on probation. The court found that continuous incarceration would have a "deleterious and negative effect and serve no

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<sup>1</sup> From ages 17 to 26, Anthony has been behind bars, with the only exception of approximately three years on probation. This includes his incarceration during the pendency of his case, with the Department of Juvenile Justice, and six years with the Department of Corrections.

<sup>2</sup> Anthony was charged with three counts that stemmed from a single incident. (TR 22). There is no evidence in the record that anyone was injured during the commission of this crime.

rehabilitative purpose.” (TR p.15). Therefore on March 10, 2004, the court ordered Anthony released to serve five years on probation. The court further placed several conditions on Anthony’s release, including that he complete drug treatment, hold a job, and pay court costs and fees. (TR p.15-16).

Only four months later, on July 16, 2004, a report was filed alleging that Anthony had violated his probation. (TR p.17). He was charged with a technical violation of his probation.<sup>3</sup> (TR p.6). Anthony had scarcely spent five months as a legal adult.

Three years later, on September 20, 2006, Anthony was brought before the Jefferson county circuit court on the violation of probation charge. (TR p.17). Anthony pled guilty to the violation and asked the court to allow him to remain on probation. (TR p.17). However, the circuit court revoked his probation and ordered him to serve the rest of his sentence behind bars. (TR p.17).

On October 6, 2008, Anthony was residing at Northpoint Training Center, a medium security prison that houses both minimum and medium security inmates. (TR. p.18). At twenty-two years of age, Anthony wrote a small but neat letter to the Department of Corrections (“DOC”). He politely stated that they had made a mistake; he was a youthful offender, not an adult offender. Anthony therefore asked that his parole eligibility date be calculated as it did for other youthful offenders, rather than at the 85% applied to adult offenders under the violent offender statute. (TR p.18). The Department of Corrections wrote back, saying that the decision in the Kentucky Supreme Court case Merriman and Hickman was not yet final, and that once it was, they would adjust his sentence accordingly. (TR p.19).

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<sup>3</sup> A technical probation violation is when an offender misses an appointment or fails to check in with his/her probation officer, as opposed to a violation where he/she has committed a new offense. See KYPB 13-01.

The Merriman and Hickman case held that the violent offender statute did not apply to youthful offenders and therefore children tried and sentenced in adult court did not have to serve 85% of their sentence before being considered for probation or parole. However, despite the holding in Merriman, the DOC still classified Anthony as a violent offender, preventing him from being considered for parole<sup>4</sup> and refusing to award him any good time credits. (TR p.21).

Being denied administrative relief by the Department of Corrections, Anthony filed a Petition for Declaration of Rights asking the Franklin circuit court to order the DOC to comply with the Merriman decision and to therefore classify him as a youthful offender, rather than a violent offender. (TR p.8). On February 9, 2009, the Franklin circuit court agreed with Anthony's arguments and held that under Merriman, Anthony could not be classified as a violent offender. The Circuit Court stated:

[T]he Supreme Court could not have been clearer in their opinion of the applicability of the Violent Offender Statute to youthful offenders. The Court unequivocally held that "[b]y statutory interpretation, logic, and belief in the good sense of the legislature, the Violent Offender Statute cannot be read to apply to youthful offenders." This language, combined with the rest of the opinion, made it abundantly clear that the Court found that the Violent Offender Statute has no application to youthful offenders.

Corrections attempts to make a distinction between the applicability of the statute to probation and parole, stating that it may not apply to the former but should apply to the latter. The Supreme Court drew no such distinction between the two practices, and this Court sees no logic in making such a distinction without a difference.

(TR. 48).<sup>5</sup>

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<sup>4</sup> Note that under the youthful offender statute and the regulations of the Kentucky Parole Board, Anthony was eligible for parole consideration after serving 20% of his sentence.

<sup>5</sup> A copy of this opinion is provided in the attached Appendix for the convenience of the Court.



The Department of Corrections appealed the Franklin circuit court's decision and the Court of Appeals reversed in a 2-1 decision. Harrod v. Edwards, 08-CI-01955, 2010 WL 4290040 (Oct. 29, 2010).<sup>6</sup> From this decision, Anthony filed a timely Motion for Discretionary Review, which was granted by this Court.

## ARGUMENT

### THE PRINCIPLES OF STATUTORY CONSTRUCTION AS APPLIED BY THIS COURT IN MERRIMAN, AS WELL AS THE INTENT AND POLICY OF THE LEGISLATURE, REQUIRES THIS COURT TO FIND THAT YOUTHFUL OFFENDERS CANNOT BE CLASSIFIED AS VIOLENT OFFENDERS

**Preservation:** This argument was properly raised and preserved in the Franklin Circuit Court by the Appellant's Petition for Declaration of Rights and Memorandum of Points and Authorities, as well as in the Court of Appeals by the Brief for Appellee.

**Relief Requested:** Because the Appellant is improperly labeled a violent offender under KRS 439.3401 in violation of the Juvenile Code, KRS 640.030 and KRS 640.080, and his rights under due process of law, Ky. Const. § 2, 11, 17 and U.S. Const. Amend. V, VIII, XIV, he respectfully requests that this Court order the Appellee to remove the "violent offender" label and recalculate his sentence, including parole eligibility dates. The Appellant further requests that this court enjoin the Appellee from categorizing any youthful offender as a violent offender.

