

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

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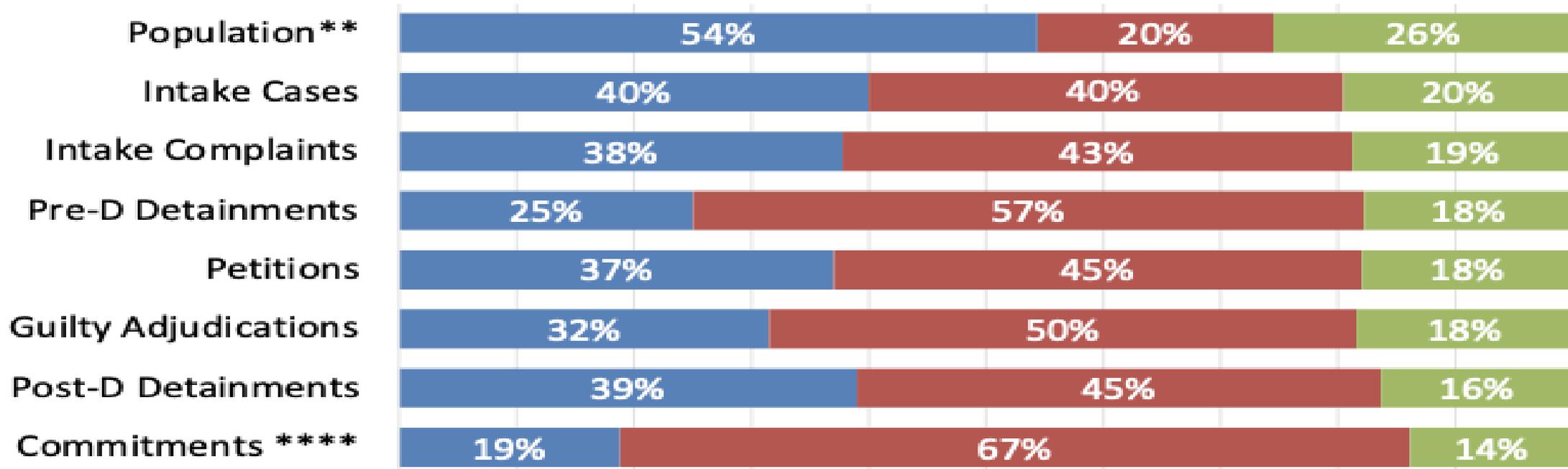
Juvenile Courts are still the best place to handle delinquency cases

- Court must foster public safety and fairness and equity. [§16.1-277](#)
- Diversion should be a primary focus of the juvenile court. *Id.*
- Felonizing forecloses opportunities: Pell grants, college admissions, jobs, public housing, and often means suspension or expulsion.
- Even JDR felonies not expunged if 14 or older at time of adjudication.
- Under [§16.1-278.8](#), the juvenile court has discretion to protect the young person's future in recognition of the potential for rehabilitation. *See attached* Standardized Dispositional Matrix.

Racial & Ethnic Disparities FY 2019 – FY 2020



■ White ■ Black ■ Other



- Data represents youth age 10-17, comparable to the census population

Trial in JDR or CC
as an adult?

14 and 15 year olds
can no longer be
automatically
certified to CC for
murder/aggd MW

§16.1-269.1(A) & (B)

1. If a juvenile 16 or older is charged with murder or aggravated malicious wounding, the juvenile court shall only conduct a preliminary hearing. If PC found, the charge will be certified to Circuit Court.
2. If the juvenile is 14 or 15, then the court may proceed, on motion of ACA, on a transfer hearing as provided in subsection A of § **16.1-269.1**.

The CW can only file an intent to certify on 16 and 17 year olds after reviewing a CSU report.

§16.1-269.1(C)

- If a 16 or 17-yr-old charged with violent/significant felony:
 - After reviewing a report provided by the CSU
 - The CWA gives notice of intent to certify for CC trial
 - JDR judge will only hold a PC hearing.
- After reviewing the report:
 - If the CWA still intends to proceed to CC
 - They shall provide written notice of such intent, including affirmation they reviewed the report.
- If the CWA decides not to proceed with intent to certify to CC, the CWA can still request a transfer hearing.

14 and 15 year olds
charged with
violent/serious
felonies now get
transfer hearings

§16.1-269.1(C)

- Under the serious felonies which used to be codified as intent to certify cases:
 - the court must now instead hold a transfer hearing, as provided in subsection A of § **16.1-269.1**, if the **CWA wants to try a 14- or 15-year-old juvenile as an adult.**

Traditional transfer cases stayed the same.

