

# DON'T THROW AWAY THE KEY



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Reevaluating Adult Time for Youth Crime in Virginia

JustChildren

A Program of the Legal Aid Justice Center

The JustChildren program of the Legal Aid Justice Center is Virginia's largest children's law center and has staff in offices in Charlottesville, Richmond and Petersburg. For the past eleven years, JustChildren has been employing a range of strategies to improve Virginia's public education, juvenile justice, and foster care systems. Much of our recent juvenile justice work has focused on youth who are being tried or incarcerated as adults in Virginia. We have immersed ourselves in this issue through our individual representation of youth at different points in the system, gathering and reviewing data, research, talking to policymakers about the practice of transfer in Virginia, and meeting with families and other community members. All of these experiences inform this report.

We would like to thank all of the youth, families, individuals, and organizations who have taught us about this issue, shared information with us, and supported us in this effort.

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# Don't Throw Away the Key

REEVALUATING ADULT TIME FOR YOUTH CRIME IN VIRGINIA

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## EXECUTIVE SUMMARY

In the mid-1990s, Virginia, like many states across the country, made dramatic changes to its juvenile justice system. Chief among these was a legislative decision to substantially limit the juvenile court judges' role in those cases where youth might be tried as adults, a process known as transfer or certification.\* After adoption, the effects of these reforms were not officially examined or discussed for more than a decade, until Delegate Brian Moran asked the Virginia State Crime Commission ("the Crime Commission") to conduct a two-year study of the Commonwealth's juvenile justice system.<sup>1</sup> The Crime Commission completed its study in 2008, but citing its need for more information and data regarding transfer, ordered a specific study of the transfer system to be completed by December 2009.<sup>2</sup>

The Legal Aid Justice Center's JustChildren Program has spent a number of years representing young people at different stages of the transfer process, meeting with stakeholders and families, and researching the issue of children being tried as adults. To supplement the work of the Crime Commission, we are issuing this report to give Commissioners, lawmakers, and juvenile justice professionals additional information that we believe is both helpful and necessary for the reexamination and reform of our current transfer system. This report calls on policymakers to reevaluate the transfer system in light of new findings about youth crime, adolescent brain development, and the current transfer system's impact on youth and their communities. It highlights the way that our transfer system, which allows youth as young as 14 to be treated as adults, is at odds with all other laws and policies in Virginia regarding our children. The report also reveals the extent to which a substantial majority of juvenile justice professionals have been dissatisfied with the current system since its creation and are seeking reform.

This report will discuss the juvenile transfer system in place prior to reforms of the mid-1990s, when judges, as opposed to the General Assembly or the Commonwealth's Attorney, were the primary decision makers in the transfer process. It will also describe the public debate about juvenile justice reform in the mid-1990s and the fact that Virginia based its reforms on the fear of possible events – a dramatic rise in youth violence and a transformation in the character of juvenile offenders – that never occurred. While supporters of the changes of the 1990s may point to a dramatic decline in youth crime that has taken place since then as evidence of their success, prominent researchers do not support this theory and the same decline was experienced in states which did not make similar changes.<sup>3</sup>

Upon closer scrutiny, it is apparent that the youth transfer policies Virginia developed in the 1990s are overly broad and unnecessarily sweep too many youth into the adult system. They can be applied unfairly, giving a disproportionate amount of authority to prosecutors rather than judges. The policies are counter-productive, likely increasing recidivism rates among youth tried as adults and unnecessarily burdening many youth with adult felony convictions. They are wasteful, expending the resources of Circuit Courts on young people who would be better served in the juvenile system. Policy makers must reexamine the transfer system in light of what we now know and adopt the changes necessary to make our system into one that is effective and just.

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\* The Virginia Code defines the various routes to Circuit Court for juvenile offenders as both transfer and certification. "Transfer" typically refers to a judge's authority to transfer a youth to Circuit Court under Va. Code § 16.1-269.1(A). "Certification" refers to the legislature's authority or the prosecutor's authority under Va. Code § 16.1-269.1(B) and Va. Code § 16.1-269.1(C). For clarity's sake, "transfer" will refer to both "transfer" and "certification" throughout the report, except when one or the other is clearly designated.

As Virginia reexamines its transfer system, this report will compare five commonly held myths about transfer practices in our Commonwealth with the reality of what we have learned since the 1990s. In drawing these comparisons, clear areas for reform and recommendations for such reform are highlighted.

**Myth #1:** Trying more children as adults is necessary to address a tidal wave of violent juvenile “superpredators” in Virginia.

**Reality #1: The predicted explosion of youth violence used to justify sweeping changes to Virginia’s transfer laws never occurred.**

Virginia built its current transfer system to handle a crime wave that never took place and at a time when crime rates were beginning to fall. Professionals involved in the juvenile justice system in the 1990s questioned the accuracy of reports of an impending crime wave at the time. Today, professionals involved in the system as well as researchers denounce the earlier predictions and point to other policies such as community policing and reducing access to guns, not more punitive laws, as the cause of the falling crime rate.

**Myth #2:** Virginia only transfers the most violent youth to Circuit Court for adult prosecution and sentencing.

**Reality #2: The current transfer system is over-inclusive. Chronic, violent youth offenders are not the only youth transferred to adult courts.**

The majority of youth who are transferred to the adult system are not murderers and rapists nor are they receiving adult prison sentences. In fact, youth charged with homicide or sexual offenses account for less than 15% of all youth convicted in Circuit Court between 2001 and 2008.<sup>4</sup> Data from the Virginia Criminal Sentencing Commission also shows that many youth receiving adult convictions must not be the most serious offenders. Over half of the youth convicted in the adult system were not sentenced to immediately serve time in adult prisons.<sup>5</sup> In fact, 1 in 5 youth was put directly on probation.<sup>6</sup> These statistics call into question the wisdom and efficacy of a system that treats so many of these youth as adults. All of the youth convicted in Circuit Court, including the nearly 1 in 10 youth transferred for nonviolent drug offenses,<sup>7</sup> suffer the consequences of having an adult felony conviction on their record.

**Myth #3:** Trying youth as adults protects the public by reducing recidivism.

**Reality #3: Youth tried and sentenced as adults are more likely to reoffend than youth who remain in the juvenile justice system.**

Research from around the country confirms that transfer does not deter youth from committing crimes and in fact increases the odds that transferred youth will commit more crimes once released. Individual youth offenders transferred to adult court were 34% more likely, on average, to re-offend after release than similarly situated youth who had been tried and treated as juveniles.<sup>8</sup> There are a number of causes cited for this, not the least of which are the lack of appropriate educational and therapeutic services in adult facilities and the real risks of sexual and physical assault from older inmates.

**Myth #4:** The juvenile offender: “Once a criminal, always a criminal.”

**Reality #4: Research confirms that teenagers are in the midst of significant developmental change and are not just smaller adults. Due to their developmental stage they act out for different reasons than adults, have less control over their environment, and are generally more impulsive. But they are also much more likely to outgrow this behavior and respond positively to rehabilitative efforts.**

Youth are in a state of flux when it comes to their identity formation, decision making ability, and brain development. Virginia recognizes this in the way it deals with youth in every other area of the law outside of crime. Youth in Virginia are unable to vote, marry, get a tattoo, or even watch R-rated movies without parental permission. While their immature state makes youth more likely to be susceptible to engage in delinquent activity, scientific research suggests that an immature brain may actually be a young offender’s greatest asset because it has the capacity to learn new skills and undo bad behaviors. However, youth tried in the adult system are often denied the services and rehabilitation that would be otherwise available in the juvenile justice system.

**Myth #5:** The current system has been in place for nearly fourteen years, it must be working fine.

**Reality #5: The majority of professionals who best understand the current system’s mechanics and consequences support reform.**

Those who best understand not only the intricacies of the current system but also the youth who are served by the system have consistently objected to the expansion of Virginia’s transfer laws. With the exception of Commonwealth’s Attorneys, juvenile justice professionals overwhelmingly support:

- (1) Giving Juvenile and Domestic Relations District Court judges sole discretion over transfer decision not mandated by statute;

(2) Giving Circuit Court judges authority to override transfer or certification to their court (“reverse waiver”); and,

(3) In appropriate cases allowing a juvenile convicted as an adult to regain his or her juvenile status.<sup>9</sup>

It is time for legislators and policy makers to remap the contours of their understanding of juvenile crime to account for what we now know, and use that accurate map to revise the Commonwealth’s transfer laws. Now is the time to examine what has been learned since the implementation of these laws and make necessary and appropriate changes to ensure that they are not casting too wide a net and ensnaring young offenders who would be better served elsewhere.

In this new era of increasingly accurate data, research, and first-hand accounts of what works and what does not, it is time to re-evaluate adult time for youth crime and to recalibrate our transfer system to make sure that we are not mistakenly throwing away the key to the jail house and the future for many of Virginia’s youth. In order to better serve the needs of Virginia’s youth and policymakers should make the following changes.

**Recommendation #1: Restore authority over transfer decisions to Juvenile and Domestic Relations District Court judges, except in those cases currently requiring automatic transfer.**

Juvenile and Domestic Relations District Court judges are the most qualified professionals to make critical decisions about whether a youth should be transferred to the adult system. These judges receive the most training in adolescent development, rehabilitation and punishment, and have the most experience evaluating individual youth. Judges also have to consider evidence from all sources – the defense, the prosecution, and probation officers. Returning authority to make transfer decisions to juvenile court judges will insure that more information is available for consideration and review, that the decision is made by a neutral fact-finder, and that the decision is transparent and reviewable.

**Recommendation #2: Increase training regarding youthful offenders and dispositions for Circuit Court judges.**

Circuit Court judges do not receive the detailed and intensive juvenile specific training available to Juvenile and Domestic Relations District Court judges. Providing Circuit Court judges with more training on juvenile offenders and juvenile rehabilitation will likely encourage even greater use of juvenile sentences and juvenile confinement for transferred youth.

### **Recommendation #3: Eliminate or greatly narrow the use of adult jails for the pre-trial detention of transferred youth.**

Virginia law allows transferred and certified youth, some as young as 14, to be detained in adult jails, and held in the general population before their trials.<sup>10</sup> While in the general population, the youth are placed at increased risk of being victimized before their trials and many, despite their being held for lengthy periods of time awaiting trial, receive no education or support services.<sup>†</sup> Policymakers should consider eliminating the use of pre-trial detention in jail, or limit it to those times when a youth is a proven danger to other youth in a juvenile detention center.

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<sup>†</sup> JustChildren has had clients as young as 14 in this situation.

# MYTH AND REALITY IN VIRGINIA'S TRANSFER SYSTEM

## CHAPTER ONE: A SYSTEM BUILT ON UNREALIZED PREDICTIONS

**Myth # 1:** Trying more children as adults is necessary to address a tidal wave of violent juvenile “superpredators” in Virginia.

In the 1990s, several specific, widely-reported violent crimes by young people, increasing overall media coverage, and expert claims of a surge in youth violence spread fear and anxiety across the nation. On March 9, 1992, *Newsweek* ran a cover story called, “Kids and Guns: A Report from America’s Classroom Killing Grounds.” The following year, *U.S. News and World Report* printed a similar cover story titled, “Guns in the Schools: When Killers Come to Class—Even Suburban Parents Now Fear the Rising Tide of Violence.”<sup>11</sup>

The Commonwealth's newspapers were filled with similar stories. Headlines like “Juvenile Crimes Escalate: Officials Say Offenses More Violent, Sophisticated,”<sup>12</sup> and “Youths ‘out of control’ in N. Virginia: Officials Sound Alarm on Gangs”<sup>13</sup> appeared in widely circulated Virginian newspapers. An op-ed titled “Kids Shouldn’t be Getting Away With Murder” authored by a federal prosecutor in Virginia proposed sweeping changes to the juvenile justice system, decrying the “growing number of boys” who are “becoming killers.”<sup>14</sup> This op-ed and similar articles proposed harsher punishment for youth, setting up a false choice: the juvenile justice system could either protect the young defendant or it could protect the general public.