**Standard of Review:** The standard of review for interpreting a statute is *de novo*. This Court is not bound by the statutory interpretation of lower courts. W.D.B. v. Commonwealth, 246 S.W.3d 448, 450 (Ky. 2007); Cardiovascular Specialists, P.S.C. v. Xenopoulos, 328 S.W.3d 215, 217 (Ky.App. 2010).

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<sup>6</sup> A copy of this opinion is provided in the attached Appendix for the convenience of the Court.

This Court is tasked with resolving a conflict between the violent offender statute, found in KRS 439.3401, and the Juvenile Code's provisions for the sentencing and parole of youthful offenders, which is found in KRS 640.030 and KRS 640.080. This Court has previously held that the violent offender statute does not apply to youthful offenders in the arena of probation. This is equally true for the violent offender statute's restriction on parole given the principles of statutory construction, and the intent and policy of the legislature.

The Juvenile Code, KRS 640.080, expressly states that a youthful offender is eligible for parole at the discretion of the parole board:

Youthful offenders **shall** be subject to the jurisdiction of the Kentucky Parole Board and may be placed on parole to the Department of Corrections. The Parole Board may, with regard to a youthful offender, exercise any of the powers which it possesses pursuant to KRS Chapter 439, except as provided in KRS Chapters 600 to 645.

KRS 640.080 (emphasis added).

This statute refers to a class of juvenile defendants, called youthful offenders, who may be tried in adult criminal court, even though they allegedly committed the offense when they were a child. Whether a juvenile can be tried in criminal court as a youthful offender, or whether the child must be tried in juvenile court, is preliminarily based on the offense that the child is charged with. A child as young as fourteen years old can be tried as an adult if he or she is charged with an A or B felony. KRS 635.020(2).

The Juvenile Code expressly states that a youthful offender transferred to circuit court shall be treated as an adult "**except as otherwise provided in this chapter.**" KRS 640.010(2)(c) (emphasis added). The Juvenile Code then creates several special procedures and provisions for youthful offenders. This Court has previously held that when the provisions for youthful offenders in the Juvenile Code conflict with adult statutes, including the violent offender statute,

the Juvenile Code is controlling. Commonwealth v. Merriman and Commonwealth v. Hickman, 265 S.W.3d 196, 199-200 (Ky. 2008). See also Hardin v. Commonwealth, 2003-CA-002164-MR, 2005 WL 627184, \*2 (Ky.App. 2005) (unpublished) (finding that a youthful offender convicted of murder is eligible for shock probation);<sup>7</sup> Shepherd v. Commonwealth, 251 S.W.3d 309, 321 (Ky. 2008) (finding that a youthful offender convicted of murder could only be sentenced to a maximum of life without the possibility of parole for 25 years).

In contrast to the Juvenile Code's mandatory grant of power to the Parole Board to consider youthful offenders for parole, the violent offender statute prohibits consideration of certain defendants for probation or parole until they have served 85% of their sentence. KRS 439.3401. The defendants that fall within this prohibition are those who meet the definition of "violent offender." KRS 439.3401. The definition of a violent offender has changed over the years since the statute was first created in 1986. Currently, the statute has been expanded to include not only a capital offense or class A felony, but also certain class B and C felonies. KRS 439.3401(1). In addition to prohibiting probation and parole, the statute also prevents the offender from earning any sentencing credit, such as credit for obtaining a high school diploma, for completing a treatment program, or for exceptionally meritorious behavior while incarcerated. KRS 439.3401(4); KRS 197.045.

If the violent offender statute were to be interpreted by this Court as controlling over the Juvenile Code, a child as young as fourteen may be transferred to adult criminal court as a youthful offender and be required to serve 85% of their sentence. Such a sentence could range

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<sup>7</sup> Undersigned counsel does not cite this unpublished opinion as binding authority. See CR 76.28(4). Rather, this opinion is cited to demonstrate the distinctions between adults and youthful offenders that has been recognized by the courts of Kentucky. A copy of this opinion is included in the Appendix to this Brief.

from a minimum of ten years<sup>8</sup> to a maximum of life in prison, resulting in a child growing up in jail with no opportunity to earn his way out until he has reached adulthood.

When there is a conflict between two statutes, this Court has the authority to harmonize the interpretation of the law so as to insure the fair administration of both statutes. Ledford v. Faulkner, 661 S.W.2d 475, 476 (Ky.1983). In interpreting a statute, the court must ascertain the legislative intent of the General Assembly. Intent is derived from looking at the language that the legislature chose, from looking at the statutes as a whole, and from the “object and policy” of the statutes. Cosby v. Commonwealth, 147 S.W.3d 56, 58-59 (Ky. 2004); County of Harlan v. Appalachian Reg'l Healthcare, Inc., 85 S.W.3d 607, 611 (Ky. 2002); Osborne v. Commonwealth, 185 S.W.3d 645, 648 (Ky. 2006); Commonwealth v. Plowman, 86 S.W.3d 47, 49 (Ky. 2002) (“The seminal duty of a court in construing a statute is to effectuate the intent of the legislature.”). “The cardinal rule of statutory construction is that the intention of the Legislature shall be effectuated, even at the expense of the letter of the law.” Commonwealth v. Rosenfield Bros. & Co., 80 S.W. 1178, 1180 (Ky. 1904).

