STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_ SUPERIOR COURT DIVISION

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

STATE OF NORTH CAROLINA )

)

v. )  **MOTION TO DISMISS**

)

XXXXXXXXXX )

Defendant. )

NOW COMES the Defendant, XXXXXXX, by and through counsel, and respectfully moves this Court to dismiss the above captioned charge pursuant to N.C.G.S. § 15A-954(a)(4); the United States Constitution, Amendment V,VIII, and XIV; the Constitution of North Carolina, article I, Sections 19, 23, and 27; *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); and *Roper v. Simmons*, 543 U.S. 551 (2005), and related case law.

1. **Factual Background**
   1. *The Charge*

The State alleges that CLIENT broke into an apartment and stole items from within. On the date of the alleged offense, CLIENT was sixteen years old. The District Attorney now seeks to brand him a felon for life and send him to prison for over a year.

* 1. *The Nature of Youth*

Children today exhibit the same “lack of maturity and underdeveloped sense of responsibility” as their peers 30 years ago. Their decisions are just as “impetuous and ill-considered,” *Johnson v. Texas*, 509 US 350, 367 (1993), they are still “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” *Roper* at 543 U.S. at 569, their characters remain “not as well formed” as those of adults, *id.* at 570. But children today—unlike those of their parents’ generation—may not be executed for even the most heinous crimes, *id.* at 551, nor subject to mandatory life without parole, *Miller*, 567 U.S. at 471, nor life without parole at all for offenses other than homicide, *Graham*, 560 U.S. at 82. Nothing about these essential qualities of youth will change on December 1, 2019, and nothing about the nature of their crimes makes children who commit minor offenses any more mature than those who commit murder. *Miller*, 567 U.S. at 465.

Nevertheless, as of December 1, 2019, minors like CLIENT, accused of Felony Breaking or Entering will presumptively be prosecuted as children in juvenile court, not as adults in criminal court. CLIENT, however, belongs to the unfortunate class of child defendants still subject to mandatory prosecution as an adult, caught between the passage and effective date of Raise the Age legislation. This Motion contends that the State cannot, by legislative fiat, accept that treating kids as adults is wrongheaded, amoral, and impractical—and continue to do so for thousands more children for over three more years.

* 1. *Raise the Age and Juvenile Jurisdiction in North Carolina*

Chief Justice Mark Martin convened the North Carolina Commission on the Administration of Law and Justice in September 2015 to make recommendations for improvement to North Carolina’s justice system. The Commission, which included a diverse group of stakeholders and which solicited input from criminal justice participants and the general public, produced a report recommending that North Carolina raise the age for adult prosecution to eighteen years old, with transfer provisions for younger offenders. *See* North Carolina Commission on the Administration of Law and Justice, *Criminal Investigation & Adjudication Committee Report, Appendix A: Juvenile Reinvestment* (2017), *available at* https://nccalj.org/wp-content/uploads/2017/pdf/nccalj\_criminal\_investigation\_and\_adjudication\_committee\_report\_juvenile\_reinvestment.pdf [hereinafter “the Report”]. The Commission concluded as follows:

[T]hat the vast majority of North Carolina’s sixteen- and seventeen-year-olds commit misdemeanors and nonviolent felonies; that raising the age will make North Carolina safer and will yield economic benefit to the state and its citizens; and that raising the age has been successfully implemented in other states, is supported by scientific research, and would remove a competitive disadvantage that North Carolina places on its citizens.

*Id.* at 44.

At the time of the Report, only North Carolina and New York automatically tried sixteen-year-olds as adults; five states set the age at seventeen and the remainder at eighteen. *Id.* Since publication of the Report, New York raised the age of adult criminal responsibility to eighteen. *See* NY CLS Family Ct Act § 301.2 *et seq* [Appendix A to this Motion]