Criminologists added to the clamor, predicting “a [teen] crime wave of epic proportions in Virginia.”<sup>15</sup> In 1993, Richard P. Kern, then director of Virginia’s Criminal Justice Research Center, stated that despite a drop in Virginia’s population of 13 to 17 year-olds in the 1980s, the violent-crime arrest rate for this age group rose 186% between 1983 and 1992.<sup>16</sup> Kern cautioned “there are things tugging at the social fabric of our society that are generating a new breed of violence among our kids.”<sup>17</sup> Despite these claims, Kern still recommended that we look to the education, social service, and public health systems instead of imprisoning more young people to reduce the purported spike in youth violence.<sup>18</sup>

Virginia’s political leadership at the time also warned of an increase in teen crime. Governor George Allen was quoted as cautioning that youth violence was “an evil menace unparalleled in our history.”<sup>19</sup>

In 1994, the General Assembly made several changes focused on the ability to charge, try, and sentence teenage offenders.<sup>20</sup> The minimum transfer age was dropped from 15 to 14.<sup>21</sup> A “once an adult, always an adult” provision was added so that youth transferred to Circuit Court for any crime, whether found guilty or not, remained under Circuit Court jurisdiction for all future charges.<sup>22</sup> Lastly, and significantly, the General Assembly gave Juvenile and Domestic Relations District Court judges more punitive sentencing options with the ability to sentence serious offenders to determinate sentences for up to seven years or until the age of 21.<sup>23</sup> This extended commitment became known as “juvenile life.”<sup>24</sup>

Despite these changes, policymakers and others in Virginia and around the country continued to express concern about violent youth. In Virginia, then Attorney General Jim Gilmore urged action by stating, “[i]f we sit idle now, all indications are that we will see a frightening increase in violent juvenile offenses in the near future.”<sup>25</sup> John Dilulio, then a professor at Princeton, also warned in 1995:

On the horizon . . . are tens of thousands of severely morally impoverished juvenile superpredators. . . .While the trouble will be greatest in black inner-city neighborhoods, other places are also certain to have burgeoning youth crime problems that will spill over into upscale central-city districts, inner-ring suburbs, and even the rural heartland.<sup>26</sup>

Governor Allen took note and created a commission focused on juvenile justice reform which issued a report in 1995.<sup>27</sup> The Commission’s report opened with a chilling quote from Adam Walinsky, Robert F. Kennedy’s former speechwriter and aide: “We have permitted the spread within our country of wastelands ruled not by the Constitution and lawful authority, but by the anarchic force of merciless killers. . . .We shrink in fear of teenage thugs on the streets.”<sup>28</sup> The report suggested that the crime wave could be curbed by severely punishing youth offenders.<sup>29</sup>

Around this same time, Virginia legislators commissioned their own studies of youth crime, one by the Joint Legislative and Audit Review Commission and the other by the Virginia Commission on Youth. Although the studies were not in agreement about the best policies to pursue,<sup>‡</sup> in 1996 the General Assembly made dramatic changes to the juvenile system that were far more severe than any of the proposed policies. The 1996 changes radically overhauled the system of trying youth as adults by significantly limiting the traditional role of juvenile court judges in the transfer process.<sup>30</sup> Specifically, these changes did the following:

- (1) Created “automatic” transfer for homicide and aggravated malicious wounding;<sup>§</sup>
- (2) Delegated to prosecutors the virtually unfettered authority to make transfer decisions when juveniles were charged with a wide range of felonies by (a) requiring prosecutors to establish nothing more than probable cause in a preliminary hearing, and (b) giving prosecutors authority to bypass a juvenile court’s adverse ruling on probable cause by seeking a direct indictment in Circuit Court; and,
- (3) Limited traditional judicial decision-making after a full, contested hearing to those remaining, less serious felonies upon a motion from the Commonwealth (see Table 1 for additional information).

These changes eliminated many checks and balances from the system and any requirement that factors beyond the original charge be taken into consideration in the vast majority of transfer cases.

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<sup>‡</sup> See later discussion of recommendations for policy change from Commission on Youth and Joint Legislative and Audit Review Committee.

<sup>§</sup> This category of transfer is also known as statutory or legislative exclusion or mandatory waiver. If a youth 14 years old or older is charged with murder or aggravated malicious wounding, a preliminary hearing is held in juvenile court. At the preliminary hearing there are minimal legal thresholds that must be met before the case is transferred to Circuit Court. These thresholds consist of the following findings: the fact that the youth is 14 or over, that there is probable cause the youth committed the crime, and that appropriate notice has been given to the youth and his/her parents.

## **Table 1: 1996 Changes to Transfer Law in Virginia**

### *Judicial Discretion Transfer § 16.1-269.1(A)*

- A prosecutor may ask a Juvenile and Domestic Relations District Court judge to transfer any child age 14 or older charged with a felony to Circuit Court.
- Juvenile and Domestic Relations District Court holds a fully contested hearing and considers evidence on among other factors the child's predicted amenability to treatment, age, physical and emotional maturity, seriousness of offense, mental health status, education level, and previous contact with the court system.
- The judge must decide by a preponderance of the evidence that the youth is not a proper person to remain within the juvenile court's jurisdiction, or whether he or she should be transferred to Circuit Court to be tried as an adult.
- Both the prosecutor and the youth have the right to appeal the judge's decision.
- **Change in the law: Gave prosecutors the right to appeal the judge's decision not to transfer a youth to Circuit Court.**

### *Automatic or Legislative Certification § 16.1-269.1(B)*

- A youth 14 years old or older charged with: (1) capital murder; (2) first or second degree murder; (3) murder by lynching; or (4) aggravated malicious wounding receives a preliminary hearing in Juvenile and Domestic Relations District Court before being automatically certified to Circuit Court.
- The preliminary hearing's only purpose is to verify the youth's age and determine whether "there is probable cause to support the charge; that notice has been given to the juvenile and the parents; and that the juvenile is competent to stand trial."
- The prosecutor may circumvent a juvenile court's failure to find probable cause in this instance by seeking a "direct indictment" in the Circuit Court.
- **Change in the law: Defined categories of crimes that must be transferred to Circuit Court. Mandatory transfer did not exist before 1996.**

### *Prosecutorial Certification § 16.1-269.1(C)-(D)*

- The prosecutor may ask the Juvenile and Domestic Relations District Court judge to certify any youth age 14 or over charged with any of the 12 listed felonies. The judge must certify the juvenile if probable cause is found during the preliminary hearing.
- The preliminary hearing's only purpose is to verify the youth's age and determine whether "there is probable cause to support the charge; that notice has been given to the juvenile and the parents; and that the juvenile is competent to stand trial."
- The prosecutor may circumvent a juvenile court's failure to find probable cause in this instance by seeking a "direct indictment" in the Circuit Court.
- **Change in the law: Gave prosecutors the power to try a juvenile as an adult based only on the crime charged, and also gave prosecutors the power to override a Juvenile and Domestic Relations District Court's finding of lack of probable cause.**

“The view that the juvenile population is by and large a hardened, violent criminal population” is false.

“Juvenile delinquents are not miniature adults, but young and immature adolescents whose criminal behavior is considered malleable.”

- *Joint Legislative Audit and Review Commission, 1996*

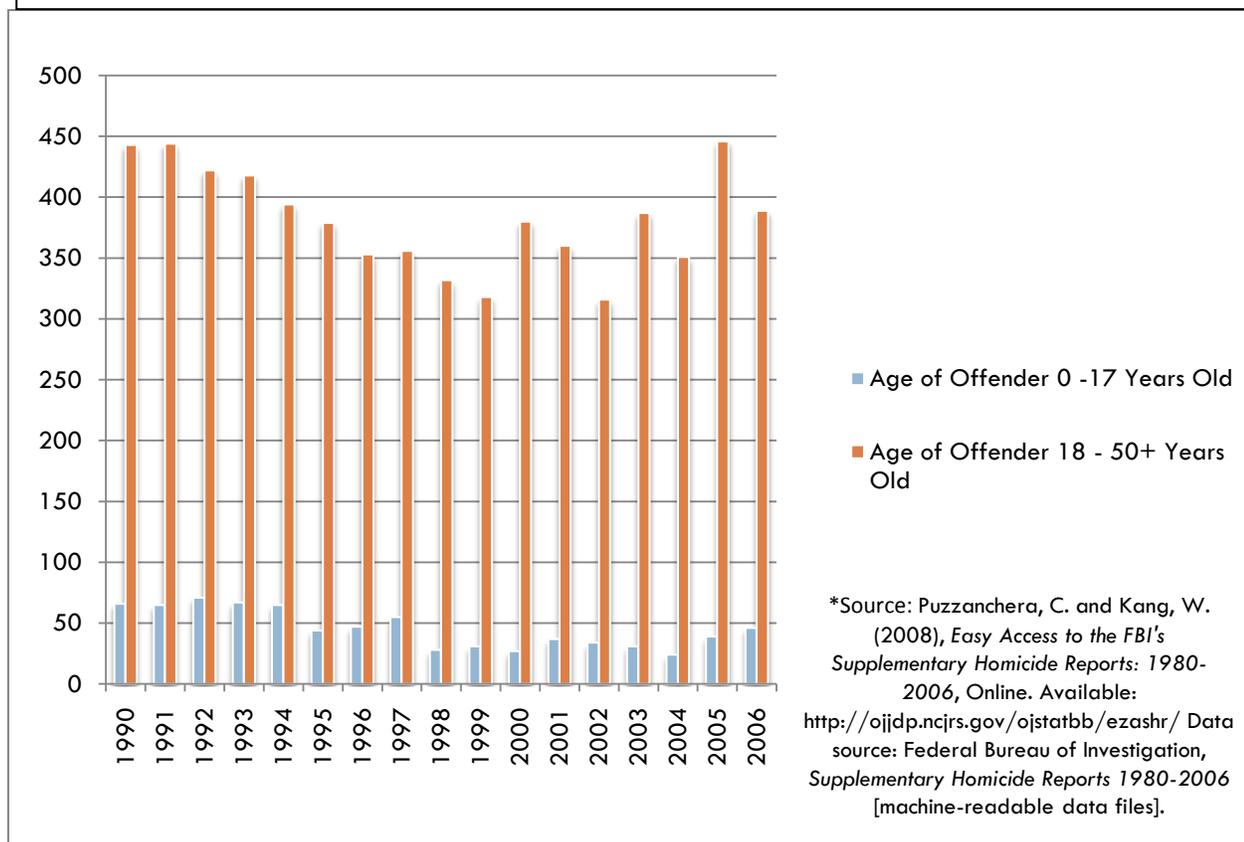
## Reality #1: The predicted explosion of youth violence used to justify sweeping changes to Virginia’s transfer laws never occurred.

The criminologists’, policymakers’, and media’s predictions in the 1990s of an overwhelming wave of violence committed by a new breed of young offender – the so-called “superpredator”– turned out to be largely untrue. Amid the claims of dramatically increasing numbers of marauding youth, juvenile justice professionals in Virginia were questioning their accuracy.<sup>31</sup> And as early as 1994, before the new laws and policies had gained a foothold, juvenile crime rates started to fall.<sup>32</sup> However, the system that was built based on these claims and fears remains intact.

To better understand the extent to which the claims of rising violence might have exaggerated or misstated what actually happened, it is worth dissecting some of the data from that time. Proponents of punitive changes to the juvenile system cited the statistic that there was a 277% increase in murder arrests from 1980 to 1993.<sup>33</sup> However, they neglected to note that this percentage was based on the total of 21 juvenile homicides statewide in 1980, which was an unusually low crime year.<sup>34</sup> In 1993, the number of homicides committed by Virginia teens rose to 67, admittedly a high number.<sup>35</sup> While any number of youth homicides is too high, this number pales in comparison to the 418 homicides committed by adults in Virginia that very same year.<sup>36</sup> It is also important to note that violent offenses such as murder, rape, robbery, and aggravated assault accounted for only 3% of all juvenile arrests in Virginia in 1993.<sup>37</sup> The perception that youth were responsible for the majority of violent crime was simply not true.