The intent and policy of this Commonwealth is to treat youthful offenders differently from their adult counterparts in recognition that juvenile offenders are less culpable and are more amenable to treatment than adult offenders. This intent is clearly articulated by the express provisions of the Juvenile Code, the case law of this Commonwealth, as well as U.S. Supreme Court precedent. In addition, the numerous revisions of the violent offender and youthful offender statutes demonstrate that the legislature did not intend the violent offender statute to apply to youthful offenders, despite the independent expansion of both statutes. Moreover, to hold that the Parole Board’s individualized and objective discretion should be substituted by the

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<sup>8</sup> Based on the minimum class of a crime that a youthful offender would be eligible for a violent offender classification. KRS 532.020.

violent offender's blanket prohibition on parole would constitute a great shift in the perception and treatment of juvenile offenders in Kentucky.

**A. THE CONSTRUCTION OF THE YOUTHFUL OFFENDER STATUTE DEMONSTRATES THE LEGISLATURE'S INTENT TO TREAT YOUTHFUL OFFENDERS DIFFERENTLY FROM ADULT OFFENDERS.**

**1.**

The legislature created the youthful offender category of defendants with the overarching goal that even if a juvenile has committed a serious crime the justice system is to focus on rehabilitation, rather than punishment. KRS 600.010(f). The Juvenile Code expressly states that its provisions are to be interpreted in a manner that promotes the protection of children, provides treatment "reasonably calculated to bring about an improvement in his condition," and that treatment be in the community whenever possible. KRS 600.010. This Court has held that these goals are applicable to the Juvenile Code's youthful offender chapter. Merriman, 265 S.W.3d at 199. Moreover, the Juvenile Code states that the youthful offender chapter "shall be interpreted to promote public safety and the concept that every child be held accountable for his or her conduct through the use of ...sanctions, **in an effort to rehabilitate delinquent youth.**" KRS 600.010(f) (emphasis added).

The Juvenile Code's distinction between youthful offenders and adult criminal defendants with the goal of rehabilitation begins at the very first stage of their court proceeding. A juvenile who qualifies for discretionary transfer to adult court as a youthful offender is entitled to a hearing to determine if such a transfer would be in the best interest of the child and the community. KRS 640.010. Even if the child is transferred to adult court, the legislature provides opportunities for the case to be sent back to the juvenile justice system. For example, if the child is transferred to adult court and the grand jury does not find probable cause of an

offense that is transferrable under the youthful offender statute, then the child is returned to juvenile court. KRS 640.010(3). If the child pleads guilty to, or is convicted of, a lesser offense that is not transferrable under the statute, then he must be sentenced under the Juvenile Code, rather than as an adult. KRS 640.040(4).

The most significant difference between adult criminal defendants and youthful offenders is the opportunities that the legislature provides for youthful offenders to obtain the benefit of treatment and be released into the community. The Juvenile Code requires that after sentencing in criminal court, once the child turns eighteen years of age, the trial court must hold a hearing (called an "eighteen year old hearing") at which the judge has the option to place the offender on probation or grant them a conditional discharge, rather than send them to an adult correctional facility. KRS 640.030(2). No such opportunity exists for adults. The Juvenile Code also gives the trial court the flexibility to allow a youthful offender to obtain more treatment at a juvenile facility after they turn eighteen. A youthful offender can stay at a juvenile facility after their eighteen year old hearing anywhere from five months to several years. KRS 640.030(3); 640.075.

Youthful offenders are also exempt from several sentencing restrictions. A youthful offender cannot be sentenced as a persistent felony offender. KRS 640.040(2). The legislature exempted youthful offenders under the age of sixteen from capital punishment years before it was found unconstitutional by the U.S. Supreme Court, and has prohibited a sentence of life without the possibility of parole ahead of the U.S. Supreme Court. KRS 640.040(1). In addition, youthful offenders are also able to request shock probation, limited only by a 180 day filing period. Adult criminal defendants are barred from obtaining shock probation depending on their

offense; if, for example, it included the use of a firearm. KRS 533.060(1). No such limitation exists for youthful offenders. KRS 640.040(3).

The Juvenile Code repeatedly provides youthful offenders with opportunities to be remain in juvenile court, to remain in juvenile treatment, to be excluded from harsh sentencing enhancements, and, whenever possible, to return to the community after successfully obtaining treatment. It would be absurd for the Juvenile Code to treat youthful offenders so differently from adult offenders by removing barriers for re-entering the community, yet subject them to the same harsh, blanket prohibition on parole. This Court cannot endorse such an absurd result. See George v. Alcoholic Beverage Control Board, 421 S.W.2d 569, 571 (Ky. 1967).

**B. STATE AND FEDERAL CASE LAW DEMONSTRATE THAT THE LEGISLATURE NEVER INTENDED THE VIOLENT OFFENDER STATUTE TO BE APPLICABLE TO YOUTHFUL OFFENDERS.**

The application of the violent offender statute to youthful offenders would not only directly contradict the provisions Juvenile Code, but would also violate the intent and spirit of our justice system as evident by state and federal case law regarding youthful offenders. This case law demonstrates the principle that juveniles who commit even the most serious offenses should receive ample opportunity to reform and re-enter society.

