

2023 EDITION

Defending Youth Charged with Serious Offenses

Editor: Jeffrey Aaron, Ph.D.



Continuing Legal Education
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Defending Youth Charged With Serious Offenses

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VIRGINIA LAWYERS PRACTICE HANDBOOK

Defending Youth Charged with Serious Offenses

First Edition

Editor:

Jeffrey Aaron, Ph.D.

Virginia Department of Behavioral Health
and Developmental Services / Richmond

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CHAPTER 4

TRANSFER OR WAIVER OF CASES FROM JUVENILE TO CIRCUIT COURT

4.1 IN GENERAL

The change of venue from juvenile court to circuit court in Virginia is potentially one of the most consequential pre-adjudication determinations that can be made for a juvenile defendant. In Virginia, the juvenile court judge must hold the interests of the child and family, public safety, and victim rights paramount. While the child's best interests constitute only one part of this obligation, the interests of the juvenile offender are no less important than any other consideration. In stark contrast, the circuit court is bound by no such obligation, and while a circuit court judge may order a juvenile disposition, a youth who is convicted as an adult in circuit court may be given almost any sentence that can be given to an adult offender.¹ Thus, movement from juvenile court to circuit court has potentially life-altering consequences, and the attorney representing a juvenile facing the possibility of transfer or certification should consider all possible action to prevent such an outcome.

Transfer based on judicial discretion has been guided by the United States Supreme Court's decision in *Kent v. United States*,² which directs that a juvenile court must exercise due process and conduct a full investigation before waiving its jurisdiction over a juvenile offender. With this requirement, the juvenile court still retained substantial authority to rule as it saw fit, but the determination remained the judge's to make. However, in the 1980s and 1990s many states, including Virginia, passed laws designed to ease the movement of adolescents into adult courts. Mechanisms included making certification mandatory in certain circumstances, allowing prosecutors to make the determination in others, increasing the number of transfer-eligible offenses, and lowering the age of transfer eligibility. All of these were adopted in Virginia. Once a juvenile has been convicted by the circuit court as an adult after

¹ For defendants under 18 at the time of the offense, *Roper v. Simmons*, 543 U.S. 551 (2005), already prohibited the imposition of the death penalty (now abolished in Virginia); *Graham v. Florida*, 560 U.S. 48 (2010), prohibits the imposition of a life sentence without the possibility of parole for non-homicide crimes; and *Miller v. Alabama*, 567 U.S. 460 (2012), prohibits the mandatory sentence of life without the possibility of parole.

² 383 US 541, 553 (1966).

transfer or certification, he or she is no longer eligible for adjudication in the juvenile court for any future offenses.³

In 2020, the Virginia legislature reversed this trend and restricted the reasons that juveniles who are between the ages of 14 and 16 could be transferred to the jurisdiction of the circuit court and sentenced as an adult.⁴

4.2 PROVISIONS FOR CERTIFICATION AND TRANSFER

In Virginia, the juvenile court has exclusive jurisdiction over any case in which a defendant is under the age of 14 at the time of the alleged offense. For cases involving a defendant who is at least 16 years of age but under age 18 at the time the offense was committed, waiver to try a minor as an adult in circuit court is governed by sections 16.1-269.1 and 16.1-270 of the Virginia Code. Under these sections of the Code, there are a number of potential mechanisms by which a juvenile defendant may be tried as an adult. For defendants who were 14 or 15 years old, transfer may only occur after a judicial hearing, unless the juvenile requests, with attorney approval, waiver of juvenile court jurisdiction.⁵ For defendants who were 16 or 17 years old, the possibility of waiver and the possible mechanisms of waiver are dependent on the nature of the charged offense. For juveniles under the age of 16, section 16.1-269.1(B) allows the Commonwealth to make a motion to transfer a child between the ages of 14 and 16 who is charged with murder or aggravated malicious wounding, but the statute otherwise only applies to juveniles 16 or older.

4.201 Mandatory Certification. In the violent felony offenses enumerated in section 16.1-269.1(B),⁶ the juvenile court must conduct a preliminary hearing, but the judge has limited jurisdiction. If the minor is 16 years of age or older, the court must certify the charge and all ancillary charges to the grand jury if the standard for probable cause has been met and if the defendant's trial competency is not at issue, presuming the defendant was 16

³ Va. Code § 16.1-271.

⁴ Section 16.1-269.1(B) allows the Commonwealth to make a motion to transfer a child between the ages of 14 and 16 who is charged with murder or aggravated malicious wounding, but the statute otherwise applies to juveniles 16 or older.

⁵ Va. Code § 16.1-270.

⁶ Murder in violation of section 18.2-31, 18.2-32, or 18.2-40 or aggravated malicious wounding in violation of section 18.2-51.2.

or 17 years of age at the time of the alleged offense.⁷ If competency to stand trial is to be evaluated, the certification decision is suspended until the defendant has been determined to be competent. The statute provides that if the juvenile is 14 years of age or older but less than 16 years of age, then the court may proceed, on motion of the attorney for the Commonwealth, as provided in section 16.1-269.1(A).⁸

4.202 Prosecutorial Discretion. For juveniles 16 years of age or older who are charged with any of the offenses listed in subsection 16.1-269.1(C),⁹ the court must conduct a preliminary hearing, unless the Commonwealth gives written notice of its intention to seek transfer to the circuit court and submits a written request to the director of the court services unit for the report described in section 16.1-269.2.