Homicide rates for youth quickly began to decline during the same time as the sensational reports of their rising. **Juvenile homicide rates declined from a high point of 71 in 1992 to 44 in 1995,<sup>38</sup> a decline that began before the drastic 1996 legislative changes and too soon for the 1994 changes to have much impact.** Overall youth arrest rates for violent crimes, after reaching a high point in 1995 began declining in 1996, the same year that the changes to the law were being debated and initially implemented.<sup>39</sup> In fact, University of Virginia scholar and expert on youth violence, Professor Dewey Cornell, concluded in 2006 that: “the rush to prosecute more juveniles as adults and to incarcerate them for longer periods had no discernible effect on juvenile crime. Studies that compared states before and after they changed their laws, or that compared states with different laws, found no deterrent effect and no effect on juvenile crime.”<sup>40</sup>

**Figure 1: Number of Homicides per Year in Virginia  
1990 – 2006**



Even in the midst of increased media reports and growing fear of youth crime, researchers and professionals in Virginia questioned the legitimacy of the claims. The bipartisan Joint Legislative Audit and Review Commission (“JLARC”), “the oversight agency of the Virginia General Assembly established to evaluate the operations and performance of state agencies and programs,”<sup>41</sup> undertook a study of the juvenile justice system at the behest of the General Assembly in 1995. JLARC’s two-part study found that:

- 29 out of every 30 youth were arrested for nonviolent offenses;<sup>42</sup>
- 19 out of every 20 youth at intake were arrested for nonviolent offenses;<sup>43</sup>
- 87% of nonviolent young offenders did not commit a violent felony within 3 years of release from the juvenile system;<sup>44</sup>
- 72% of youth convicted of a violent offense did not commit another violent felony within 3 years of release;<sup>45</sup> and,

- **Young offenders tried in Circuit Court were often placed in adult prisons upon conviction due to jurisdictional constraints “where the already remote prospect of rehabilitation is further reduced.”<sup>46</sup>**

JLARC concluded that its analysis of gathered data contradicted notions of a “juvenile superpredator,” stating, “the view that the juvenile population is by and large a hardened, violent criminal population” is false.<sup>47</sup> The JLARC study highlighted the fact that “juvenile delinquents are not miniature adults, but young and immature adolescents whose criminal behavior is considered malleable.”<sup>48</sup> Based on these findings, JLARC recommended several changes to the juvenile justice system focused on limiting the number of youth transferred and increasing rehabilitative options for youth. These recommendations included:

- Concurrent or expanded jurisdictional authority for juvenile courts to the age of 25;
- A broader range of sanctions available to judges;
- More opportunities for treatment, as opposed to incarceration, for youth; and,
- Increased use of community based services and treatment for nonviolent offenders.<sup>49</sup>

The General Assembly reached a compromise on these recommendations in 1995. The legislature adopted more punitive sanctions for young offenders while passing the Virginia Juvenile Community Crime Control Act (“VJCCCA”) “to establish a community based system of progressive intensive sanctions and services that correspond to the severity of the offense and treatment needs.”<sup>50</sup> Unfortunately the amount of funding available through the VJCCCA has been cut in half over the past ten years.<sup>51</sup>

Around the same time of these studies of the system, professionals in the juvenile justice community in Virginia were also questioning the validity of media and governmental claims and the push for punitive reform. For example, in 1994, six members of the Department of Youth and Family Services Board of Directors (the Department of Juvenile Justice’s predecessor) resigned citing “philosophical differences” with the administration.<sup>52</sup> Then-board member Franklin Slayton said he was resigning because “the administration ha[d] focused on the worst of the worst.”<sup>53</sup> In his opinion, the leadership was **“copping out . . . on the question of what to do with the large number of juveniles [who] can be turned around and rehabilitated.”**<sup>54</sup> Roanoke County Juvenile and Domestic Relations District Court Judge Philip Trompeter also felt **“there [was] just a lot of hype and media hysteria about how violent and nasty kids [were] . . . kids [were] really being vilified.”**<sup>55</sup>

Leesburg juvenile attorney and spokesperson for Citizens United for the Rehabilitation of Errants, John Flannery, echoed concerns that the frightening statistics used to justify sweeping changes in juvenile justice law were flawed, referring to them as “cooked statistics.”<sup>56</sup>

**Dilulio’s “theories on superpredators were utter madness.”**

- Franklin E. Zimring, University of California at Berkeley law professor, 2001

The concerns raised by these and other juvenile justice professionals over the validity of the claims were born out. The dire predictions made in the mid-1990s in Virginia and elsewhere have proven to be wrong. In 2001, University of California at Berkeley law professor Franklin E. Zimring was one of many people publicly debunking the “juvenile superpredator” theory. He told the *New York Times* “[John Dilulio’s] prediction wasn’t just wrong, it was exactly the opposite.”<sup>57</sup> Dilulio’s “theories on superpredators were utter madness,” Zimring said.<sup>58</sup> **Dilulio himself denounced his earlier conclusions, telling the *Times* in the same article that he “would have shouted” for crime prevention rather than increased incarceration if he “knew then what [he] knows now.”<sup>59</sup>**

The spike in youth crime in the 1980s and early 1990s that gave rise to the dire predictions is now largely attributed “to economic disparity, adult drug dealers using youth as pawns, and, most importantly, easy access to guns,” not the proliferation of violent, unfeeling, immoral youth.<sup>60</sup> While claims persist that youth crime rates decreased as a result of harsh transfer laws, these theories have been debunked by the majority of experts, who instead attribute the decrease in youth crime rates to smart policies that addressed these underlying issues. Dewey Cornell, a nationally renowned expert on youth violence, points to law enforcement efforts such as community policing, reducing crack dealing and access to guns, increased mental health efforts, mentoring, and youth conflict-resolution as the key factors contributing to the crime rate decline.<sup>61</sup> Other respected researchers like Amy Vorenberg, professor of law at Franklin Pierce Law Center, also point to similar societal shifts as the cause for declining crime rates:

Theories abound about the cause of the downward decline of juvenile crime in the mid-1990s and include a more robust job market, the growth of community policing, market and policy changes dealing with illegal drugs and firearms, and even the legalization of abortion twenty years earlier. The cause and effect of the more punitive laws do not appear to be a leading factor in the decline, as the shift in the law came after the crime rate had already stabilized and begun a downward trend.<sup>62</sup>

In other words, at the end of the last century, Virginia redesigned its juvenile transfer system in response to predictions of a crime wave that we now know never took place. The result of this redesigned transfer system is that lower level offenders and young people unnecessarily face adult courts, adult convictions, and adult prison time. **It is time for legislators to review and recalibrate our transfer system in light of this information.**

The cause and effect of the more punitive laws do not appear to be a leading factor in the decline, as the shift in the law came after the crime rate had already stabilized and begun a downward trend.

- Amy Vorenberg, Franklin Pierce Law Center law professor, 2009

## **CHAPTER TWO: VIRGINIA'S TRANSFER LAWS ARE OVERLY BROAD**

**Myth #2:** Virginia only transfers the most violent youth to Circuit Court for adult prosecution and sentencing.

Legislators drastically reformed juvenile justice laws in the 1990s with the stated goal of protecting the public and nonviolent incarcerated youth from the most serious and violent youth offenders. With regard to public safety, the aim of the changes of the 1990s “was to ‘incapacitate’ violent, repeat offenders, keeping them off the streets during crime-prone age years with longer sentences, - and making room for them in prison by diverting from prison less serious criminals with alternative punishments.”<sup>63</sup> Governor Allen’s Commission on Juvenile Justice stated that the intent of such changes was to “provide for the safety of the public”<sup>64</sup> and also to “separate the most violent and chronic juvenile offenders from other juvenile delinquents by trying and sentencing them as adults and confining them in separate juvenile facilities.”<sup>65</sup> While this may have been the stated intention of the legislative changes, current statistics suggest a very different outcome.

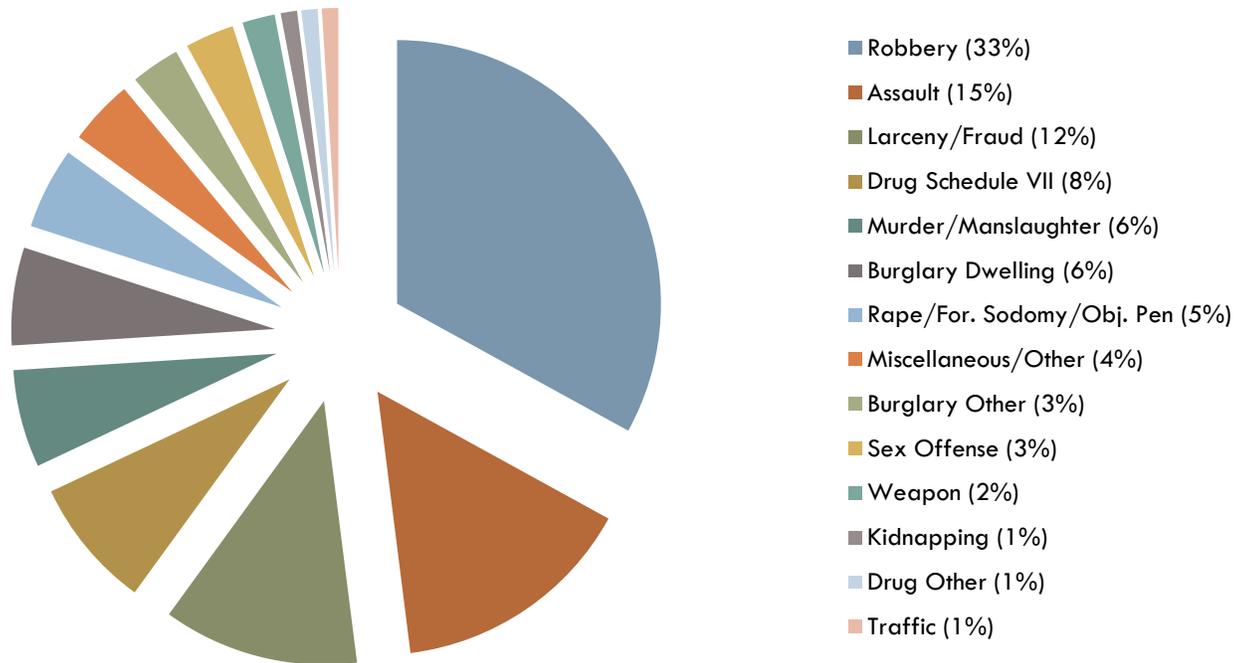
**Reality #2: The current transfer system is over-inclusive. Chronic, violent youth offenders are not the only youth transferred to adult courts.**

While legislators maintained that they wanted to punish and incarcerate the most violent and chronic young offenders, unless the case is one where the juvenile court judge is making the transfer decision, a youth’s history does not have to be taken into account. The legislative changes of the mid-1990s appear to have ensnared many youth beyond those that policymakers claimed were the focus of the reforms.

Recent data from the Virginia Criminal Sentencing Commission (“the Sentencing Commission”) suggests that the most violent youth offenders are not the majority of those transferred in Virginia (see Figure 2). The vast majority of youth transferred to Circuit Court were charged with either robbery or non-sexual assault,<sup>66</sup> very serious charges which can often cover not so serious behavior and over which prosecutors have transfer discretion. These two charges alone constitute nearly half (48%) of all youth convicted as adults between 2001 and 2008.<sup>67</sup> Youth charged with homicide or sexual assault made up only 6.0% and 8.0% respectively of the transferred population between 2001 and 2008.<sup>68</sup> In fact, nonviolent drug offenders, who get transferred as a result of a judicial not a prosecutorial determination, made up 9.0% of all youth transferred, more than youth charged with either homicide or sex offenses.<sup>69</sup>

## Figure 2: Juveniles Convicted in Circuit Court FY 2001-2008 by Most Serious Offense

\*Source: Meredith Farrar-Owens, Virginia Criminal Sentencing Commission, Juveniles Convicted in Circuit Court FY2001-FY2008, Presentation to the Virginia State Crime Commission (June 25, 2009).

