

**Major Changes in the Sentencing of Minors:
Recent Legal Updates in the Sentencing of Youth in Virginia**

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I. Treatment of Youth Charged with Criminal Offenses: National Perspective.

- a. [In Re Gault, 387 U.S. 1](#) (1967): The due process rights of youth facing delinquency proceedings in juvenile court must be protected, just as those of adults. Gault guaranteed the right to counsel, to confront adverse witnesses, and to have the charges proved beyond a reasonable doubt.
- b. In the [late 1980s and early 1990s](#), states began enacting laws that permitted youth to be prosecuted in adult courts and to be sentenced to serve time in adult jails and prisons. This included allowing youth to face the imposition of the death penalty as well as sentences of life without the possibility of parole (LWOP).
- c. At the same time, states passed Zero Tolerance laws requiring the suspension or expulsion from school of youth for certain delinquency matters.
- d. Beginning in 2005, the Supreme Court has issued a series of rulings involving juveniles that recognize the unique developmental features distinguishing youth from adults.
 - i. Rulings rely on the 8th Amendment core concept that punishment for a crime must be proportioned to both the offense and the offender.
 - ii. Focused upon the key distinctions of youth, as evidenced by both neuroscience and developmental psychology research.
 - iii. Center on the recognition that youth are constitutionally different from adults for purposes of sentencing because of their diminished culpability and their "greater prospects for reform."
 - iv. The key qualities of youthfulness including immaturity, irresponsibility, and recklessness are all transient characteristics that will change overtime.
 - v. Key findings include:

1. A youth's "lack of maturity and underdeveloped sense of responsibility lead to reckless, impulsive and heedless risk taking" (*Roper*, 543 U.S. at 569).
2. Youth are more vulnerable to negative influences from peers and family members.
3. Youth have limited control over their environment and often lack the ability to remove themselves from negative settings, including their own homes..
4. A young person's character is less fixed than that of an adult, making them more likely to change.
5. Developmentally, youth are less able to accurately assess consequences and have a higher proclivity for risk-taking.

vi. Key Cases

1. [Roper v. Simmons, 543 U. S. 551](#) (2005)
 - a. Imposition of the death penalty for juveniles violates the 8th Amendment.
2. [Graham v. Florida, 560 U.S. 48](#) (2010)
 - a. The 8th Amendment prohibits the imposition of life sentences for juveniles who were convicted of non-homicide offenses.
 - b. Ruling is grounded in the need to consider evolving standards of decency under the 8th Amendment.
3. [JDB v. North Carolina, 564 U.S. 261](#) (2011)
 - a. 13-year-old JDB questioned without Miranda warnings by police and school administrators about a series of robberies. At issue was whether JDB was in custody for purposes of requiring Miranda.
 - b. Supreme Court held age is a relevant factor in determining whether an individual is in custody, especially because youth:
 - i. Have a different perspective on and understanding of the legal system.
 - ii. Are easily influenced by their environment and their peers.
4. [Miller v. Alabama, 567 U.S. 460](#) (2012)
 - a. Mandatory LWOP sentences for youth convicted of homicide violate the 8th Amendment.
 - b. Defendants must have individualized sentencing proceedings.

5. [Montgomery v. Louisiana, 577 U.S. ____](#) (2016)
 - a. Held that states must retroactively apply the [Miller v. Alabama](#) ban on mandatory death in prison sentences.