The 2017 Juvenile Justice Reinvestment Act passed as part of the 2017 state budget in June 2017 with bipartisan support. The JJRA adopted the majority of the Commission’s recommendations, including Raise the Age: it increased the age of juvenile court jurisdiction to eighteen and required mandatory transfer to Superior Court for trial for class A through G felonies and motor vehicle offenses. *See* N.C.G.S. §§ 7B-1601 *et seq.* However, for class H and I felonies committed by sixteen-year-olds, N.C.G.S. § 7B-1601, the court must affirmatively find after hearing that “the protection of the public and the needs of the juvenile will be served by transfer to superior court;” otherwise, the juvenile court retains exclusive jurisdiction. N.C.G.S. § 7B-2200.5; N.C.G.S. § 7B-2203. At a transfer hearing, the court must consider eight factors, and the juvenile has an opportunity to object and be heard. N.C.G.S. § 7B-2203.[[1]](#footnote-1)

According to its own terms, the JJRA’s expansion of juvenile court jurisdiction applies to “offenses committed on or after” December 1, 2019.

1. **Legal Grounds**
   1. *Equal Protection*

The Equal Protection Clause of the United States Constitution protects against “disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.” *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). However, classifications with no rational or legitimate justification will be struck down, *e.g. United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (invalidating a provision of the Food Stamp Act of 1964 because the challenged classification was “wholly without any rational basis”), as will classifications entirely unrelated to their purported goals, *e.g. Cleburne*, 473 U.S. at 435 (employing rational basis review to strike down a zoning ordinance requiring permits for group homes for the mentally disabled but not others).

In interpreting the parallel clause of our state constitution’s Equal Protection Clause, “the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court.” *Watch Co. v. Brand Distributors*, 285 N.C. 467, 474 (1974). A criminal statute violates the Equal Protection Clause of the North Carolina Constitution if it “prescribes different punishment for the same acts committed under the same circumstances by persons in like situation.” *State v. Benton,* 276 N.C. 641, 660 (1970) (quotations omitted).

There is no legitimate, rational basis for distinguishing between the automatic prosecution and punishment of CLIENT in adult court now from the prosecution and punishment of a sixteen-year-old alleged to have committed the same acts after December 1, 2019. Critically—and unlike rational basis analysis—once the court finds an equal protection violation, the burden to demonstrate an inability to remedy the violation in a timely fashion rests with the State. *Cf. Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (“The burden rests upon the [school systems] to establish that such time is necessary” to comply with the Court’s desegregation rulings). Thus, the prosecution of CLIENT as an adult violates the state and federal constitutions’ guarantees of equal protection of the laws.

* 1. *Due Process*

The right to due process protects “those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and which define ‘the community’s sense of fair play and decency,’ *Rochin v. California*, [342 U.S. 165, 173 (1952)].” *United States v. Lovasco*, 431 U.S. 783, 790 (1977). The Federal Due Process Clause converges with the North Carolina Law of the Land Clause. *State v. Balance*, 229 N.C. 764, 769 (1949) (“The term ‘law of the land’ is synonymous with ‘due process of law,’ a phrase appearing in the Federal Constitution and the organic law of many states.”). Notably, a state constitution may provide more rights than the federal constitution. *See, generally*, W. J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977) (noting that a state court may interpret its own constitution so as to provide greater protections of individual liberties).

Given that as of December 1, 2019 North Carolina no longer permits a sixteen-year-old charged with a class H felony to be automatically prosecuted, tried, and sentenced as an adult, with the attendant direct and collateral consequences, the prosecution of CLIENT violates the North Carolina and United States Constitutions’ guarantees of due process. In a seminal case concerning procedural due process protections for juveniles subject to transfer to adult court, the Supreme Court held that “there is no place in our system of law for reaching a result of such *tremendous consequences* without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.” *Kent v. United States*, 383 U.S. 541 (1966) (emphasis added). More recently, and by way of example, the Supreme Court of New Jersey analyzed a statute imposing mandatory lifetime sex offender registry for juveniles adjudicated delinquent of certain sex offenses. *In re State ex rel. C.K.*, 182 A.3d 917 (N.J. 2018). That court held that this *automatic* and *irrevocable* punishment as applied to juveniles violated New Jersey’s substantive due process clause because, in light of scientific and legal consensus about the malleability of adolescents, the punishment “no longer bears a rational relationship to a legitimate state purpose and arbitrarily denies those individuals their right to liberty and enjoyment of happiness.” *Id.* at 935.

CLIENT has been prosecuted in adult court without a hearing and without a statement of reasons and, therefore, without the protections afforded him under the state and federal constitutions.