For juveniles who are 14 years of age but less than 16 years of age at the time the offense was committed, the prosecutor must affirmatively move the court for their transfer to the circuit court for the offenses contained in section 16.1-269.1(B). This hearing is held prior to an adjudicatory hearing on the merits, and the decision to transfer is in the court's discretion, subject to proof of the conditions set forth in subsection 16.1-269.1(A).

If a juvenile who was 16 or 17 years of age at the time of the alleged offense is charged with any of a number of other serious felonies, enumerated in section 16.1-269.1(C), then the judge must certify the charge and all ancillary charges to the grand jury if the court determines that the standard for probable cause has been met and if the defendant's trial competency is not at issue, provided that the Commonwealth's attorney has given notice pursuant to the subsection to move the proceedings to circuit court and requested a report as required by statute from the court services unit. Defendants who were 14 or 15 years of age at the time of the alleged offense may only be certified after a transfer hearing.¹⁰

4.203 Judicial Transfer. If a juvenile who was 16 or 17 years of age at the time of the alleged offense is charged with any other offense that

⁷ Va. Code § 16.1-269.1(A)(3).

⁸ Va. Code § 16.1-269.1(B).

⁹ Including but not limited to felony homicide, abduction, malicious wounding, carjacking, armed robbery, forcible sodomy, object sexual penetration, and possession with the intent to distribute of a controlled substance.

¹⁰ See *infra* ¶¶ 4.203 (Judicial Transfer), 4.204 (Voluntary Waiver).

would be a felony if committed by an adult, or if a juvenile who was 14 or 15 years of age is charged with any offense that would be a felony if committed by an adult,¹¹ then, conditioned on the prosecutor's motion to transfer, the report prepared by the court services unit, and a finding of probable cause, and if the defendant's trial competency is not at issue, the juvenile court judge must hold a transfer hearing and determine whether to retain jurisdiction or transfer the case to the circuit court. The court must then determine, based on the preponderance of the evidence, whether the juvenile is a proper person to remain within the jurisdiction of the juvenile court. Section 16.1-269.1(A)(4) specifies the factors the court is to consider:

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

¹¹ Va. Code § 16.1-269.1(A).

number and nature of prior commitments to juvenile correctional centers, (iv) the number and nature of previous residential and community-based treatments, (v) whether previous adjudications and commitments were for delinquent acts that involved the infliction of serious bodily injury, and (vi) whether the alleged offense is part of a repetitive pattern of similar adjudicated offenses;

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

The Code is silent as to how these factors are to be assessed and the relative weight they are to be given. They are offered as guidance for the basis of the decision, but the statute makes it clear that the judge has discretion to weigh the factors as he or she sees fit and specifies, “[n]o transfer decision shall be precluded or reversed on the grounds that the court failed to consider any of the factors specified in subdivision 4.”¹²

While the factors enumerated in section 16.1-269.1(A) are defined as those a judge must consider in a transfer hearing, there is no specific guidance in the Code about what factors a prosecutor should consider when considering a motion to certify¹³ in cases in which the discretion falls to the Commonwealth's attorney. Nonetheless, it would not be unreasonable to assume that the same factors should guide that determination. Each of the factors that the court is directed to consider relates to the potential for rehabilitation, the juvenile's degree of culpability, and the protection of the public, and it is reasonable to infer that these considerations should also inform the Commonwealth's attorney's determination of which cases are appropriate for adult

¹² Va. Code § 16.1-269.1(A)(4).

¹³ Va. Code § 16.1-269.1(C).

prosecution and which are not. Such a position is supported by the National District Attorneys Association National Prosecution Standards relating to juvenile justice,¹⁴ which provide the following general guidance: “[w]hile the safety and welfare of the community, including the victim, is their primary concern, prosecutors should consider the special circumstances and rehabilitative potential of the juvenile to the extent they can do so without unduly compromising their primary concern.”¹⁵

With specific reference to transfer decisions, the standards state:

The transfer of cases to criminal court should be reserved for the most serious, violent, and chronic offenders. Prosecutors should make transfer decisions on a case-by-case basis and take into account the individual factors and state requirements of each case including, among other factors, the gravity and violent nature of the current alleged offense, the record of previous delinquent behavior of the juvenile charged, and the availability of adequate treatment, services and dispositional alternatives in juvenile court.¹⁶

Such guidance may be a useful reference for the attorney representing a juvenile subject to transfer or certification in discussion with the prosecutor ahead of any decisions.

4.204 Voluntary Waiver. A juvenile defendant 16 years of age or older who is charged with any offense that would be a felony if committed by an adult may voluntarily waive juvenile court jurisdiction even in cases in which the prosecutor does not move to certify the case to circuit court. Such a waiver may occur at any point before the adjudicatory hearing but requires the written consent of counsel.¹⁷ When waiver is made, the juvenile is treated as an adult in the circuit court in the same manner as if a transfer of the case had occurred.¹⁸ In most cases, there is little or no advantage in waiving the juvenile

¹⁴ The standards are available online at https://ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition_January-2023-1.pdf.

¹⁵ *National Prosecution Standards*, Part V Juvenile Justice, introductory paragraph (Nat'l Dist. Att'y's Ass'n 4th ed. Jan. 2023).

¹⁶ *National Prosecution Standards*, Standard 5-1.6 Transfer to Criminal Court (Nat'l Dist. Att'y's Ass'n 4th ed. Jan. 2023).

¹⁷ Va. Code § 16.1-270.

¹⁸ *Id.*