e. Transfer of Cases

- i. All states have some provisions for juveniles charged with certain crimes to have their cases heard in adult courts¹. The mechanisms vary but include
 1. Discretionary Transfers:
 - a. Gives discretion to judges and/or prosecutors as to whether to transfer a juvenile aged defendant's case into the adult court system.
 - b. Case-by-case consideration.
 - c. Typical considerations include:
 - i. Age of the youth at the time of the offense.
 - ii. Nature/seriousness of the charge.
 - iii. Youth's history (including prior charges as well as family and environmental factors).
 - d. Currently, 45 states allow a form of discretionary transfer.
 2. Statutory Exclusions:
 - a. Statutes which direct certain classes of cases (i.e. homicides) are automatically transferred to adult court systems.
 - b. Categorical classification based on charge and defendant's age.
 3. States may employ multiple methods for transferring cases and may set varied ages and other criteria for transfers.
- ii. Age of Juveniles vs. Adults
 1. Maximum age (at time of offense) of juvenile court jurisdiction is **17 years old**: 45 states (including MI which goes into effect in 2021)
 2. Maximum age (at time of offense) of juvenile court jurisdiction is **18 years old**: 1 state (VT, effective 2020)
 3. Maximum age (at time of offense) of juvenile court jurisdiction is **16 years old**: 4 states (GA, TX, WI; MO effective 2021)

¹ [Trying Juveniles as Adults: An analysis of state transfer laws and reporting](#), Office of Juvenile Justice and Delinquency Prevention, US Dept. of Justice (2011).

II. Judicial discretion and considerations when sentencing youth

- a. 2020 [House Bill 744](#) amending Va. Code 16.1-272
 - i. Circuit Court Judges must consider specific youth-related factors when sentencing a child.
 - ii. Judges must consider [adverse childhood experiences \(ACEs\)](#)², childhood trauma, and experience with any child welfare agency or other removal from the child's home.
 - iii. Judges must consider how children are developmentally different than adults and therefore less culpable for their actions.
 - iv. Judges must craft proportional, age-appropriate sentences for children and not [rely on mandatory minimum sentences](#). When creating or reviewing the sentence of a child adjudicated on a _____ of a felony, the court may
 1. depart from any mandatory minimum, or
 2. suspend any applicable sentence.

III. Other new Virginia statutes relating to the treatment of youth in criminal matters

a. Custodial Interrogation of Child [Va. Code 16.1-247.1](#)

- i. Prior to any custodial interrogation of a child by law enforcement the child's parent, guardian or legal custodian shall be notified of their arrest; and
- ii. The child shall have contact with their parent, guardian or legal custodian.
- iii. Notification can be in person, electronic, by telephone or video conference
- iv. Exceptions: Custodial interrogation may be conducted without notification if the parent, guardian, or legal custodian is:

² <https://www.cdc.gov/violenceprevention/aces/index.html>. Adverse childhood experiences, or ACEs, are potentially traumatic events that occur in childhood (0-17 years). For example:

- experiencing violence, abuse, or neglect
- witnessing violence in the home or community
- having a family member attempt or die by suicide

Also included are aspects of the child's environment that can undermine their sense of safety, stability, and bonding such as growing up in a household with:

- substance misuse
- mental health problems
- instability due to parental separation or household members being in jail or prison

ACEs are linked to chronic health problems, mental illness, and substance misuse in adulthood. ACEs can also negatively impact education and job opportunities. However, ACEs can be prevented.

1. A co-defendant in the alleged offense.
2. Has been arrested for, charged with, or is being investigated for a crime against the child.
3. If, after every reasonable effort is made to notify them, the parent, guardian or legal custodian cannot be located or refuses contact with the child.
4. The officer conducting the interrogation reasonably believes the information sought is necessary to protect life, limb, or property from an imminent danger and the questions are limited to those that are reasonably necessary to obtain such information.

b. Parole Eligibility [Va. Code 53.1-165.1](#)

- i. Persons who were juveniles at the time of their offense are eligible for parole if:
 1. They have been sentenced to more than 20 years (either for a single offense or for multiple offenses); and
 2. They have served at least 20 years of their sentence

c. Disorderly Conduct [Va. Code 18.2-415\(D\)](#)

- i. The provisions of 18.2-415 shall not apply to any elementary or secondary school student if the conduct occurred
 1. On the property of any elementary or secondary school;
 2. On a school bus; or
 3. At any activity conducted or sponsored by any elementary or secondary school.
- ii. This does not bar prosecution of youth who engage in activity that violate other provisions of the Virginia Code while on school premises, school buses, or engaging in school activities.

d. Elimination of automatic certification as an adult for youth ages 14 or 15. [Va. Code 16.1-269.1](#)

i. If a juvenile 16 or older is charged with murder in violation of § [18.2-31](#), [18.2-32](#) or [18.2-40](#) or aggravated malicious wounding in violation of § [18.2-51.2](#), the juvenile court shall only conduct a preliminary hearing and if probable cause is found, the charge will be certified to Circuit Court.

ii. If the juvenile is 14 years of age or older, but less than 16 years of age, then the court may proceed, on motion of the attorney for the Commonwealth, as provided in subsection A of § [16.1-269.1](#).