The U.S. Supreme Court's landmark decision of In re Gault in 1967 ushered in a new shift in the justice system's view of children. That decision highlighted the juvenile court's system's efforts to rehabilitate young offenders, rather than to punish. However, the decision also expanded a juvenile's rights in the court system and emphasized procedural protections to avoid arbitrary decisions that are fundamentally unfair to children. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

Since Gault, the U.S. Supreme Court has consistently expanded the rights of children in the justice system and repeatedly held that youthful offenders are different from adult defendants. Finding that children are more susceptible to influence, the U.S. Supreme Court created a different standard for determining whether a juvenile's confession was coerced. Gallegos v. Colorado, 370 U.S. 49, 55, 82 S.Ct. 1209, 1213 (1962). Finding that children are less culpable and more amenable to rehabilitation, the Court abolished the death penalty and life without parole for juveniles. Roper v. Simmons, 543 U.S. 551, 569-571, 125 S.Ct. 1183, 1195-1196 (2005); Graham v. Florida, 130 S.Ct. 2011, 2030 (2010). Most recently, the U.S. Supreme Court found that the difference between children and adults requires an analysis that accounts for the child's age when determining whether Miranda was violated. J.D.B. v. North Carolina, 131 S.Ct. 2394, 2402-03 (2011).

The U.S. Supreme Court's decisions in Roper and Graham have signaled a national trend in considering adolescent brain science when determining whether adult laws apply to juveniles. Well established scientific research demonstrates how children are different from adults and that sentencing laws, including parole eligibility, must take these differences into account. As such, the American Bar Association and juvenile justice organizations have called for youthful offenders to always be given an opportunity for parole, regardless of the length of sentence. See Michele Deitch, et al., *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, The University of Texas at Austin, LBJ School of Public Affairs, 83 (July 2009).<sup>9</sup>

Kentucky has embraced the decisions in Roper and Graham, and the nationally-recognized importance of providing youthful offenders opportunities to reform and re-enter society, as evident by its decision in Merriman. Beyond Merriman and the provisions of the

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<sup>9</sup> This report is available at <http://www.campaignforyouthjustice.org/key-research.html>.



Juvenile Code, Kentucky case law also recognizes the differences between youthful and adult offenders by providing more protections for young offenders. In this great Commonwealth, youthful offenders cannot be sentenced to life without parole for a capital offense. Shepherd v. Commonwealth, 251 S.W.3d 309, 321 (Ky. 2008). Children have the full benefit of due process of law when charged with contempt of court or a probation violation. Q.C. v Commonwealth, 164 S.W.3d 515, 517 (Ky.App. 2005). The learned courts of the Commonwealth have protected our children's right to an attorney with fervor, holding that the child must consult an attorney before he can waive this right. D.R. v. Commonwealth, 64 S.W.3d 292, 296-297 (Ky.App. 2001). They have ensured a child will not be unduly pressured into pleading guilty by requiring a full recitation of their rights prior to accepting a plea. J.D. v. Commonwealth, 211 S.W.3d 60, 63 (Ky.App. 2006). They have held fast to the principle of keeping children and families together, and rehabilitating a child in the community whenever possible by requiring a clear articulation of the necessity of placing a child in a restrictive environment. X.B. v. Commonwealth, 105 S.W.3d 459, 461 (Ky.App. 2003).

These protections demonstrate our justice system's common thread of viewing and treating young offenders differently than adult offenders. Our system recognizes and reacts to the fact that children are more likely to be pressured, more susceptible to influence and to psychological harm, and less likely to understand the consequences of their actions. Thompson v. Oklahoma, 487 U.S. 815, 834-35 108 S.Ct. 2687, 2698-99 (1988). The case law and our Juvenile Code demonstrate that our justice system believes children are more able to reform and return to society as productive citizens, and so has created numerous mechanisms for this to occur.

The very purpose of this law, as has been declared by this court upon more occasions than one, is to provide for the protection and care of juvenile offenders in a humanitarian effort to prevent them from becoming outcasts and criminals, rather than to inflict punishment for their delinquencies.

Mattingly v. Commonwealth, 188 S.W. 370, 371 (Ky.App. 1916). A fair and just system in this Commonwealth requires that the law account for the difference inherent in young offenders. The violent offender statute does not account for the individual offender, his youth, his circumstances, and most importantly, his rehabilitation. Given this state's longstanding tradition of the treatment of young offenders, the Juvenile Code's provision for the consideration of parole for all youthful offenders must control.