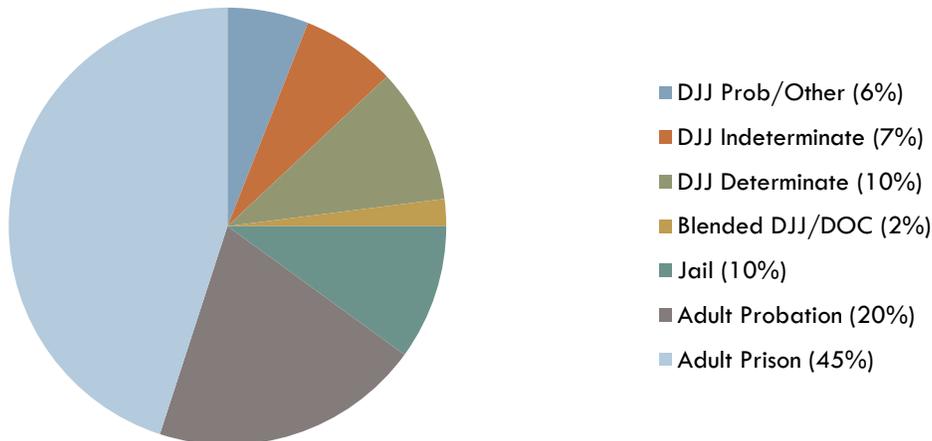


The Sentencing Commission's data also reveals that many youth receiving adult convictions do not even receive sentences placing them in adult prisons. Specifically, the Sentencing Commission data shows that over half of the young offenders convicted of a felony by a Circuit Court (i.e., charged and convicted as adults) between 2001 and 2008 were not even sentenced to serve time in adult prison (see Figure 3).<sup>\*\*70</sup> Instead, **1 in 5 of those youth was put directly on probation** and did not serve any time post trial and an additional 1 in 5 received pure juvenile sentences.<sup>71</sup> While those youth were protected from the consequences of serving significant time in an adult prison, an adult felony conviction on their record will be a permanent barrier to future opportunities and rehabilitation.

<sup>\*\*</sup> It is possible and even likely that some portion of these youth received sentences that included some suspended adult prison time.

### Figure 3: Youth Convicted in Circuit Court FY 2001-2008, by Type of Disposition

\*Source: Meredith Farrar-Owens, Virginia Criminal Sentencing Commission, Juveniles Convicted in Circuit Court FY2001-FY2008, Presentation to the Virginia State Crime Commission (June 25, 2009).



Given that Virginia has generally high incarceration rates and a reputation for not being “soft” on crime, these sentencing decisions suggest that Circuit Court judges, once provided the facts and information about the offender and not just the offense, are concluding that these youth are not in fact the “worst of the worst” and can be handled in the juvenile or probation systems.

The statistics cited above, raise serious questions about whether the transfer system created in the mid-1990s is being reserved for the intended population – Virginia’s most serious violent and chronic juvenile offenders – or, as appears to be the case, used for a much broader category of youth. The data also raises the question: **If many of the youth tried as adults receive juvenile sentences or just probation, don’t we need a better system of distinguishing which juveniles truly require trial and treatment as adults, and which do not?**

In addition to the Sentencing Commission data, there is evidence that transfer laws disproportionately impact minority youth. Currently, a disproportionate number of African-American males are transferred into adult prisons.<sup>72</sup> In 2005, African-American youth represented 73% of youth entering the adult corrections system in Virginia.<sup>73</sup> While this percentage alone is disturbing, it is equally distressing to note that African-American youth consistently represent a disproportionate percentage of the population at all points in the juvenile justice process: 44.6% of youth at intake and 66.1% of youth committed to the Department of Juvenile Justice, compared to around 20% of the total youth population.<sup>74</sup> It is clear in examining these numbers that African-Americans represent a higher percentage of youth as punishment increases throughout the juvenile justice system. The impact of current transfer policy could therefore raise questions about fairness and potential bias.

Although robbery is a very serious crime, Virginia's robbery laws cover a wide range of behavior. Specifically, Virginia's common law definition of robbery is "the taking, with intent to steal, of

According to the most recent data available, African American youth in Virginia represented:

- 20% of the entire youth population
- 44.6% of youth at intake
- 55.0% of youth at detention
- 66.1 % of youth at commitment
- 73 % of youth transferred to the adult system

the personal property of another, from her person or in her presence, against her will, by violence or intimidation."<sup>75</sup> **Under this definition, a prosecutor could certify to Circuit Court both the youth who steals a classmate's lunch money through a threat of harm and the youth who robs a person of all his valuables at gun-point.** While these youth and their behaviors are very different, prosecutors can certify both without reference to any more information than the criminal charge or any meaningful judicial review or oversight.

Malicious wounding is another serious charge with a broad definition.<sup>††</sup> The Virginia code defines it as "maliciously shooting, stabbing, cutting, or wounding any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill."<sup>76</sup> This too is a charge over which the prosecutor has certification

authority. A person in a school fight who lands a lucky, nose-breaking punch, or a young person who stabs another person, might both be charged with malicious wounding. Thus, there is, like robbery, a broad array of young people who can face adult charges and confinement without judicial review or oversight to sort out the most serious of these charges from those that are more juvenile in nature.

Virginia's accomplice liability laws permit less active participants in a crime to be charged and convicted as if they committed the full crime themselves.<sup>77</sup> Given the fact that many youth offenses are committed in groups due to youth's susceptibility to peer influence, it is important to at least consider the differing roles in a crime that individual youth may play. However, for those charges where prosecutors make the final decision, there is no requirement that they consider this or any other factor.

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<sup>††</sup> Malicious wounding is one of the crimes that falls under the label "assault" in Table 3 and so is included in the 15% of the crimes for which youth were convicted in Circuit Court between 2001 and 2008.

### ADULT PRISON OR PLEA

Two weeks after the incident, Edgar Dulaney and his wife were notified by the prosecutor's office that it would seek to try their son as an adult. He said he was later told his son faced 25 years in an adult prison.

Knowing his son's gentle demeanor, age and that he had never been in trouble before, Dulaney said he didn't want him in an adult prison. So when Rafferty recommended he plead guilty instead, Dulaney said he saw no alternative despite complete confidence in his son's innocence.

"He was just 15 then. I said, 'We'll just take the deal and then I'll fight it after taking the plea.'"

On Aug. 22, 2007, the boy, who by then had turned 16, pleaded guilty to rape and breaking and entering. In exchange, prosecutor Olsen dropped an abduction charge and the possibility of adult prison but did ask that he be required to undergo sex-offender treatment and be placed on the sex-offender registry.

Teens convicted of sex offenses as juveniles are not automatically required to register as sex offenders. By law, the prosecutor must request it and a judge approve it.

On Sept. 19, 2007, the boy was given an "indeterminate" sentence and ordered both to undergo sex-offender treatment and register as a sex offender.

He is currently housed in a Department of Juvenile Justice facility.

*\*Pamela Gould, Free Lance Star, Feb. 5, 2009.*

Anecdotal evidence and the study done by the Crime Commission also reveal that another problem evident in the transfer system caused by the lack of judicial oversight is that the threat of transfer is used as a plea bargaining tool.<sup>78</sup> The use of transfer in this way raises two concerns. First, if these youth can be appropriately dealt with by the juvenile court and Department of Juvenile Justice at the end of a case then the threat of transfer should not be raised in the first place. Second, youth may be pleading guilty when they are in fact not guilty only to avoid the severe penalties associated with trial in adult court. The real ramifications of this practice were discussed at length in a Fredericksburg Free Lance Star article that ran on February 5, 2009 (see box on left).<sup>79</sup> The article discusses the case of a youth who plead guilty to a crime he did not commit in order to avoid trial as an adult.<sup>80</sup> He was sent to a juvenile correctional center, two months later the "victim" recanted, and now he is registered as a sex offender for life.

## CHAPTER THREE: TRYING YOUTH AS ADULTS MAKES COMMUNITIES LESS SAFE

**Myth # 3:** Trying youth as adults protects the public by reducing recidivism.

One public safety prevention plan from the mid-1990s likened harsher punishment for youth offenders to mandatory seatbelt use as a way to protect the public.<sup>81</sup> The advocates of this plan and others believed that incarcerating youth in the adult prison population was not only reasonable, but also necessary to protect Virginians.<sup>82</sup> However, the research on the

effects of trying and treating youth as adults suggests that this was a faulty premise, and that increased use of transfer may jeopardize rather than enhance public safety.

**“Transferring juveniles to the adult justice system generally increases, rather than decreases, rates of violence among transferred youth.”**

- Angela McGowan, et al., *Centers for Disease Control and Prevention, 2007*

### **Reality #3: Youth tried and sentenced as adults are more likely to reoffend than youth who remain in the juvenile justice system.**

Contrary to what many transfer policy supporters believe, “transferring juveniles to the adult justice system generally increases, rather than decreases, rates of violence among transferred youth.”<sup>83</sup> Researchers in Virginia began to note the inherent problems with sending youth to adult correctional facilities as early as the 1980s. Virginia-based studies in 1983 and 1984 on jailing youth with adults found:

- Jailed youth were at greater risk for suicide;
- Jailed youth were at greater risk of physical, sexual, and verbal assault;<sup>84</sup>
- The experience did not benefit or rehabilitate the youth in a meaningful way, and;<sup>85</sup>
- The experience was likely to encourage future delinquent or criminal behavior.<sup>86</sup>

Decades later, researchers are still strongly opposed to incarcerating youth with adults. The Centers for Disease Control and Prevention’s (“the CDC”) 2007 *Guide to Community Preventive Services* reviewed the published scientific evidence concerning the effects of transfer laws on preventing or reducing violence.<sup>87</sup> The study concluded that:

[T]ransfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system. **To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good.**<sup>88</sup>

In August 2008, the Bush administration's Office of Juvenile Justice and Delinquency Prevention ("OJJDP"), a division of the United States Department of Justice, released a research report on the general and specific deterrent effects of transferring juveniles to adult criminal court.<sup>89</sup> The report reached conclusions similar to those of the CDC.<sup>90</sup> Specifically, the OJJDP found "the bulk of the evidence suggests that transfer laws, at least as they are currently implemented and publicized, have little or no general deterrent effect," meaning the broad youth population is not discouraged from participating in criminal activity by the threat of transfer.<sup>91</sup> The report also found that individual youth offenders transferred to adult court, particularly violent offenders, were more likely to re-offend after release than similarly situated youth who had been tried and treated as juveniles.<sup>92</sup> The report concluded that, "the extant research provides sound evidence that transferring juvenile offenders to the criminal court does not engender community protection by reducing recidivism. On the contrary, transfer substantially increases recidivism."<sup>93</sup>

Although Virginia has not conducted similar longitudinal studies on recidivism rates among young offenders who are treated as juveniles and those who are treated as adults, nothing suggests that the outcomes would be different here than in those states where studies have been conducted. In fact, treatment programs within Virginia's juvenile correctional centers like the Department of Juvenile Justice's sex offender treatment program show significant promise with regard to reducing recidivism rates. Of the 513 sex offenders released from Virginia juvenile correctional centers from 2002 to 2006 only 13 had been rearrested and convicted of a new sex offense in 2007.<sup>94</sup>

The increased violence and re-offending among youth confined in adult facilities is likely due to the increased violence to which these youth are exposed once imprisoned.<sup>95</sup> Consistent with the Virginia research in the early 1980s, recent national studies show that youth in adult facilities are more likely to commit suicide than youth in juvenile facilities<sup>96</sup> and are at greater risk of being raped or sexually assaulted.<sup>97</sup> **In fact, "in terms of risk for sexual assault while in confinement, youth incarcerated in adult prisons and jails are probably at the highest risk of all" and represented "7.7% of all victims of substantiated violence perpetrated by people confined in adult jails and prisons ... in 2005."**<sup>98</sup>

In addition to the increased exposure to violence and victimization, the lack of educational and rehabilitative services available in prisons also leads to increased recidivism among youthful offenders.<sup>99</sup> As we describe in greater detail below, prisoners in Virginia Department of Corrections' (adult) facilities, including juvenile offenders, lack access to adequate rehabilitative interventions such as education, vocational training, substance abuse treatment, aggression management, and psychological services.<sup>100</sup> Youth can be exposed to similar circumstances if held in an adult jail pretrial. Take for example, the story of a fifteen year old boy held in the Norfolk jail pending his trial for mugging.<sup>101</sup> During his lengthy time in the facility, not only was he kept in a cell with older inmates

"The extant research provides sound evidence that transferring juvenile offenders to the criminal court does not engender community protection by reducing recidivism. On the contrary, transfer substantially increases recidivism."