* 1. *Cruel and Unusual Punishment*

The Eighth Amendment’s prohibition on cruel and unusual punishment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). North Carolina’s Constitution, article I, section 27 similarly prohibits “cruel or unusual punishments,” and our Court “historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions.” *State v. Green*, 348 N.C. 588, 603 (1998).[[2]](#footnote-2) The “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures” as well as “state practice.” *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989)). *See also Roper v. Simmons*, 543 U.S. 551, 563 (2005) (finding “objective indicia of society’s standards” are “expressed in legislative enactments and state practice”).

The automatic prosecution and sentencing of a sixteen-year-old as an adult is inconsistent with current societal values and evolving standards of decency. Five states (Georgia, Michigan, Missouri, Texas, and Wisconsin) set the age for adult criminal responsibility at seventeen, and the remainder set it at eighteen. *See* Juvenile Justice Geography, Policy, Practice & Statistics, *Jurisdictional Boundaries*, *available at* http://www.jjgps.org/jurisdictional-boundaries (last visited May 30, 2018) [Appendix B].[[3]](#footnote-3) Notably, the national consensus concerning the appropriate age for automatic adult prosecution is vastly stronger than the consensus that existed when the Supreme Court ruled in *Graham* that life without the possibility of parole for juvenile non-homicide offenders was unconstitutional, 560 U.S. at 62 (39 jurisdictions permitting), or than when it ruled in *Miller* that mandatory life without the possibility of parole for juvenile homicide offenders was unconstitutional, 567 U.S. at 482 (29 jurisdictions permitting). Moreover, *Miller* itself holds that “none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.” *Id.* at 412.

Perhaps most compellingly, all states that have passed recent legislation concerning the age of adult criminal responsibility have raised, not lowered, the age. *See* Appendix B. This includes North Carolina, whose JJRA brought it in line with all other states and the District of Columbia. With this Act, North Carolina now statutorily recognizes that sixteen- and seventeen-year olds should not be automatically prosecuted as adults when they commit non-violent criminal offenses.

States, including North Carolina, thus are unanimous in declaring that sixteen-year-olds should not be automatically tried as adults, a declaration that is in accord with the scientific and constitutional distinction between adults and juveniles. *See, e.g., Miller*, 567 U.S. at 471(“[C]hildren are constitutionally different from adults for purposes of sentencing.”); *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (“[C]hildren cannot be viewed simply as miniature adults.”); *State v. Sterling*, 233 N.C. App. 730, 734 (2014) (noting that age 18 serves as a “bright line” for constitutional challenges to sentencing schemes). Moreover, the “consistency in the direction of change” is “powerful evidence” of evolving standards of decency, *Atkins*, 536 U.S. at 315, and in this instance compels the conclusion that the automatic prosecution of Halo in adult court is unconstitutional.

No judgment in adult court can lie consistently with the Eighth Amendment. Automatic prosecution in adult court triggers a slew of serious—and many permanent—consequences: public records of arrest, housing in adult jail subject to the adult bail scheme, absence of parental involvement, public record of conviction, sentencing under more punitive adult sentencing rules, service of sentence in the adult probation or adult prison systems, and extensive collateral consequences of conviction. *See* the Report, pages 4-6 (comparing adult and juvenile proceedings). The prosecution of a sixteen- or seventeen-year-old who commits a crime before December 2019 “takes on a punitive aspect that cannot be justified by our Constitution.” *In re State ex rel. C.K.*, 182 A.3d 917, 935 (N.J. 2018). Thus CLIENT has already been “punished” in a constitutionally significant manner. *Accord United States v. Juvenile Male*, 819 F.2d 468, 471 (4th Cir. 1987) (“The significance of the ‘transfer’ [to adult court] is not that the transferred defendant must appear in a different court, the district court, and defend himself according to the procedural rules of the district court instead of those of a juvenile court. Rather, its significance is that the transferred defendant is suddenly subject to much more severe punishment.”).[[4]](#footnote-4)

For these reasons, prosecuting and/or sentencing CLIENT as an adult would violate the prohibition against cruel and unusual punishment.

1. **Conclusion**

For the foregoing reasons, CLIENT’s “constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant’s preparation of his case that there is no remedy but to dismiss the prosecution.” N.C.G.S. § 15A-954(a)(4).