§16.1-269.1(A)

If a juvenile 14 or older at the time of alleged offense is charged with a felony offense other than those referred to above (essentially non-violent felonies), the court shall:

- on motion of the CWA and
- prior to a hearing on the merits
- hold a transfer hearing and
- may retain jurisdiction or
- transfer juvenile for proper criminal proceedings in CC.

A transfer hearing pursuant to Part (A) of § 16.1-269.1 is a two-step process.

§16.1-269.1

1. First, a hearing to determine if probable cause exists; then,
2. A second hearing to review the transfer report, and all other relevant evidence, on the issue of transfer.
 - a. The Transfer Report must be prepared by the CSU for all transfer hearings pursuant to Va. Code 16.1-269.2.
 - b. The Court shall not consider the report until a finding has been made concerning probable cause.

Findings
necessary for
transfer under
§16.1-269.1(A).

Any transfer to CC shall be subject to the following conditions:

1. 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;
2. JDR court finds PC exists to believe that the juvenile committed a felonious delinquent act;
3. Juvenile competent for trial. Child presumed to be competent. Must rebut the presumption of competence by preponderance of the evidence; and
4. The JDR court finds by a preponderance of evidence that juvenile is not a proper person to remain within the jurisdiction of the juvenile court.

Factors JDR Court must consider in transfer hearings

Transfer Hearing Considerations under §16.1-269.1(A)

1. The child's age.
2. The seriousness and number of alleged offenses.
3. Can they be retained in JJ system long enough for effective treatment?
4. Appropriateness/availability of services and alternatives in both systems.
5. The record and previous history of the juvenile.
6. Have they ever absconded from legal custody?
7. The extent of any degree of intellectual disability or mental illness.
8. The juvenile's school record and education.
9. The juvenile's mental and emotional maturity.
10. The juvenile's physical condition and physical maturity.

Power of Circuit Court Over Juvenile Offender §16.1-272

§16.1-272

- When a juvenile indicted, **all ancillary charges** go to Circuit Court.
- The **judge sentences the defendant, not a jury.**
- **Mandatory minimums do not have to be imposed on juveniles.**
- **Court must consider (i) the juvenile's exposure to adverse childhood experiences, early childhood trauma or any child welfare agency, and (ii) the differences between juvenile and adult offenders.**
- The juvenile shall be eligible to earn sentence credits in the manner prescribed by § [53.1-202.2](#) for the portion of the sentence served as a serious juvenile offender under § [16.1-285.1](#).
- For sex offenses, the juvenile will have to register as sex offender for sex offenses pursuant to § [9.1-900](#).

Trauma Among Committed Youth, FY 2019



- 61% - parent criminal activity
- 58% - parent incarceration
- 53% - physical assault/abuse
- 40% - parent substance abuse
- 35% - parent death or abandonment
- 22% - family domestic violence
- 20% - self injurious behavior (SIB), suicide attempts, or suicidal ideation
- 17% - sexual assault/abuse

95% reported at least one of the above
67% reported 3 or more of the above

Blended
sentencing in
significant/violent
felonies.
§16.1-272

- If convicted of a violent juvenile felony, under [§16.1-272](#), the court has **three options** for sentencing:
 - (i) the juvenile **serve a portion of the sentence in DJJ as a serious juvenile offender** under [§ 16.1-285.1](#) and rest as DOC active or suspended time (**blended sentence**).
 - (ii) serve sentence as DOC active or suspended time; or
 - (iii) adult time be suspended conditioned upon successful completion of conditions a juvenile court could impose, including commitment to DJJ under subdivision A 14 of [§ 16.1-278.8](#) or [§ 16.1-285.1](#).

Non-violent
felonies in
Circuit Court
§16.1-272

- If the juvenile is convicted of a non-violent felony—
 - Court may in its discretion handle like juvenile court, including, but not limited to:
 - indeterminate commitment under § [16.1-285.1](#)
 - or impose an adult sentence and suspend the sentence conditioned upon successful completion of conditions as may be imposed in a juvenile court.

Misdemeanors in
Circuit Court
§16.1-272

§16.1-272

- If the juvenile is only convicted of a misdemeanor, the CC sentences as a JDR court would.

When adult
sentenced
for prior
juvenile
offense.

§ 16.1-284

§16.1-284

When the juvenile court sentences an adult who has committed, before the age of 18, a delinquency offense, the court may impose for each offense:

- a. the penalties not to exceed the punishment for a Class 1 misdemeanor
- b. provided that the total jail sentence imposed shall not exceed 36 continuous months and the total fine shall not exceed \$2,500.