1. Except as provided in subsections B and C, if a juvenile 14 years of age or older at the time of an alleged offense is charged with an offense which would be a felony if committed by an adult, the court

shall, on motion of the attorney for the Commonwealth and prior to a hearing on the merits, hold a transfer hearing and may retain jurisdiction or transfer such juvenile for proper criminal proceedings to the appropriate circuit court having criminal jurisdiction of such offenses if committed by an adult.

e. Elimination of prosecutorial discretion on intent to certify as an adult cases for youth ages 14 or 15. [Va. Code 16.1-269.1](#).

i. If a juvenile 16 or older is charged with a violent or significant felony,³ and after reviewing a report provided by the Court Service Unit, the Commonwealth's attorney provides notice of an intent to certify the juvenile for trial as an adult, the Juvenile court will only hold a probable cause hearing. If the Court finds probable cause, the case will be certified for trial as an adult in Circuit Court as long as the following conditions are met:

1. ****Prior to giving written notice of intent to proceed pursuant to this subsection, the attorney for the Commonwealth shall submit a written request to the director of the court services unit to complete a report as described in subsection B of § 16.1-269.2 unless waived by the juvenile and his attorney or other legal representative.*
2. *The report shall be filed with the court and mailed or delivered to (i) the attorney for the Commonwealth and (ii) counsel for the juvenile, or, if the juvenile is not represented by counsel, to the juvenile and a parent, guardian, or other person standing in loco parentis with respect to the juvenile, within 21 days of the date of the written request.*
3. *After reviewing the report, if the attorney for the Commonwealth still intends to proceed pursuant to this subsection, he shall then provide the written notice of such intent, which shall include affirmation that he reviewed the report.*
4. *The notice shall be filed with the court and mailed or delivered to counsel for the juvenile or, if the juvenile is not then represented by counsel, to the juvenile and a parent, guardian or other person standing in loco parentis with respect to the juvenile at least seven days prior to the preliminary hearing.*
5. *If the attorney for the Commonwealth elects not to give such notice, if he elects to withdraw the notice prior to certification of the charge to the grand jury, or if the*

³ Murder in violation of § 18.2-33; felonious injury by mob in violation of § 18.2-41; abduction in violation of § 18.2-48; malicious wounding in violation of § 18.2-51; malicious wounding of a law-enforcement officer in violation of § 18.2-51.1; felonious poisoning in violation of § 18.2-54.1; adulteration of products in violation of § 18.2-54.2; robbery in violation of § 18.2-58 or carjacking in violation of § 18.2-58.1; rape in violation of § 18.2-61; forcible sodomy in violation of § 18.2-67.1; object sexual penetration in violation of § 18.2-67.2; manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance or an imitation controlled substance in violation of § 18.2-248 if the juvenile has been previously adjudicated delinquent on two or more occasions of violating § 18.2-248 provided the adjudications occurred after the juvenile was at least 14 16 years of age; manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute methamphetamine in violation of § 18.2-248.03 if the juvenile has been previously adjudicated delinquent on two or more occasions of violating § 18.2-248.03 provided the adjudications occurred after the juvenile was at least 16 years of age; or felonious manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute anabolic steroids in violation of § 18.2-248.5 if the juvenile has been previously adjudicated delinquent on two or more occasions of violating § 18.2-248.5 provided the adjudications occurred after the juvenile was at least 16 years of age, provided the attorney for the Commonwealth gives written notice of her intent to proceed pursuant to this subsection.