**C. BY ESTABLISHING THE YOUTHFUL OFFENDER STATUTE, THE LEGISLATURE EMBRACED THE PRINCIPAL THAT JUVENILE OFFENDERS ARE LESS CULPABLE AND MORE AMENABLE TO TREATMENT THAN THEIR ADULT COUNTERPARTS.**

Children are different. In fact, “[o]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.” J.D.B. v. North Carolina, 131 S.Ct. 2394, 2404 (2011) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115, (1982)). In areas such as contracts, marriage, voting and holding office, children are treated as different and their conduct regulated in ways distinct from their adult counterparts. Thompson v. Oklahoma, 487 U.S. 815, 823 (U.S. 1988). Time and time again, this Court as well as the United States Supreme Court has held that children “‘often lack the experience, perspective, and judgment’ expected of adults.” Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (citing Bellotti v. Baird, 443 U.S. 622, 635 (1979)). Continuing research into adolescent brain development further substantiates that children are not the same as adults because their thought processes differ in key ways. More recently, this has been borne out scientifically as adopted by the U.S. Supreme Court in cases such as Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005) and Graham v. Florida, 130 S.Ct. 2011, 2021 (2010).

In these decisions, the U.S. Supreme Court recalled, “. . . as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, ‘[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.’ These qualities often result in impetuous and ill-considered actions and decisions.” Roper, 543 U.S. at 569 (citing Johnson v. Texas, 509 U.S. 350, 367, 113 S.Ct. 2658 (1993)); see also Eddings, 455 U.S. at 115–116 (“Even the normal 16-year-old customarily lacks the maturity of an adult.”).

The U.S. Supreme court delineated three fundamental differences between children and adults convicted of crimes that sentencing laws must take into account. First, children lack both developmental and emotional maturity. Second, juveniles are more susceptible to negative influences, including trauma and peer pressure. Eddings, 455 U.S. at 115. This concept concerns not only peer pressure, but also the psychological stressors of broken families, abuse, and other family concerns whose impact is the most acute at this time of life. The third broad difference between adults and juveniles is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, *IDENTITY: YOUTH AND CRISIS* (1968). Juveniles experiment with different personalities to learn how to interact with the world around them and what behaviors, attitudes and actions are acceptable. Therefore, “[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.” Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *American Psychologist* 1009, 1014 (Dec. 2003)<sup>10</sup> Thus, in only a few years, a youth can outgrow the very tendencies that caused them to be in the situation where the

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<sup>10</sup> This article is available at <http://faculty.vassar.edu/abbaird/PreviousSite/juvJustice/steinberg.pdf>.

crime occurred. "From a moral standpoint 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." Id at 570. Moreover, the tendencies that make youthful offenders less culpable at the time of their offense also makes them less culpable for mistakes made if they are granted probation at eighteen.

It is a fallacy to believe that when a juvenile enters the prison system at eighteen that there is little potential for change and maturity. To the contrary, "The qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen." Roper, 543 U.S. at 574. Thus, incarcerating a youthful offender for behaviors that occurred when their mind was not fully developed, while also denying them the opportunity to prove that they have matured and rehabilitated simply because they are barely over eighteen and in the adult prison system, is fundamentally unfair and constitutes cruel and unusual punishment.

No clearer is the need for reviewing a youthful offender's development, maturity, and rehabilitation beyond the offender's eighteenth birthday than the example of the Appellant, Anthony Edwards. Anthony barely turned eighteen years old when he was released on probation. He had worked hard and demonstrated to the Jefferson circuit court that he was rehabilitated while in the custody of the Department of Juvenile Justice. However, his limited maturity, his susceptibility to external pressures, and his transitory character, which was innate in his young age hampered his success on probation. But Anthony's probation was not revoked because his rehabilitation failed and he committed a new crime. His probation was revoked because he violated a term of his probation- a term that would not otherwise subject an adult to incarceration. It was not until three years later, when Anthony was a mature adult that he was picked up and sent to prison. He now sits in jail for an action that occurred while he was

technically an adult in the eyes of the law but still a child developmentally. Yet the DOC's policy of categorizing him as a violent offender provides no opportunity to account for Anthony's developmental immaturity at the time of his offense, or at the time of his probation violation, nor even the type of probation violation. Nor does the violent offender statute's prohibition on parole account for the individual facts of Anthony's case: his history, rehabilitative efforts and maturation while incarceration, and support in the community. The blanket prohibition of parole for virtually all of Anthony's sentence, without regard for these factors constitutes cruel and unusual punishment and violates the letter and spirit of the Juvenile Code.

NOTE: ARGUMENT D, ON PAGES 16-19, STRICKEN PER COURT ORDER ENTERED 8/17/2012. THE LISTING "E" ON PAGE 19 IS CORRECTED TO "D".

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*D.E. changed per court order Aug. 17, 2012*  
**THE LEGISLATURE HAD AMPLE OPPORTUNITY TO EXPRESSLY STATE THAT THE VIOLENT OFFENDER STATUTE APPLIES TO YOUTHFUL OFFENDERS BUT HAS INSTEAD UPHELD THE DISTINCT TREATMENT OF YOUTHFUL OFFENDERS.**

At the time that the violent offender statute and the youthful offender statute were both created in 1986, the legislature was well acquainted with the differences between adults and children. As a result, the two statutes were created independently and remained that way despite numerous revisions and expansions of each statute. The DOC has improperly applied these distinct statutes to each other, causing a result that was not intended by the legislature: virtually all youthful offenders serving their sentence in DOC prisons are classified as violent offenders and are therefore stuck in prison without hope of demonstrating their development and achievement in rehabilitation.