Serious Offender Reviews Generally

- o To serve time in DJJ, must be a Determinate (serious offender) or Indeterminate Commitment.
- o Sentencing judge has discretion to reduce sentence based on the progress made during DJJ commitment.
- o Review after 2 years in DJJ and every year until turn 21 or are released.
- o 2016 costs=\$171,588/year per kid in direct care.
- o Counterproductive to hold once rehabilitated.

- See Lambie, I., & Randell, I. (2013). The impact of incarceration on juvenile offenders. *Clinical Psychology Review*, 33, 448, 459.
- See also <http://www.djj.virginia.gov/pdf/residential/Guidelines> for Length-of-Stay.pdf

More on Serious offender reviews

- a. DJJ petitions court for SOR with a **serious offender progress report** and **risk assessment** 60 days BF the 2-year anniversary of original sentencing.
- b. Within 30 days of the court's receipt of the petition, the court must schedule the hearing pursuant to [§ 16.1-266](#).
- c. SOR hearing occurs in the Court where originally sentenced.
- d. DJJ may also petition for an earlier release "when good cause exists." [§ 16.1-285.1\(F\)](#).
- e. Intended to allow judge to compare the underlying sentence for the crime committed with this particular youth's rehabilitation.
- f. DJJ has a number of evidence-based stepdown programs that help with reentry, including:
 - i. Detention Reentry, Community Placement Programs, and independent or Apartment Living.

What must the Court consider at a SOR hearing?

1. Under [§ 16.1-285.2\(B\)](#), court must review the **progress report**.
-- Includes educational and treatment progress, potential for danger to self or community and an aftercare plan. [§ 16.1-285.2\(B\)](#).
2. The court must also consider under [§ 16.1-285.2\(D\)](#):
 - i. the experiences and character of the juvenile,
 - ii. the nature of the offenses that the juvenile committed,
 - iii. the manner in which the offenses were committed,
 - iv. the protection of the community,
 - v. the recommendations of the Department,
 - vi. Exposure to ACES, early trauma, or any child welfare agency,
 - vii. the differences between juvenile and adult offenders, and
 - viii. any other factors the court deems relevant.

What else may a court consider at a SOR hearing?

1. Additional evidence from probation officers, the juvenile correctional center, and treatment professionals.
2. Evidence from the client, his legal counsel, his guardian or family, or whatever court deems relevant. [§ 16.1-285.2\(C\)](#).
 - a. Possible sources:
 - i. DJJ reentry services experts
 - ii. DJJ counselors and advocates
 - iii. POs
 - iv. Rehabilitation Counselor
 - v. Behavioral Services Unit (BSU) Therapist
 - vi. DJJ Teachers and Vocational instructors
 - vii. volunteers in programs at the facility.

Virginia judges do have the authority to suspend any remaining time on a sentence at a serious offender review.

- In Va. Code Ann. [§16.1-285.2\(E\)](#), at a serious offender review, the Court has several options, including:
 - “(ii) the suspension of the unserved portion of the adult sentence in whole or in part based upon the juvenile's successful completion of the commitment as a serious offender.”
 - Court may suspend Def’s remaining DJJ or DOC time, including MM time, if the court finds she has successfully completed the SO program.

The Circuit Court has the power to suspend remaining time on a serious offender juvenile's sentence even if there was a plea agreement.

Bardales v. Commonwealth, 71 Va. App. 737 (2020).

- At a SOR, CC removed juvenile offender from placement in DJJ due to serious infractions while in custody there.
- Court placed him in DOC Youthful Offender Program.
- This did not violate plea agreement. where parties agreed that the offender “shall receive a blended sentence.”
- The Court has discretion under [§16.1-285.2\(E\)](#) to adjust the sentence at a serious offender review.
- Hopefully, we see a need to reduce the remaining time bc of good behavior and rehabilitation, rather than this.

Some add'l Important Caselaw for Serious Offender Reviews

- ***Bullock v. Commonwealth***, 631 S.E.2d 334, 336 (Va. Ct. App. 2006). The CC has discretion to determine how the juvenile offender should serve his sentence. Although the trial court sentenced the offender to serve his sentence in the DOC rather than in DJJ, the COA held “there is no clear evidence in the record that supports ...the Commonwealth’s position that the court had to sentence [defendant] to the Department of Corrections.” *Id.* at 339.
- ***Edmonds v. Commonwealth***, 2013 Va. App. LEXIS 71. The defendant appealed the revoking of his suspended adult sentence at his serious offender review. *Id.* at 1. The court affirmed the judge’s broad discretionary power in the serious offender review, and the judge’s power to revoke the suspended sentence. *Id.*