Accordingly, through counsel, he moves for a hearing on the matter, for a dismissal of the charge, and for such other relief as is just and proper.

Respectfully submitted, this the \_\_\_ day of July, 2019.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ATTORNEY

Attorney for CLIENT

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion on the Assistant District Attorney, XXXXX Judicial District, by inter-office courier, this the\_\_\_ day of July, 2019.

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ATTORNEY

Attorney for CLIENT

**APPENDIX A: Relevant Portions of NY CLS Family Ct Act § 301.2 *et seq.***

## **§ 301.2. Definitions [Effective October 1, 2018]**

As used in this article, the following terms shall have the following meanings:

1. “Juvenile delinquent” means a person over seven and less than sixteen years of age, or commencing on October first, two thousand eighteen a person over seven and less than seventeen years of age, and commencing October first, two thousand nineteen a person over seven and less than eighteen years of age, who, having committed an act that would constitute a crime, or a violation, where such violation is alleged to have occurred in the same transaction or occurrence of the alleged criminal act, if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law.

2. “Respondent” means the person against whom a juvenile delinquency petition is filed pursuant to section 310.1. Provided, however, that any act of the respondent required or authorized under this article may be performed by his or her attorney unless expressly provided otherwise.

3. “Detention” means the temporary care and maintenance of children away from their own homes, as defined in section five hundred two of the executive law. Detention of a person alleged to be or adjudicated as a juvenile delinquent shall be authorized only in a facility certified by the division for youth as a detention facility pursuant to section five hundred three of the executive law.

4. “Secure detention facility” means a facility characterized by physically restricting construction, hardware and procedures.

5. “Non-secure detention facility” means a facility characterized by the absence of physically restricting construction, hardware and procedures.

6. “Fact-finding hearing” means a hearing to determine whether the respondent or respondents committed the crime or crimes alleged in the petition or petitions.

7. “Dispositional hearing” means a hearing to determine whether the respondent requires supervision, treatment or confinement.

8. “Designated felony act” means an act which, if done by an adult, would be a crime: (i) defined in sections 125.27 (murder in the first degree); 125.25 (murder in the second degree); 135.25 (kidnapping in the first degree); or 150.20 (arson in the first degree) of the penal law committed by a person thirteen, fourteen, fifteen, or sixteen, or commencing October first, two thousand nineteen, seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (ii) defined in sections 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); 130.35 (rape in the first degree); 130.50 (criminal sexual act in the first degree); 130.70 (aggravated sexual abuse in the first degree); 135.20 (kidnapping in the second degree) but only where the abduction involved the use or threat of use of deadly physical force; 150.15 (arson in the second degree) or 160.15 (robbery in the first degree) of the penal law committed by a person thirteen, fourteen, fifteen, or sixteen, or, commencing October first, two thousand nineteen, seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (iii) defined in the penal law as an attempt to commit murder in the first or second degree or kidnapping in the first degree committed by a person thirteen, fourteen, fifteen, or sixteen, or commencing October first, two thousand nineteen, seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (iv) defined in section 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); subdivision two of section 160.10 (robbery in the second degree) of the penal law; or section 265.03 of the penal law, where such machine gun or such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of the penal law committed by a person fourteen or fifteen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (v) defined in section 120.05 (assault in the second degree) or 160.10 (robbery in the second degree) of the penal law committed by a person fourteen, fifteen, or sixteen or, commencing October first, two thousand nineteen, seventeen years of age but only where there has been a prior finding by a court that such person has previously committed an act which, if committed by an adult, would be the crime of assault in the second degree, robbery in the second degree or any designated felony act specified in paragraph (i), (ii), or (iii) of this subdivision regardless of the age of such person at the time of the commission of the prior act; (vi) other than a misdemeanor committed by a person at least seven but less than seventeen years of age, and commencing October first, two thousand nineteen, a person at least seven but less than eighteen years of age, but only where there has been two prior findings by the court that such person has committed a prior felony.

9. “Designated class A felony act” means a designated felony act that would constitute a class A felony if committed by an adult.

10. “Secure facility” means a residential facility in which the respondent may be placed under this article, which is characterized by physically restricting construction, hardware and procedures, and is designated as a secure facility by the division for youth.