The section of the Juvenile Code that delineates whether a child can be tried as a youthful offender is found in KRS 635.020. This statute was created at the same time as the other provisions of the Juvenile Code. Unlike many other provisions of the Juvenile Code, KRS 635.020 has been revised 6 times since it was enacted. Its core provision states that a child who

was at least fourteen years old at the time of the offense and is charged with a capital offense, a Class A or Class B felony may be transferred to adult court as a youthful offender. KRS 635.020 (1986).

In 1994, the number of children impacted by this statute was greatly increased by the addition of a provision which automatically transferred a child to adult court as a youthful offender if they were charged with **any** felony during which a firearm was "used." KRS 635.020(4) (1994). Previously, a child could only be charged as an adult after the juvenile court held a transfer hearing and found that, based on a list of eight factors, it was appropriate for the child to be transferred. KRS 640.010(2). The firearm provision allowed children to be transferred to adult court without such a hearing. Its language was also vague enough to capture children whose co-defendant used a firearm during the commission of the offense, even if they themselves did not.

Two other relatively small changes greatly expanded the scope of the youthful offender statute. In 1996, the statute permitted the discretionary transfer of a child charged with a C or D felony if they had one prior felony, rather than requiring two prior felony adjudications. The last expansive change occurred in 2000, when the legislature included in the automatic transfer provision that the firearm did not need to be functional. Naturally, these expansions have created an increase in the number of children who are tried as youthful offenders in adult criminal court, and are therefore likely to be incarcerated in an adult prison. Despite these expansions, the legislature did not restrict any of the sentencing provisions for youthful offenders, leaving intact their ability to earn probation and parole through treatment and rehabilitation.

At the time that the youthful offender statute underwent its major change in 1996, the violent offender statute was still rather limited. It remained virtually unchanged from its creation

in 1986 through to 1998. In that original form, the statute only applied to offenders who were convicted of a capital offense, a class A felony, or a Class B felony where victim died, was raped, sodomized or had serious physical injury. KRS 439.3401 (1986). In addition, the prohibition on parole was only in place until the offender served 50% of their sentence. KRS 439.3401 (1986). Therefore, prior to 1996, if the DOC had applied the violent offender statute to youthful offenders, it would have only effected the limited number of cases where the child had a capital offense or class A felony charge, or in the extreme circumstance where the child was convicted of a class B felony and the victim had been seriously and violently injured.

In 1998, the legislature made the violent offender statute harsher by extending sentence duration to 85% and requiring the DOC to withhold sentencing credit, with the exception of educational credit. However, the legislature did not expand the scope of the statute. This did not occur until 2002, when the legislature added that robbery in the 1<sup>st</sup> degree, which is a B felony, was a “violent offense” regardless of whether anyone was actually harmed during the commission of the offense. KRS 439.3401 (2002). The statute was also expanded to include burglary in the 1<sup>st</sup> degree, a B felony, where there was no actual injury. KRS 439.3401(1)(2002) (including an attempted assault, or kidnapping, or wanton endangerment during a burglary as qualifying as a violent offense).

In 2006, the violent offender statute was re-organized and expanded to include several C felonies. KRS 439.3401(2006) (including criminal abuse in the first degree and various sexual offense that can be charged as a C felony depending on the facts). The most recent change was in 2011, when the legislature removed the possibility of awarding any sentencing credit to a violent offender, including educational credit. KRS 439.3401(4) (2011).



Given the lengthy history of revisions, the legislature had ample opportunity to amend the violent offender statute to expressly state that it applies to youthful offenders. It did not. Without express language stating that the violent offender statute applies to youthful offenders, the Juvenile Code provisions control. Merriman, 265 S.W.3d at 200-201.

**F. THE PAROLE BOARD'S INDIVIDUALIZED, BALANCED, AND OBJECTIVE APPROACH TO DECIDING WHETHER AN OFFENDER SHOULD BE RELEASED ON PAROLE IS CONSISTENT WITH THE INTENT OF THE LEGISLATURE IN CONTRAST TO THE VIOLENT OFFENDER'S BLANKET PROHIBITION OF PAROLE BASED ON THE CATEGORY OF THE OFFENSE.**

As stated in the Juvenile Code, youthful offenders must be eligible to be released on parole as determined by the Kentucky Parole Board. KRS 640.080. The Parole Board is an independent agency within the Department of Corrections, which reviews whether an inmate is eligible for early release based on the Board's policies and regulations. "The Parole Board is the primary releasing authority for all convicted felons and youthful offenders in the Commonwealth of Kentucky." Kentucky Parole Board, 2010 Annual Report, p. 10 [hereinafter "KPBR"].<sup>19</sup>

An offender is normally eligible for a parole hearing after serving a minimum of 15% or 20% of their sentence, depending on the class of the offense.<sup>20</sup> The Parole Board has three choices when deciding a case: defer the decision until a future date, order the inmate to serve until the minimum expiration date of their sentence, or recommend parole. If paroled, the inmate is under the supervision of the DOC and is required to comply with certain conditions set by the Board and/or the Department of Probation and Parole. KPBR p.12.

The Parole Board makes a decision based on numerous factors, including the offender's behavior while incarcerated, the seriousness of their offense, and their education and job skills.