- Richard Redding, Office of Juvenile Justice and Delinquency Prevention, 2008

who harassed him, but he was also essentially denied an education. The young man was only “given high school equivalency books to study” and periodic meetings with an instructor.<sup>102</sup> Ultimately he was acquitted but his educational future was in jeopardy.<sup>103</sup> Conversely, the Department of Juvenile Justice makes such services available, and even required, for most juvenile offenders including those between the ages of 18 and 21.<sup>104</sup>

Given the violence and the almost complete absence of rehabilitative opportunities, it should not be surprising that recidivism rates are higher for youth confined in adult facilities.

## CHAPTER FOUR: YOUTH ARE DIFFERENT

**Myth #4:** The juvenile offender: “Once a criminal, always a criminal.”

Fear was not the only driving force behind the changes to transfer laws in the mid-1990s. Policy makers also asserted that offenders, in particular young offenders, were incapable of rehabilitation and would continue their criminal behavior if not locked up. A federal prosecutor at the time stated, “while second and third chances for juveniles once entailed little risk to the public, with the new young killers, there is no room for error.”<sup>105</sup>

A recent *Virginian-Pilot* article on juvenile crime in the Hampton Roads area<sup>106</sup> elicited on-line comments that suggest many Virginians still mistakenly believe young offenders cannot be, or should not be, rehabilitated.<sup>107</sup> Many commentators thought that a teenager who commits an “adult crime” should do the “adult time.”<sup>108</sup> One representative post said: “Old enough to do the crime is old enough to do the time [in my opinion] so lock them up in adult prisons or execute them if they murder someone in the course of the crime. I can live with it.”<sup>109</sup> Another suggested the Commonwealth incarcerate certain youth offenders for life: “Steal a Gun: Life in Jail! Use a Gun in a Crime: Life in Jail! Minors in possession of Guns: Life in Jail! Gang membership: Life in Jail! . . . Without strong medicine this problem will only get worse.”<sup>110</sup>

**Reality #4: Research confirms that teenagers are in the midst of significant developmental change and are not just smaller adults. Due to their developmental stage they act out for different reasons than adults, have less control over their environment, and are generally more impulsive. But they are also much more likely to outgrow this behavior and respond positively to rehabilitative efforts.**

“Our willingness to treat [youth as young as 14] as adults when they commit crimes, and expose them to the same punishments as adults when they are convicted, is inconsistent with virtually every other decision [society] make[s] about teenagers under federal and state law.”

- Laurence Steinberg, adolescent psychologist, 2009

We intuitively and from experience know that children are different from adults. **Virginia law consistently reflects society's understanding that people under 18 generally lack the mental maturity to make important decisions.** Absent parental consent in limited cases, a minor in Virginia cannot:

- Buy or use legal tobacco products;<sup>111</sup>
- Buy, use, possess, or serve alcohol;<sup>112</sup>
- Get a tattoo;<sup>113</sup>
- Marry;<sup>114</sup>
- See an "R" rated movie or movie preview;<sup>115</sup>
- Vote; or,<sup>116</sup>
- Use a cell phone – even with a hands-free device – while driving on a highway.<sup>117</sup>

In addition to these restrictions on the behavior of youth, Virginia law places significant burdens on a youth seeking emancipation in order to be treated as an adult. The process is a formal one that requires the youth to be 16 years old or older, the filing of a petition in the Juvenile and Domestic Relations District Court, the appointment of a Guardian ad Litem to represent the child's best interests, and the appointment of counsel for the parents.<sup>118</sup> An order declaring the youth emancipated will only be entered after a hearing where "it is found that (i) the minor has entered into a valid marriage, whether or not that marriage has been terminated by dissolution; or (ii) the minor is on active duty with any of the armed forces of the United States of America; or (iii) the minor willingly lives separate and apart from his parents or guardian, with the consent or acquiescence of the parents or guardian, and that the minor is or is capable of supporting himself and competently managing his own financial affairs."<sup>119</sup>

**In other words, there is a significant discrepancy between what it takes to have adult civil rights and what it takes to be treated as an adult for criminal purposes. In the former, legislators require abundant caution and judicial oversight. In the latter, nothing more than a criminal charge is required.** Put another way, "our willingness to treat [youth as young as 14] as adults when they commit crimes, and expose them to the same punishments as adults when they are convicted, is inconsistent with virtually every other decision [society] make[s] about teenagers under federal and state law."<sup>120</sup>

#### **FIXED VERSUS TRANSITIONING IDENTITY AND IDEALS**

Widely accepted and longstanding theories of psychological and cognitive development during adolescence support the theory that youth are not small adults but still forming a sense of identity. Erik Erikson, a well known and well respected developmental psychologist and psychoanalyst, laid out a widely accepted theory on human social development which explicitly carved out adolescence as a **"distinct period of confusion during which identity and ideals are still being formed."**<sup>121</sup> Erikson described the struggles of this period as, "[in] their search for a new sense of continuity and sameness, which must now include sexual maturity, some adolescents have come to grips again with crises of earlier years before they can install lasting idols and ideals as guardians of a final identity."<sup>122</sup> In describing the journey youth must make as they establish their identity, Erikson found it was not uncommon for a youth to rebel or "run away in some form or another" from societal norms.<sup>123</sup> **However, he noted that this was a transitory period for youth and these behaviors were easily changed, "if they are diagnosed and treated correctly, seemingly psychotic and criminal incidents do not have the same fatal significance which they have at other ages."**<sup>124</sup> In the context of Erikson's research and thesis, harsh adult transfer policies do the dual harm of misunderstanding juvenile behavior on the front end as a

manifestation of a fixed identity and set of ideals, and on the back end, exposing a child who is in the midst of shaping his identity and ideals to extremely harmful adult influences and potential trauma.

The portion of the brain that controls reasoning, impulse control, and long-term decision-making is not fully developed until a young person is in their 20s.

- American Psychological Association, 2005

### JUDGMENT AND DECISION MAKING

Other studies demonstrate additional differences between youth and adults in judgment and decision-making.<sup>125</sup> These differences boil down to several key facts: **“adolescents, as compared with adults, are more susceptible to influence, less future oriented, less risk averse, and less able to manage their impulses and behavior, and that these differences likely have a neurobiological basis.”**<sup>126</sup> The broad conclusion based on these findings is that **“juveniles may have diminished decision making capacity compared with adults.”**<sup>127</sup> In addition to these neurobiological differences, youth, often due to the constraints placed upon them by societal norms and laws, are in less control of their environment. In other words, youth “lack the freedom that adults have to extricate themselves” from a situation that could lead to criminal activity.<sup>128</sup> This is not to say young offenders should not be held responsible for their actions. Instead, the innate differences between youth and adults should be a critical factor in determining and administering the appropriate sentence for a young offender.

### BRAIN DEVELOPMENT

More recent breakthroughs in neuro-science - brain imaging studies and the resulting understanding of brain functioning - correspond to the long-standing findings of psychologists. Brain imaging studies reveal that the very area of the brain responsible for the differences we see in behavior between youth and adults, the frontal lobe, is not fully developed in adolescence.<sup>129</sup> Indeed, the portion of the brain that controls reasoning, impulse control, and long-term decision-making is not fully developed until a young person is in their 20s.<sup>130</sup> As preeminent adolescent psychologist and professor of psychology at Temple University, Dr. Laurence Steinberg says, “anyone who has raised a teenager, taught a teenager, counseled a teenager, or been a teenager” knows they seek instant gratification and peer approval, regardless of the risks to themselves or others, much more than adults.<sup>131</sup>

Young people can and often do “outgrow” impulsive and risky behavior as their brains mature. Dr. Steinberg recently explained to Congress that the areas of the brain that “puts the brakes on impulsive behavior” mature as children age.<sup>132</sup> Indeed, “studies show that more than 90% of adolescents who commit crimes – even very serious crimes – cease their criminal behavior by the time adolescence has ended.”<sup>133</sup> At least until late adolescence, “individuals’ values, attitudes, beliefs, and plans are likely to be tentative and exploratory expressions, rather than enduring representations of personhood.”<sup>134</sup> This is a reflection of the major physical changes going on in the human brain during this time. “One of the most exciting discoveries from recent neuroscience research is how incredibly plastic the human brain is.”<sup>135</sup> This is in direct contradiction to earlier beliefs that the brain was done growing and behaviors were set at young ages.<sup>136</sup> Dr. Jay Giedd, a neuroscientist at the National Institute of Mental Health, stated, “now we realize that isn’t true; that even throughout childhood and even the teen years, there’s enormous capacity for change.”<sup>137</sup>

## APPLICATION OF THESE PRINCIPLES IN VIRGINIA'S CORRECTIONAL SYSTEMS

While each provide secure, barbed wire surrounded, locked facilities, the greatest differences between the Virginia Department of Juvenile Justice (“DJJ”) and the Virginia Department of Corrections (“DOC”) lie in each Department’s approach to rehabilitation and reintegration. DJJ’s approach, for example, “begin[s] with the premise that planning for release starts at intake.”<sup>138</sup> DJJ residents can access substance abuse and mental health treatment as well as milieu model therapy and “life skills” programs almost immediately and throughout their commitment.<sup>139</sup> Thus, DJJ rehabilitation programs are designed to help each young offender mature into a stable, productive, and law-abiding citizen well before he returns to his community. The focus of these programs acknowledges the unique potential for change which youth have. DOC “life skills” programs, on the other hand, are not available until the year before the prisoner is released.<sup>140</sup>

DJJ also provides consistent age-appropriate therapy to all inmates on a mandatory or “as-needed” basis. DJJ therapists specialize in youth offender rehabilitation because its population is comprised exclusively of people under age twenty-one.<sup>141</sup> Services provided to a young offender in DOC are not likely tailored to youth or reentry, since the average DOC inmate is twenty years older and bound to serve approximately sixteen years longer than the average DJJ inmate.<sup>142</sup> Substance abuse and mental health treatment in DOC is infrequent and often ineffective. For example, DOC reports that approximately 80% of its 35,000 inmates attribute their criminal behavior to substance abuse problems but only 1,200 receive appropriate intervention services.<sup>143</sup> **Put another way, the DJJ offers real opportunities for a juvenile offender to change and move past their delinquent behavior while the DOC offers few such opportunities.**

In our representation of youth who have been tried as adults, we have seen young people transform themselves through their involvement in the opportunities available at DJJ. Many of our clients have been able to gain high school diplomas, college credits, work experience, vocational training, and therapeutic services including aggression management and substance abuse prevention while at DJJ. These youth make great strides towards rehabilitation and better their chances for becoming productive members of their community upon release. Unfortunately, we have also seen clients transferred to DOC where their opportunities to participate in such skill building and rehabilitative programs end.