11. “Restrictive placement” means a placement pursuant to section 353.5.

12. “Presentment agency” means the agency or authority which pursuant to section two hundred fifty-four or two hundred fifty-four-a is responsible for presenting a juvenile delinquency petition.

13. “Incapacitated person” means a respondent who, as a result of mental illness, or intellectual or developmental disability as defined in subdivisions twenty and twenty-two of section 1.03 of the mental hygiene law, lacks capacity to understand the proceedings against him or her or to assist in his or her own defense.

14. Any reference in this article to the commission of a crime includes any act which, if done by an adult, would constitute a crime.

15. “Aggravated circumstances” shall have the same meaning as the definition of such term in subdivision (j) of section one thousand twelve of this act.

16. “Permanency hearing” means an initial hearing or subsequent hearing held in accordance with the provisions of this article for the purpose of reviewing the foster care status of the respondent and the appropriateness of the permanency plan developed by the commissioner of social services or the office of children and family services.

17. “Designated educational official” shall mean (a) an employee or representative of a school district who is designated by the school district or (b) an employee or representative of a charter school or private elementary or secondary school who is designated by such school to receive records pursuant to this article and to coordinate the student’s participation in programs which may exist in the school district or community, including: non-violent conflict resolution programs, peer mediation programs and youth courts, extended day programs and other school violence prevention and intervention programs which may exist in the school district or community. Such notification shall be kept separate and apart from such student’s school records and shall be accessible only by the designated educational official. Such notification shall not be part of such student’s permanent school record and shall not be appended to or included in any documentation regarding such student and shall be destroyed at such time as such student is no longer enrolled in the school district. At no time shall such notification be used for any purpose other than those specified in this subdivision.

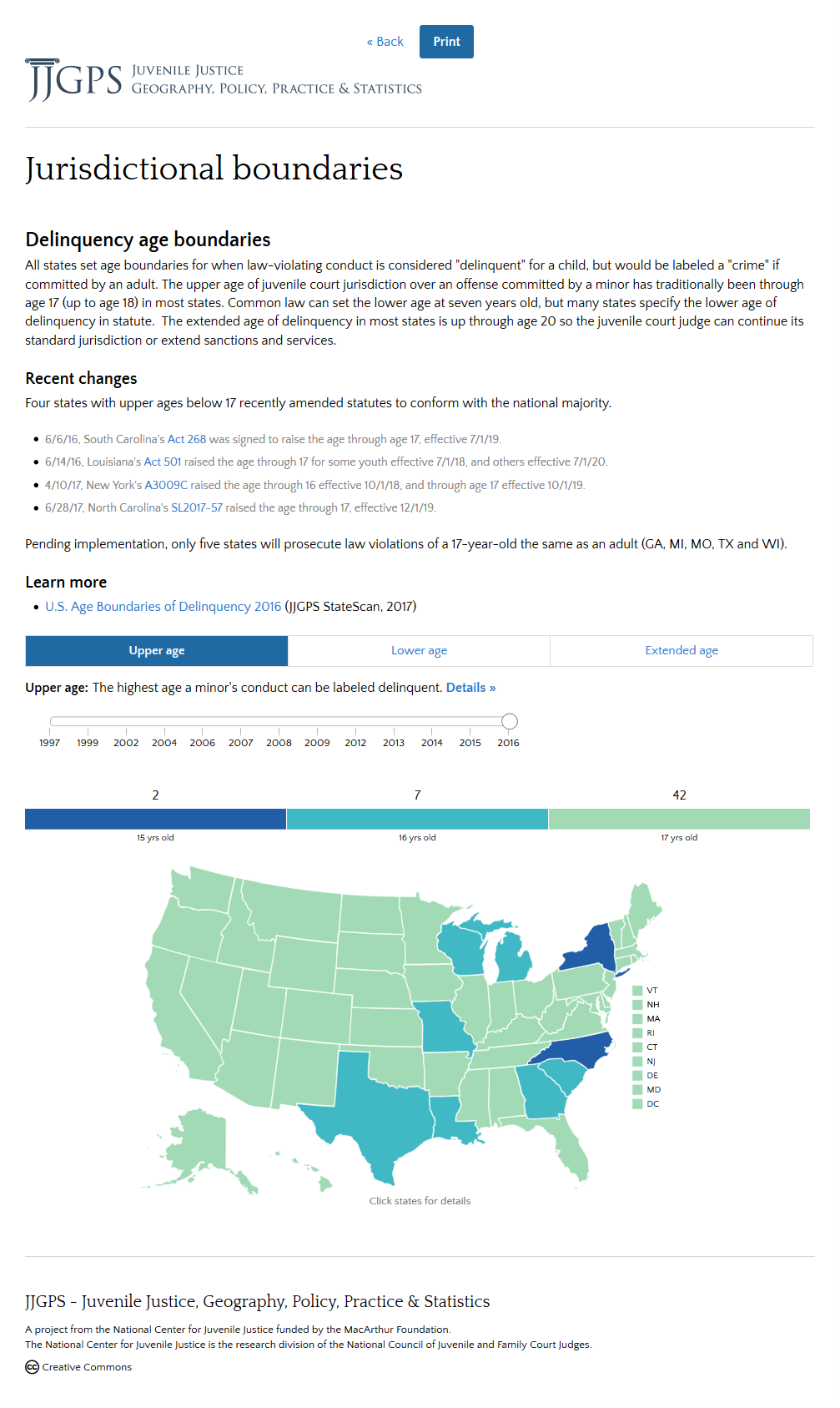
**§ 302.1. Jurisdiction [Effective October 1, 2018]**