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<sup>19</sup> This report is available at <http://www.justice.ky.gov/parolebd/publications.htm>.

<sup>20</sup> An offender convicted of a D felony is eligible for parole after serving 15% of their sentence. KRS 439.340(3)(a). An offender convicted of a more serious felony is eligible after serving 20%, though it depends on their sentence. See KAR 501:030(3)(c).

KPBR p.11. Victims are also entitled to provide their input. KPBR p.14. Unlike when a trial judge makes a probation decision, when the Parole Board makes a decision on whether to grant an offender parole they are required to use an objective, scientifically validated, evidence-based tool to assist them- the Parole Guidelines Risk Assessment. KRS 439.335. The Parole Guidelines Risk Assessment provides “the Board with information as to the inmate’s likelihood of success under parole supervision.” KPBR p.15. Among the factors included in the assessment are: the offense, supervision history, education level, classification level, and if the inmate completed an educational or treatment program. KPBR p.15. The Parole Board’s autonomy and objective, evidence-based standards reduce the risk that their decisions are influenced by political or media pressure.

While the Parole Board has procedures in place to decide whether a youthful offender should be paroled, due to the DOC’s current interpretation of the violent offender statute, virtually no youthful offender is eligible for parole consideration. See KYPB Policy & Proc. 13-03.<sup>21</sup> In the 2009-2010 fiscal year, the Parole Board heard 2554 initial hearings for adult criminal defendants. In the same year, the Board held only 9 youthful offender hearings. In the 2010 calendar year, the Parole Board heard 2719 initial hearings for adult criminal defendants but held only 8 youthful offender hearings. KPBR p.17-19.

As demonstrated by the above, the Kentucky Parole Board is well equipped to make a fair and impartial decision on whether a youthful offender should be paroled by looking at the facts and circumstances of each individual case.

[P]roviding serious youthful offenders with an opportunity for parole does not suggest that the individual will or should be granted parole at any specified date. Instead, the opportunity for parole simply indicates that the child would have the chance at some point in the future to demonstrate

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<sup>21</sup> The Policies and Procedures of the Kentucky Parole Board are available at their website: <http://www.justice.jy.gov/parolebd/>.

that they have been rehabilitated and no longer present a risk to public safety....The possibility of parole provides incarcerated youth a sense of hope and the motivation to exhibit good behavior while working towards rehabilitation so they can become functioning members of society.

Deitch, *From Time Out to Hard Time*, supra, at 84. The violent offender statute replaces the well-reasoned discretion of the Parole Board with blanket prohibition, denying the youth any chance at parole until they have practically served out their time, regardless of the offender's efforts at rehabilitation. Given the unique circumstance of youthful offenders—their limited developmental maturity, their lessened culpability, and their greater ability to be reformed—the violent offender statute's total disregard for the offender's individual characteristics and circumstances would make its application to children an affront to our principles of justice. In contrast, the Parole Board's focus on an offender's reform efforts is consistent with the Juvenile Code's intent to hold youthful offender's accountable, but with the overarching goal of rehabilitation. KRS 600.010(f).

Therefore, the intent of the legislature to provide youthful offenders with the opportunity to earn early release on parole through meritorious behavior and engagement in rehabilitative programs while incarcerated, as well as the principles of treating youthful offenders differently than adult offenders that has been embraced by this Court require the statutory construction of the violent offender statute and KRS 640.030 and KRS 640.080 to result in the Juvenile Code's supremacy over the violent offender statute.

**G. COMMONWEALTH V. MERRIMAN CONTROLS THE ISSUE AT BAR AND MANDATES THAT THE VIOLENT OFFENDER STATUTE IS INAPPLICABLE TO YOUTHFUL OFFENDERS.**

In addition to the express provisions of the Juvenile Code and the intent of the legislature, this Court has also championed the innate differences between adult offenders and youthful

offenders and remedied the conflict between the violent offender statute and the Juvenile Code by finding that the violent offender statute is inapplicable to youthful offenders. Commonwealth v. Merriman, 265 S.W.3d 196 (Ky. 2008). This holding is applicable to the case at bar and its reasoning and logic necessitate that the violent offender statute's prohibition on parole is also inapplicable to youthful offenders.

In Merriman, this Court examined the violent offender statute and the sentencing provision of the Juvenile Code, KRS 640.030(2), and held that:

In order for the Violent Offender Statute to control over the specific language of KRS 640.030(2), it must have express language saying that it applies to youthful offenders. Even then, if the two statutes were viewed as irreconcilable, KRS 640.030(2) would control as the more specific statute. **By statutory interpretation, logic, and belief in the good sense of the legislature, the Violent Offender Statute cannot be read to apply to youthful offenders.**

265 S.W.3d at 200-201 (emphasis added). While this Court was analyzing the violent offender statute and the Juvenile Code under the circumstances of probation, the Court painted the nonsensical application of the violent offender statute to youthful offenders in broad strokes. The Court's logic and reasoning in Merriman is equally sound for determining whether the violent offender statute's prohibition on parole is applicable to youthful offenders. Just as the juvenile statute found controlling in Merriman provides for the probation of a youthful offender, the same statute also provides for that child's parole:

[A]ny sentence imposed upon the youthful offender shall be served in a facility or program operated or contracted by the Department of Juvenile Justice until the expiration of the sentence, **the youthful offender is paroled**, the youthful offender is probated, or the youthful offender reaches the age of eighteen (18), whichever first occurs. The Department of Juvenile Justice shall take custody of a youthful offender, remanded into its custody, within sixty (60) days following sentencing. If an individual sentenced as a youthful offender attains the age of eighteen (18) prior to the expiration of his sentence, and has not been probated or

released on parole, that individual shall be returned to the sentencing court....