While the “adult time for adult crime” notion sounds good, it does not comport with what we know about child and adolescent development, and, as described in section three, leads to negative outcomes for both youth and their communities.

Throughout childhood and even the teen years, there’s enormous capacity for change.

-Dr. Jay Geidd, neuroscientist at the National Institute of Mental Health, 2002

## **CHAPTER FIVE: VIRGINIA JUVENILE JUSTICE PROFESSIONALS SUPPORT REFORM**

**Myth #5:** The current system has been in place for nearly fourteen years, it must be working fine.

**Reality #5: The majority of professionals who best understand the current system's mechanics and consequences support reform.**

Most professionals working in the juvenile justice system believe its goal should be balancing rehabilitation and punishment and that judges should have greater decision-making power in the transfer process.

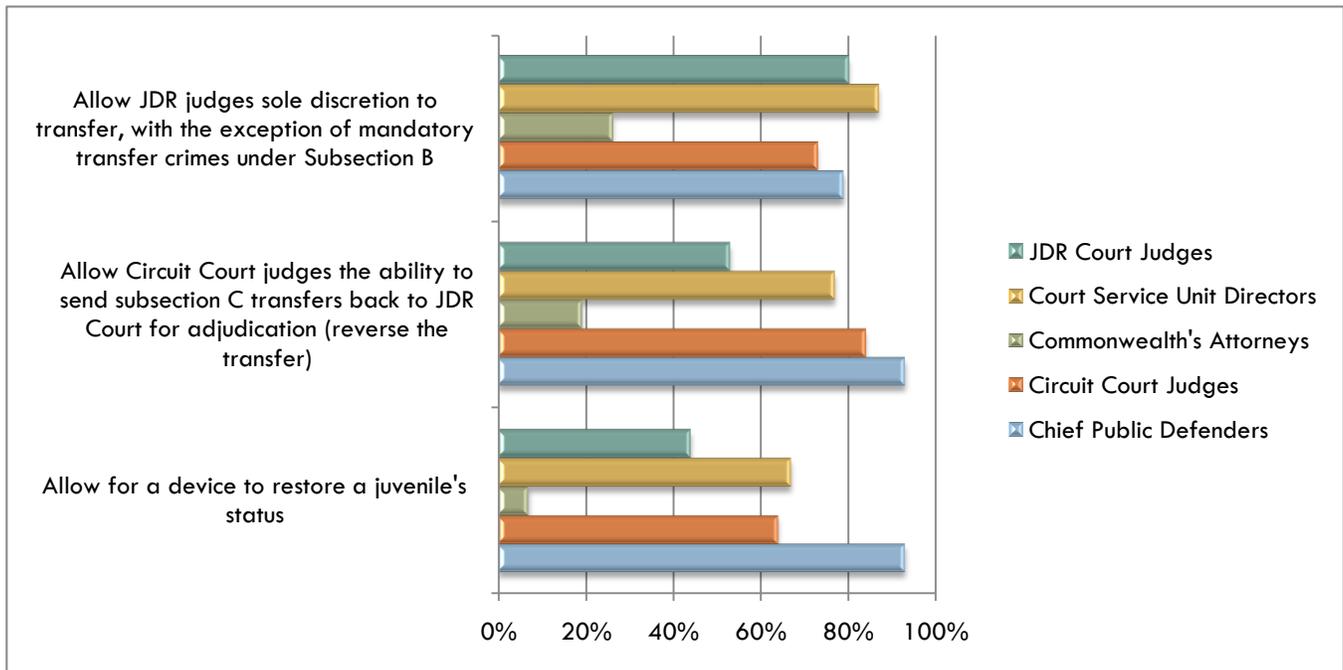
A recent study found that after 14 years of experience with this current system, juvenile justice professionals believe that change is necessary. In 2006, the Crime Commission conducted a two-year study of Virginia's juvenile justice system.<sup>144</sup> This study is ongoing, but is noteworthy because it now focuses on youth transfer and certification to Circuit Court.<sup>145</sup> The completed portion of the Crime Commission study includes a survey of Chief Public Defenders, Circuit Court judges, Commonwealth's Attorneys, Court Service Unit Directors, juvenile court judges, and the Director of the DJJ.<sup>146</sup> **The survey results mirror similar surveys completed in 1994 and 1996. In the current survey, the majority of all groups, except Commonwealth's Attorneys,<sup>††</sup> favored giving Juvenile and Domestic Relations District Court judges sole discretion to transfer youths charged with crimes other than those defined in Va. Code § 16.1-269.1(C).<sup>147</sup> The same groups and the Director of the Department of Juvenile Justice favored granting Circuit Court judges the authority to reverse the transfer of juveniles certified to Circuit Court under § 16.1-269.1(D).<sup>148</sup>**

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<sup>††</sup> 2008 survey of 57 Commonwealth's Attorneys revealed the following attitudes towards reform: 74% oppose giving Juvenile and Domestic Relations District Court judges sole discretion over transfer decisions not mandated by statute; 81% oppose allowing a circuit Court judge to reverse a transfer decision; only 7% oppose a system that adheres to the "once an adult, always an adult" approach to justice. (Virginia State Crime Commission, Transfer and Certification of Juveniles, presentation to Virginia State Crime Commission (June 25, 2009)).

### Figure 4: Results of 2008 Survey of Juvenile Justice Professionals by Percentage of Respondents Favoring Policy Proposals

\*Source: Virginia State Crime Commission, *HJR 113 (2008) Final Report: Study of Virginia's Juvenile Justice System*, H. Doc. No. 12, at 1 (2009).



While we might expect that defense attorneys and Commonwealth’s Attorneys would have different views on who is the most appropriate decision maker in transfer cases, it is noteworthy that Court Service Unit Directors strongly support expanding judicial authority. Court Service Unit Directors are public safety officers who, in many ways, are neutral participants in the process and most concerned with what will protect the public and be rehabilitative for the youth. Their strong support for expanding the role of judges should send a clear signal to legislators that the proposal to expand judicial authority warrants their close attention.

It is also significant that these sentiments, after nearly fourteen years of experience with the law, echo legislative survey results from the 1990s. In 1996, the Commission on Youth conducted its first comprehensive review of the juvenile justice system since 1977.<sup>149</sup> The Commission conducted a two-part survey on juvenile justice reform. The first part of the survey, which focused on transfer policies, was sent to juvenile justice professionals.<sup>150</sup> Specific responses of note to that part of the survey include: 68% of juvenile justice respondents opposed giving the Commonwealth’s Attorney sole discretion to transfer all youth charged with felonies to adult court;<sup>151</sup> 91% of **Circuit Court judges believed their own courts**

**were not the proper venue to handle all juvenile felony charges; and 55% of Circuit Court judges “felt that their pre-bench training in juvenile law, child development, and community services was inadequate to prepare them to handle all juvenile felony cases.”**<sup>152</sup> The second part of the survey included the opinions of 811 randomly selected Virginians.<sup>153</sup> Overall responses to both surveys revealed Virginians favored a rehabilitative focus for the juvenile justice system rather than a punitive focus.<sup>154</sup> **Eighty percent of Virginians said judges, not prosecutors, should decide whether to try a young person as an adult.**<sup>155</sup> The 1996 survey produced 55 recommendations for improving Virginia’s juvenile justice system, seven of which focused specifically on how to appropriately deal with serious juvenile offenders.<sup>156</sup>

## RECOMMENDATIONS FOR REFORMING VIRGINIA'S TRANSFER SYSTEM

When Virginia “reformed” its juvenile transfer system in 1996 it did so to respond to an anticipated wave of cold-blooded and violent youth. That crime wave never happened, and in fact youth crime was falling even before the 1996 legislative changes were implemented. However, those dramatic changes to the transfer system remain in place. Given the research that shows the negative outcomes associated with trying and treating youth as adults and the Virginia statistics which suggest that many youth in Virginia unnecessarily receive adult felony convictions, the Crime Commission study will hopefully provide the impetus necessary to reconsider the 1996 changes and recalibrate our transfer system in light of what we have learned since their passage. As Virginia goes down this path, it will not be alone.<sup>§§</sup>

As policy makers reconsider the changes of the mid-1990s to our transfer system, current research, feedback from court professionals, statistics and case stories all support the following recommendations:

### **RECOMMENDATION #1: RESTORE AUTHORITY OVER TRANSFER DECISIONS TO JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT JUDGES, EXCEPT IN THOSE CASES CURRENTLY REQUIRING AUTOMATIC TRANSFER.**

Juvenile and Domestic Relations District Court judges are the most qualified professionals to make transfer decisions for youth. These judges receive the most training in adolescent development, rehabilitation and punishment, and have the most experience evaluating individual offenders. Judges must remain neutral, and also have to consider evidence from all sources – the defense, the prosecution, and probation officers. A Juvenile and Domestic Relations District Court judge’s decision can be appealed to Circuit Court by either the Commonwealth’s Attorney or the lawyer for the youth. In other words, giving authority back to juvenile court judges will insure that more information is available for consideration and review, that the decision is made by a neutral fact-finder, and that the decision is transparent and reviewable.

Unfortunately, under Virginia’s current system transfer decisions appear to increasingly involve consideration of less information rather than more. For example, the number of transfer reports (reports that include social history information regarding the youth and offense information) generated by the Court Services Unit has decreased from 1,168 in 1996 to 257 in 2007.<sup>157</sup> “Whereas before, a transfer report was required in every instance, now transfer reports are only required for those [cases] that proceed under subsection A [judicial discretion transfer].”<sup>158</sup> This is evidence of the fact that judges are deciding far fewer transfer cases, and the majority of transfer decisions are made by prosecutors without the benefit of this extensive background information. Specifically, when prosecutors have the authority to

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<sup>§§</sup> Colorado Governor Bill Ritter created a juvenile clemency board to review adult convictions given to kids. Governor Ritter created the panel in part to acknowledge that kids are not the same as, and should not necessarily be treated as, adults. Lawmakers in Connecticut are gradually increasing the age at which a juvenile can be tried as an adult in most cases to 18 years old from 16 years old. The reform will be complete by 2010. In Illinois, a young offender can no longer be automatically transferred to adult court for violating a drug law within 1,000 feet of public housing or a school. The legislature repealed this law in part because it disproportionately punished minority youth in Cook County (Chicago), two thirds of whom were first time offenders. (Sharon Cohen, *Prosecuting Kids as Adults: Some States Ponder Changes*, The Associated Press, Dec. 1, 2007, available at [http://www.usatoday.com/news/nation/2007-12-01-tryingkids\\_N.htm](http://www.usatoday.com/news/nation/2007-12-01-tryingkids_N.htm).)

transfer a juvenile offender without a full judicial review of that decision, they are not required to consider any information beyond the juvenile's age and the charge and must make the decision very early on in the case.<sup>159</sup>

Not only can decisions be made without the benefit of background information, professionals without the necessary training to effectively evaluate the appropriateness of the transfer decision are increasingly the people making the decisions. **According to the Crime Commission's 2008 study, juvenile court judges "predominantly hear juvenile cases and receive many hours of juvenile specific training" while "Commonwealth's Attorneys and their assistants typically do not receive much juvenile specific training."**<sup>160</sup> In fact, a review of the training provided to juvenile court judges between 2005 and 2008 revealed that they received 47 sessions dedicated to juvenile specific issues.<sup>161</sup> Training provided to Commonwealth's Attorneys between 2006 and 2008 by the Commonwealth's Attorneys Services Council "did not offer specific juvenile justice focused training components in their programs" and there was "very little juvenile specific training."<sup>162</sup> Additionally, it has been recognized that **a prosecutor's decision to try a juvenile as an adult is "largely offense-driven and made soon after arrest, before the prosecutor has much information about the youth's background," information which would be useful for assessing a youth's threat to society.**<sup>163</sup>

For instance, a full judicial review would be able to distinguish between those less serious robbery and malicious wounding cases (such as those not involving weapons) and those involving weapons and where more serious harm takes place, first time and repeat offenders, and youth who have had an opportunity for rehabilitation and those who have not, among other things. In the current system, it is the charge alone that determines whether or not the prosecutor has the unreviewable authority to transfer a case.