1. The family court has exclusive original jurisdiction over any proceeding to determine whether a person is a juvenile delinquent.

2. In determining the jurisdiction of the court the age of such person at the time the delinquent act allegedly was committed is controlling.

3. Whenever a crime and a violation arise out of the same transaction or occurrence, a charge alleging both offenses shall be made returnable before the court having jurisdiction over the crime. Nothing herein provided shall be construed to prevent a court, having jurisdiction over a violation relating to a criminal act from lawfully entering an order in accordance with 345.1 of this article where such order is not based upon the count or counts of the petition alleging such criminal act.

**APPENDIX B**



1. N.C.G.S. § 7B-2203(b) states that “the court shall determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court and shall consider the following factors:

   (1)  The age of the juvenile;

   (2)  The maturity of the juvenile;

   (3)  The intellectual functioning of the juvenile;

   (4)  The prior record of the juvenile;

   (5)  Prior attempts to rehabilitate the juvenile;

   (6)  Facilities or programs available to the court prior to the expiration of the court's jurisdiction under this Subchapter and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts;

   (7)  Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; and

   (8)  The seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as an adult.” [↑](#footnote-ref-1)
2. It is an open question whether the disjunctive “or” in the North Carolina Constitution signifies greater protections than exist in the United States Constitution for minor defendants automatically tried and sentenced as adults. *See State v. Jefferson*, 798 S.E.2d 121, 126 n.3 (N.C. Ct. App. 2017) (identifying provisions mandating automatic transfer of certain juveniles to adult court as nationally unique and noting that the defendant had not raised a challenge under the North Carolina Constitution). Although Halo, through counsel, asserts that the North Carolina’s “cruel or unusual” clause is broader than the federal “cruel and unusual” one, he also asserts that he is entitled to relief under the narrower “cruel and unusual” punishment formulation and will focus his arguments there. [↑](#footnote-ref-2)
3. North Carolina and three other jurisdictions have passed laws that raise the age of criminal responsibility but have delayed implementation of those laws. New York recently passed raise the age legislation setting the age of responsibility at eighteen, but its implementation will occur in phases set to begin October 1, 2018. Likewise, South Carolina’s amendments are effective July 1, 2019 and Louisiana’s are effective July 1, 2018. *See* Appendix B. [↑](#footnote-ref-3)
4. In a pre-*Miller* case, the North Carolina Court of Appeals rejected an Eighth Amendment challenge to the mandatory transfer of juveniles aged 13 and up charged with a class A felony. S*ee State v. Stinnett*, 129 N.C. App. 192 (1998). In light of recent jurisprudence, and the fact that the charge against CLIENT is a class H felony, *Stinnett* is inapposite. [↑](#footnote-ref-4)