KRS 640.030(2). By this explicit language, the Juvenile Code provides for the parole of a youthful offender prior to their eighteen year old hearing. However, if the violent offender statute applied to youthful offenders, it would be impossible for them to be considered for parole prior to their eighteen year old hearing because they must first serve 85% of their sentence. Since the minimum sentence such a youthful offender can receive is 10 years,<sup>22</sup> even the youngest youthful offender, at 14 years of age,<sup>23</sup> would be ineligible for parole prior to their eighteen year old hearing because they would have to serve 8.5 years before being eligible for parole. Thus, if the violent offender statute were to apply to youthful offenders in the arena of parole, the same statute that was restored under Merriman would once again become null and void. Such a result is barred by the doctrine of statutory construction. See Lewis v. Jackson Energy Co-op Corp., 189 S.W.3d 87, 90 (Ky. 2005) (“Statutes should be construed in such a way that they do not become ineffectual or meaningless.”).

In addition to the expectation that a youthful offender will be eligible for parole prior to their eighteen year old hearing, the Juvenile Code also states that “No youthful offender shall be subject to limitations on probation, **parole**, or conditional discharge as provided for in KRS 533.060.” KRS 640.040(3)(emphasis added). While this statute does not mention the violent offender statute, it does reference KRS 533.060, which does not, in fact, have any restrictions on parole. Rather, KRS 533.060 limits probation only. This Court previously held in Merriman, that the legislature’s omission of the violent offender statute under KRS 640.040 “is equally consistent with oversight as it is with intention.” 265 S.W.3d at 200. However, since the legislature expressly included parole in the list of restrictions which do not apply to youthful

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<sup>22</sup> Based on a Class B felony conviction.

<sup>23</sup> KRS 635.020.

offenders, it suggests that the legislature intended for youthful offenders to be exempt from probation **and parole** restrictions similar to those found in KRS 533.060. This Court has embraced this intent, stating, “We reasoned that the prohibited dispositions found in KRS 640.040(3) include application of the violent offender statute to youthful offenders.” Commonwealth v. Carneal, 274 S.W.3d 420, 427, fn.1 (Ky. 2008).

Moreover, this Court stated in Merriman that the legislature did not need to expressly state in KRS 640.040 that the violent offender statute was inapplicable to youthful offenders because this was made apparent by the Juvenile Code’s sentencing provisions in KRS 640.030:

By mandating the courts to make certain determinations when a juvenile is returned on his 18<sup>th</sup> birthday, the legislature had no need to specifically say in addition that the Violent Offender Statute does not apply. By the very language in KRS 640.030(2), it is apparent that the Violent Offender statute cannot act to prevent consideration of probation....

Merriman, 265 S.W.3d at 200. Just as KRS 640.030 makes it apparent that the violent offender statute cannot bar consideration of probation, so too does the Juvenile Code’s provisions for the parole of youthful offenders under the same statute, as well as KRS 640.080, make it apparent that the violent offender statute cannot bar consideration of parole, alleviating any need for the Juvenile Code to state so expressly.

Since the Juvenile Code expressly provides for the discretionary parole of youthful offenders, and exempts youthful offenders from limitations on probation and parole, in light of this Court’s precedent, the Juvenile Code is controlling over the violent offender statute. Moreover, to find that the violent offender statute applies to youthful offenders in the case of parole but not probation would be illogical and disregard this state’s long-standing tradition of distinguishing between juvenile offenders and adult offenders. Our system of justice does not endorse a scenario where youthful offenders grow up in prison without regard for the individual

factors in their case and their strides for reform. The laws of this Commonwealth demand that children are viewed as uniquely more than their worst act.

### CONCLUSION

For the reasons stated above, Anthony Edwards requests that this Court order the Appellee to remove the "violent offender" label and recalculate his sentence, including parole eligibility dates. The Appellant further requests that this court enjoin the Appellee from categorizing any youthful offender as a violent offender.

Respectfully Submitted,



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La Mer Kyle-Griffiths  
Assistant Public Advocate  
100 Fair Oaks Lane, Suite 302  
Frankfort, KY 40601  
(502) 564-8006 ext. 284



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Renée VandenWallBake  
Assistant Public Advocate  
100 Fair Oaks Lane, Suite 302  
Frankfort, KY 40601  
(502) 564-8006 ext. 211

COUNSEL FOR APPELLANT

## **APPENDIX**

<b>Tab Number</b>	<b>Item Description</b>
1	Opinion and Order of the Franklin Circuit Court
2	Court of Appeals Opinion -- 2009-CA-000440-MR
3	Court of Appeals Opinion -- 2003-CA-002164-MR
4	Department of Corrections Report -- 2012