Making this kind of change would create a two-tiered transfer system: judicial discretion transfer and automatic or legislative certification. Commonwealth's Attorneys would still be able to *initiate* transfer proceedings in Juvenile and Domestic Relations District Court, but judges would be the ultimate decision maker. Also, Commonwealth's Attorneys could no longer circumvent judicial review by directly indicting a youth in Circuit Court. This change would not prevent the transfer of any youth outright but would make sure that the transfer system is open and transparent, and all necessary and important information is taken into consideration prior to the transfer decision.

**As described previously, this change is supported by a majority of juvenile court involved professionals: 79% of Chief Public Defenders, 73% of Circuit Court judges, 87% of Court Service Unit Directors, and 80% of Juvenile and Domestic Relations District Court judges.**<sup>164</sup> The only group not in favor of this option is Commonwealth's Attorneys.<sup>165</sup>

Another, though less efficient strategy for ensuring all necessary information is considered prior to trying a youth as an adult, would be to provide Circuit Court judges, upon a motion from the youth's lawyer and a full hearing, the authority to reverse a youth's transfer or certification and waive the case back to juvenile court. **A significant portion of juvenile justice system professionals support the reverse waiver option: the Director of the Department of Juvenile Justice, 93% of Chief Public Defenders, 84% of Circuit Court Judges, 77% of Court Service Unit Directors, and 53% of juvenile court judges.**<sup>166</sup> A majority of surveyed Commonwealth's Attorneys did not approve of this option.<sup>167</sup> There are increased expenses related to this option because it would require two hearings – a

preliminary hearing in juvenile court and a full transfer hearing in Circuit Court. Providing juvenile court judges with the authority to make transfer decisions in all cases would eliminate this extra cost.

A final, but more narrow, option would be to expand Circuit Court judges' general authority in transfer cases. Currently, Circuit Court judges have the authority to sentence a youth charged as an adult to a juvenile facility or juvenile probation, but they do not have the authority to treat the charges as juvenile delinquency charges.<sup>168</sup> Thus, a young offender – who a Circuit Court judge determines is not mature and/or dangerous enough to serve in the general adult prison population – still has a permanent adult felony conviction on his or her record. This drastically limits the youth's future educational, professional, and housing opportunities. Providing Circuit Court judges with the power to give transferred youth juvenile adjudications consistent with the sentences they impose would make it more likely that those youth could take full advantage of opportunities for rehabilitation, education, and employment necessary for their success upon release.

## **RECOMMENDATION #2: INCREASE TRAINING REGARDING YOUTHFUL OFFENDERS AND DISPOSITIONS FOR CIRCUIT COURT JUDGES.**

The Crime Commission has pointed out that “Circuit Court judges do not receive detailed and intensive juvenile specific training and handle far fewer juvenile criminal cases as compared to Juvenile and Domestic Relations District Court judges who predominantly hear juvenile cases and receive many hours of juvenile specific training.”<sup>169</sup> Providing Circuit Court judges with more training on juvenile offenders and juvenile rehabilitation will likely encourage even greater use of juvenile sentences and juvenile confinement for transferred youth.

## **RECOMMENDATION #3: ELIMINATE OR GREATLY REDUCE THE USE OF ADULT JAILS FOR THE PRE-TRIAL DETENTION OF TRANSFERRED YOUTH.**

Virginia law allows transferred and certified youth, some as young as 14, to be detained in adult jails, and held in the general population before their trials.<sup>170</sup> While in the general population, the youth are placed at increased risk of being victimized before their trials<sup>171</sup> and many, despite their being held for lengthy periods of time awaiting trial, receive no education or support services.<sup>\*\*\*</sup> Given the availability of juvenile sentences and frequency in which they are used, it makes little sense to terminate all services for up to a year only to return the youth to a juvenile setting after conviction and sentencing. Therefore, policymakers should consider eliminating the use of pre-trial detention in jail or limit it to those times when a youth is a proven danger to other youth in a juvenile detention center. In order to protect the public we must protect youth that are easily rehabilitated in the juvenile system. Only young offenders whose behavior is clearly a danger to other youth should be placed in adult facilities.

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<sup>\*\*\*</sup> JustChildren has had clients as young as 14 in this situation.

## CONCLUSION

What Virginians know about youth violence has changed since the 1990s. We now know that the predicted crime wave of juvenile superpredators did not occur and that the system we built to respond to the wave - one which made it easier to try children as adults without any requirement of judicial review or background investigation - is now ensnaring some youth who appear to be inappropriate candidates for adult convictions and adult confinement. Current research from across the country makes clear that transferring and certifying more youth to Circuit Court and sending them to adult prison does not promote public safety, but harms youth, limits rehabilitation, and increases recidivism. In most areas of the law, we recognize that youth are different from adults; however, we have not acknowledged these important differences in transfer laws.

Likewise current research makes clear that youth are not adults and that their psychological, social, and biological development makes them more amenable to treatment and rehabilitation. The most effective juvenile justice policies must take into account these scientific differences between adults and youth.

Given these shortcomings it should come as no surprise that with the exception of prosecutors, Virginia's juvenile justice professionals overwhelmingly support the reform of our current system. This combination of research, data and experience taken together with the Crime Commission's study will hopefully inspire members of the General Assembly and our next Governor to call for and create change. In this new era of increasingly accurate data, research, and first-hand accounts of what works and what does not, it is time to re-evaluate adult time for youth crime and to recalibrate our transfer system to make sure that we are not mistakenly throwing away the key to the jail house and the future for many of Virginia's youth.

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<sup>1</sup> Virginia State Crime Commission, *HJR 113 (2008) Final Report: Study of Virginia's Juvenile Justice System*, H. Doc. No. 12, at 1 (2009).

<sup>2</sup> *Id.*, at 2.

<sup>3</sup> Benjamin Steiner and Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, *Journal 96 J. Crim. L. & Criminology* 1451 (2005-2006). Steiner and Wright (2006) analyzed changes in juvenile violent crimes rates before and after the passage of direct file laws in 14 states that enacted such laws. They found a deterrent effect for Michigan but no effect in any of the 13 other states. Steiner, Hemmens, and Bell (2006) analyzed changes in juvenile violent crime before and after the passage of statutory exclusion laws in 22 states and find a deterrent effect for Maine but no effect in any of the 21 but no effect in any of the 21 other states.

<sup>4</sup> Meredith Farrar-Owens, Virginia Criminal Sentencing Commission, *Juveniles Convicted in Circuit Court FY2001-FY2008*, Presentation to the Virginia State Crime Commission (June 25, 2009).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Angela McGowan, et al., U.S. Department of Health and Human Services, Center for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System* (2007), Summary, available at <http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>.

<sup>9</sup> Virginia State Crime Commission, *HJR 113: Virginia's Juvenile Justice System*, (Dec. 9, 2008) available at [http://vscc.virginia.gov/CrimeCommission/December%209%202008/HJR113JuvenileJusticePolicies\\_files/frame.htm](http://vscc.virginia.gov/CrimeCommission/December%209%202008/HJR113JuvenileJusticePolicies_files/frame.htm).

<sup>10</sup> Va. Code Ann. § 16.1-249(D).

<sup>11</sup> Robert E. Shepherd, Jr., *How the Media Misrepresents Juvenile Policies*, UCLA Center for Communications & Community Newstand, (Winter 1998) available at <http://www.c3.ucla.edu/newsstand/media/how-the-media-misrepresents-juvenile-policies>.

<sup>12</sup> Carlos Sanchez, *Juvenile Crimes Escalate: Officials Say Offenses More Violent, Sophisticated*, *Wash. Post*, Mar. 3, 1994, at V1.

<sup>13</sup> Ty Clevenger, *Youths 'out of control' in N. Virginia: Officials Sound Alarm on Gangs*, *Wash. Times*, Sept. 1, 1995, at A1.

<sup>14</sup> Richard Cullen, Op-Ed., *Kids Shouldn't be Getting Away With Murder*, *Wash. Post*, Oct. 22, 1995, at C8.

<sup>15</sup> Frank Green, *Huge Crime Wave Predicted in Next Decade*, *Richmond Times Dispatch*, Nov. 19, 1993, at A1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Governor George Allen, *Remarks to the Joint Session of the Virginia General Assembly, Special Session II* (Sept. 19, 1994).

<sup>20</sup> Virginia Commission on Youth, *Report to the Governor and the General Assembly of Virginia: Study of Juvenile Justice System Reform*, H. Doc. No. 37, at 33 (1996).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* This law has since been amended to require a conviction in Circuit Court before permanently treating a juvenile as an adult for future charges.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Laurence Hammack, *Juvenile Justice on Trial; How to Deal With Youth Crime? State Panels Take Opposite Views*, *The Roanoke Times*, Dec. 16, 1995, at A1.

<sup>26</sup> John Dilulio, *The Coming of the Super-predator*, *The Weekly Standard*, Nov. 27, 1995, at 23.

<sup>27</sup> Governor's Commission on Juvenile Justice Reform, *Final Report*, at Executive Summary (1995).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, at 8 – 11.

<sup>30</sup> Robert E. Shepherd, Jr., *Legal Issues Involving Children*, 30 *U. Rich. L. Rev.* 1467, 1476 - 1480 (1996).

<sup>31</sup> The Joint Legislative Audit and Review Commission, *Report to the Governor and the General Assembly of Virginia: Juvenile Delinquents and Status Offenders - Court Processing and Outcomes*, S. Doc. No. 14, at 119 (1996).

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<sup>32</sup> Puzzanchera, C. and Kang, W. (2008), *Easy Access to the FBI's Supplementary Homicide Reports: 1980-2006*, Online. Available: <http://ojjdp.ncjrs.gov/ojstatbb/ezashr/> Data source: Federal Bureau of Investigation, *Supplementary Homicide Reports 1980-2006* [machine-readable data files].

<sup>33</sup> Hammack, *supra* note 25

<sup>34</sup> *Id.*

<sup>35</sup> Puzzanchera and Kang, *supra* note 32.

<sup>36</sup> *Id.*

<sup>37</sup> Hammack, *supra* note 25.

<sup>38</sup> Puzzanchera and Kang, *supra* note 32.

<sup>39</sup> Uniform Crime Reporting Section Department of Virginia State Police, *Crime in Virginia* (1984 – 2006).

<sup>40</sup> Dewey Cornell, *School Violence: Fears vs. Fact*, at 13 (2006) citing Redding, R.E. and Mrozowski, B. (2005) *Adjudicatory and dispositional decision making in juvenile justice*. In K. Heilburn, N.E.S. Goldstein, & R.E. Redding (Eds.) *Juvenile Delinquency: Prevention, Assessment, and intervention* (pp. 2320256). New York: Oxford University Press.

<sup>41</sup> Commonwealth of Virginia Joint Legislative Audit and Review Committee *available at* <http://jlarc.state.va.us/about.htm>.

<sup>42</sup> S. Doc. No. 14, *supra* note 31, at IV.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, at 119.

<sup>46</sup> *Id.*, at IV.

<sup>47</sup> *Id.*, at 119.

<sup>48</sup> *Id.*, at I.

<sup>49</sup> *Id.*, at IV - VI.

<sup>50</sup> Virginia Department of Juvenile Justice, *Data Resource Guide: FY 2008*, at 93 *available at* [http://www.djj.virginia.gov/About\\_Us/Administrative\\_Units/Research\\_and\\_Evaluation\\_Unit/pdf/Intro&Overview\\_2008.pdr](http://www.djj.virginia.gov/About_Us/Administrative_Units/Research_and_Evaluation_Unit/pdf/Intro&Overview_2008.pdr).