juvenile is 14 years of age or older, but less than 16 years of age, he may proceed as provided in subsection A.

ii. If the juvenile is 14 years of age or older, but less than 16 years of age, then the court may proceed on a transfer hearing, on motion of the attorney for the Commonwealth, as provided in subsection A of § **16.1-269.1**⁴.

f. All other felonies stayed the same with regard to transfer. [Va. Code 16.1-269.1](#).

i. If a juvenile 14 years of age or older at the time of an alleged offense is charged with an offense other than those referred to above, which would be a felony if committed by an adult, the court shall, on motion of the attorney for the Commonwealth and prior to a hearing on the merits, hold a transfer hearing and may retain jurisdiction or transfer such juvenile for proper criminal proceedings to the appropriate circuit court having criminal jurisdiction of such offenses if committed by an adult. Any transfer to the appropriate circuit court shall be subject to the following conditions:

- a. Notice as prescribed in §§ **16.1-263** and **16.1-264** shall be given to the juvenile and his parent, guardian, legal custodian or other person standing in loco parentis; or attorney;
- b. The juvenile court finds that probable cause exists to believe that the juvenile committed the delinquent act as alleged or a lesser included delinquent act which would be a felony if committed by an adult;
- c. The juvenile is competent to stand trial. The juvenile is presumed to be competent and the burden is on the party alleging the juvenile is not competent to rebut the presumption by a preponderance of the evidence; and
- d. The court finds by a preponderance of the evidence that the juvenile is not a proper person to remain within the jurisdiction of the juvenile court. In determining whether a juvenile is a proper person to remain within the jurisdiction of the juvenile court, the

⁴ Except as provided in subsections B and C, if a juvenile 14 years of age or older at the time of an alleged offense is charged with an offense which would be a felony if committed by an adult, the court shall, on motion of the attorney for the Commonwealth and prior to a hearing on the merits, hold a transfer hearing and may retain jurisdiction or transfer such juvenile for proper criminal proceedings to the appropriate circuit court having criminal jurisdiction of such offenses if committed by an adult.

court shall consider, but not be limited to the following factors:

- The juvenile's age;
- The seriousness and number of alleged offenses, including (i) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (ii) whether the alleged offense was against persons or property, with greater weight being given to offenses against persons, especially if death or bodily injury resulted; (iii) whether the maximum punishment for such an offense is greater than 20 years confinement if committed by an adult; (iv) whether the alleged offense involved the use of a firearm or other dangerous weapon by brandishing, threatening, displaying or otherwise employing such weapon; and (v) the nature of the juvenile's participation in the alleged offense;
- Whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation;
- The appropriateness and availability of the services and dispositional alternatives in both the criminal justice and juvenile justice systems for dealing with the juvenile's problems;
- The record and previous history of the juvenile in this or other jurisdictions, including (i) the number and nature of previous contacts with juvenile or circuit courts, (ii) the number and nature of prior periods of probation, (iii) the number and nature of prior commitments to juvenile correctional centers, (iv) the number and nature of previous residential and community-based treatments, (v) whether

previous adjudications and commitments were for delinquent acts that involved the infliction of serious bodily injury, and (vi) whether the alleged offense is part of a repetitive pattern of similar adjudicated offenses;

- Whether the juvenile has previously absconded from the legal custody of a juvenile correctional entity in this or any other jurisdiction;
- The extent, if any, of the juvenile's degree of intellectual disability or mental illness;
- The juvenile's school record and education;
- The juvenile's mental and emotional maturity; and
- The juvenile's physical condition and physical maturity.

Additional Resources:

[Juvenile Age of Jurisdiction and Transfer to Adult Courts, National Conference of State Legislatures \(2020\)](#)

[Trying Juveniles as Adults: An analysis of state transfer laws and reporting](#), Office of Juvenile Justice and Delinquency Prevention, US Dept. of Justice (2011)

[Virginia Department of Juvenile Justice Transformation Update 2019](#)