<sup>51</sup> Barry Green, Department of Juvenile Justice, *Court Involved Juveniles: Trends and Issues*, Annual VML Conference (Oct. 20, 2009) *available at* [http://www.djj.state.va.us/Resources/DJJ\\_Presentations/pdf/juvenile%20offender%20trends\\_update\\_10092009.pdf](http://www.djj.state.va.us/Resources/DJJ_Presentations/pdf/juvenile%20offender%20trends_update_10092009.pdf).

<sup>52</sup> Hammack, *supra* note 25.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Elizabeth Becker, *As Ex-Theorist on Youth 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times, February 9, 2001, at A19.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Youth Violence Myths and Realities: A Tale of Three Cities: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec.*, Feb. 11, 2009 (statement of Barry Krisberg, President, National Council on Crime and Delinquency *available at* <http://judiciary.house.gov/hearings/pdf/Krisberg090211.pdf>).

<sup>61</sup> Dewey Cornell, *The Myth of the Superpredator*, Virginia Youth Violence Project Curry School of Education University of Virginia (2008).

<sup>62</sup> Amy Vorenberg, *A Miscarriage of Juvenile Justice: A Modern Day Parable of the Unintended Results of Bad Law Making* (June 2, 2009) *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1413206](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413206).

<sup>63</sup> Green, *supra* note 15, at A1.

<sup>64</sup> Governor's Commission on Juvenile Justice Reform, *supra* note 27, at 8.

<sup>65</sup> *Id.*, at 47.

<sup>66</sup> Farrar-Owens, *supra* note 4.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

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<sup>70</sup> Id.

<sup>71</sup> Id.

<sup>72</sup> Campaign for Youth Justice, *The Consequences aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, at 89 (2007).

<sup>73</sup> Id.

<sup>74</sup> Virginia Department of Juvenile Justice, *Judicial Liaison Meeting Presentation*, at 6, 16 (May 8, 2009) available at [http://www.djj.virginia.gov/Resources/DJJ\\_Presentations/pdf/judicial\\_liason\\_presentation\\_with\\_deleted%20slides-final.pdf](http://www.djj.virginia.gov/Resources/DJJ_Presentations/pdf/judicial_liason_presentation_with_deleted%20slides-final.pdf).

<sup>75</sup> Va. Code Ann. §18.2-58; *Pritchard v. Commonwealth*, 225 VA 559 (1983).

<sup>76</sup> Va. Code Ann. §18.2-51.

<sup>77</sup> Va. Code Ann. §18.2-22.

<sup>78</sup> H. Doc. No. 12, *supra* note 1, at 17.

<sup>79</sup> Pamela Gould, *Will Girl's Rape Claim Reversal Clear Teen?*, *Fredericksburg Free Lance Star*, at A-1, A5, (Feb. 5, 2009) available at [http://fredericksburg.com/News/FLS/2009/022009/02052009/442642/index\\_html](http://fredericksburg.com/News/FLS/2009/022009/02052009/442642/index_html).

<sup>80</sup> Id.

<sup>81</sup> Department of Criminal Justice Services, *Governor's Comprehensive Crime Prevention Plan for Virginia*, at 2 (1994).

<sup>82</sup> Id.

<sup>83</sup> McGowan, et al., *supra* note 8.

<sup>84</sup> Virginia State Crime Commission, *The Use of Jails for Juveniles in Virginia: An Assessment and Recommendations*, at 1 (1983).

<sup>85</sup> Id., at 3; Joint Subcommittee Studying the Placement of Juveniles in Adult Jails, *Report to the Governor and the General Assembly of Virginia*, S. Doc. No. 22, at 8 (1984).

<sup>86</sup> S. Doc. No. 22, *supra* note 85, at 8-9 (discussing an opinion poll of mental health specialists).

<sup>87</sup> McGowan, et al., *supra* note 8, at 9.

<sup>88</sup> Id.

<sup>89</sup> Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, *Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin* (Aug. 2008).

<sup>90</sup> Id.

<sup>91</sup> Id. at 3.

<sup>92</sup> Id., at 4.

<sup>93</sup> Id., at 6.

<sup>94</sup> Barry Green and Sam Abed, Virginia Department of Juvenile Justice, *Juvenile Trends: Successes and Challenges*, (August 2008) available at [http://www.djj.state.va.us/Resources/DJJ\\_Presentations/pdf/JDRTrainingConference-FinalPresentation-08112008.pdf](http://www.djj.state.va.us/Resources/DJJ_Presentations/pdf/JDRTrainingConference-FinalPresentation-08112008.pdf).

<sup>95</sup> Redding, *supra* note 89, at 7 - 8.

<sup>96</sup> Robert E. Shepherd, Jr., *Evidence Mounts on Wisdom of Trying Juveniles as Adults*, 22 WRT Crim. Just. 42-43 (2008).

<sup>97</sup> National Prison Rape Elimination Commission Report, at 155-156 (June 2009) *citing* William, *Midyear 2006*; Beck, A. J., & Harrison, P. M. (2006). *Sexual violence reported by correctional authorities, 2005*. Washington, D.C.: U.S. States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

<sup>98</sup> Id.

<sup>99</sup> Redding, *supra* note 89, at 7 - 8.

<sup>100</sup> Virginia Department of Corrections, *Life Skills Programming*, available at <http://www.vadoc.state.va.us/offenders/institutions/programs/life-skills.shtm>; Va. Dep't. of Corrections, *Institutions Overview: Substance Abuse Programming*, available at <http://www.vadoc.state.va.us/offenders/institutions/institutions-overview.shtm>.

<sup>101</sup> Matthew Roy, *Jailing Young Offenders Poses Dilemma*, *The Virginian-Pilot* (April 9, 2008).

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> Virginia Department of Juvenile Justice, *supra* note 50, at 153 -159.

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<sup>105</sup> Cullen, *supra* note 14.

<sup>106</sup> Kristin Davis and Amy Jeter, *Armed and Dangerous: The new reality of teen crime*, The Virginian-Pilot, May 10, 2009, at A1.

<sup>107</sup> See generally, Public Postings to PilotOnline.com, <http://hamptonroads.com/2009/05/armed-and-dangerous-new-reality-teen-crime?page=2#comments>.

<sup>108</sup> Id.

<sup>109</sup> Id. (Comment at May 10, 2009, 21:09EDT).

<sup>110</sup> Id. (Comment at May 10, 2009, 14:08EDT).

<sup>111</sup> Va. Code Ann. § 18.2-386.2.

<sup>112</sup> 21 U.S.C § 158.

<sup>113</sup> Va. Code Ann. § 18.2-386.3.

<sup>114</sup> Va. Code Ann. § 20-48.

<sup>115</sup> Va. Code Ann. § 18.2-386.

<sup>116</sup> Va. Code Ann. § 24.2-403.

<sup>117</sup> Va. Code Ann. § 46.2-334.01(C1).

<sup>118</sup> Va. Code Ann. §§16.1-331 and 332.

<sup>119</sup> Va. Code Ann. §16.1-333.

<sup>120</sup> *The Juvenile Justice Accountability and Improvement Act of 2009: Hearing on H.R. 2289 Before House Judiciary Committee*, 111th Cong. 1 (June 9, 2009) (statement of Dr. Laurence Steinberg).

<sup>121</sup> Erik Erikson, *Identity Youth and Crisis*, W.W. Norton & Company, at 131 (1968).

<sup>122</sup> Id., at 128.

<sup>123</sup> Id., 132.

<sup>124</sup> Id.

<sup>125</sup> Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. Psychologist 1009, 1012 (2003).

<sup>126</sup> Id., at 1013.

<sup>127</sup> Id.

<sup>128</sup> Id., at 1014 citing Fagan J., (2000) *Contexts of choice by adolescents in criminal events*, In T. Grisso & R. Schwartz (Eds.) *Youth on trial: A developmental perspective on juvenile justice* (pp. 371 – 401), Chicago: University of Chicago Press.

<sup>129</sup> Id., at 1013 (2003) citing Jay N. Geidd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, Nature Neuroscience Vol. 2, No. 10, 861 (Oct. 1999).

<sup>130</sup> Brief for the American Psychological Association, et. al. as *Amicus Curiae* Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005); Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. Rev. 207, 238-39 (2003).

<sup>131</sup> Steinberg, *supra* note 120.

<sup>132</sup> Id.

<sup>133</sup> Id.

<sup>134</sup> Steinberg & Scott, *supra* note 125, at 1015.

<sup>135</sup> Dr. Jay Giedd, *Frontline: Inside the Teenage Brain* (PBS television broadcast, 2002) available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/view/>.

<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> Virginia Department of Juvenile Justice, *supra* note 50, at 158.

<sup>139</sup> Id.

<sup>140</sup> Virginia Department of Corrections, Life Skills Programming, available at <http://www.vadoc.state.va.us/offenders/institutions/programs/life-skills.shtm>.

<sup>141</sup> Virginia Department of Juvenile Justice, DJJ Partnership, available at [http://www.djj.virginia.gov/Resources/DJJ%20Partnership%20Newsletter/volume4\\_issue2/frontpage.pdf](http://www.djj.virginia.gov/Resources/DJJ%20Partnership%20Newsletter/volume4_issue2/frontpage.pdf).

<sup>142</sup> Virginia Department of Corrections, 2007 Statistical Summary, available at <http://www.vadoc.virginia.gov/about/facts/research/new-statsum/fy07statsummary.pdf> (The average DOC inmate is 36.5 years old and sentenced to serve 17.7

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years); Va. Dep't. of Juvenile Justice, *supra* note 144 (The average DJJ inmate is 16.5 years old and sentenced to serve 15.2 months).

<sup>143</sup> Virginia Department of Corrections, Institutions Overview: Substance Abuse Programming, <http://www.vadoc.state.va.us/offenders/institutions/institutions-overview.shtm> (last visited June 10, 2009).

<sup>144</sup> Virginia State Crime Commission, *HJR 136: Juvenile Justice Study*, H. Doc. No. 10 (2008) available at <http://leg2.state.va.us/DLS/H&SDocs.NSF/4d54200d7e28716385256ec1004f3130/c7529de7ddb729698525725a00752fa0?OpenDocument>.

<sup>145</sup> Virginia State Crime Commission, *Virginia State Crime Commission 2008 Interim Executive Summary of Activities*, Rep. Doc. No. 71 (2009) available at <http://leg2.state.va.us/dls/h&sdocs.nsf/9a83750e4a6bc7a485256ee400700118/f3fbe0372053e37f852573d00058d299?OpenDocument>.

<sup>146</sup> H. Doc. No. 12, *supra* note 1.

<sup>147</sup> Virginia State Crime Commission, *supra* note 9.

<sup>148</sup> *Id.*

<sup>149</sup> H. Doc. No. 37, *supra* note 20, at 2.

<sup>150</sup> *Id.*, at 47.

<sup>151</sup> *Id.*, at 51

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*, at 59.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> H. Doc. No. 12, *supra* note 1, at 18 - 19.

<sup>158</sup> *Id.*

<sup>159</sup> Va. Code Ann. §16.1-269.1(C).

<sup>160</sup> Virginia State Crime Commission, *supra* note 9.

<sup>161</sup> H. Doc. No. 12, *supra* note 1, at 17, Fn. 44.

<sup>162</sup> *Id.* at 17, Fn. 45.

<sup>163</sup> Redding, *supra* note 89.

<sup>164</sup> Virginia State Crime Commission, *supra* note 9.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Va. Code Ann. §16.1-272.

<sup>169</sup> H. Doc. No. 12, *supra* note 1, AT 17.

<sup>170</sup> Va. Code Ann. § 16.1-249(D).

<sup>171</sup> *Id.*