I. AN INTRODUCTION TO THE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT

A. Historical Back Ground

1. The first separate and distinct juvenile court in the country was established in Cook County (Chicago) in 1899.

2. The juvenile justice system in Virginia began in 1910 with the creation of authority for judges to sentence juveniles to indeterminate sentences in separate, privately run facilities, even though they were still tried in the regular criminal justice system. In 1914, Virginia established juvenile justice jurisdiction for courts by legislation that largely paralleled the Illinois statute.

3. In 1950 a comprehensive Virginia juvenile code was enacted based on the Standard Juvenile Court Act recommended by the National Council on Crime and Delinquency.5

4. A series of United States Supreme Court decisions in 1966 and 1967 led to a radical transformation of juvenile court practices in Virginia and elsewhere.

5. The Court in Kent ruled that in making a decision as momentous as withdrawing the benefits of the juvenile system from a youth, the state must provide the juvenile with counsel, a hearing on the question of waiver or transfer, access to any records or reports considered by the court in making the decision, and a statement of the reasons for waiving the juvenile court's jurisdiction.

6. Any lingering doubts about the constitutional dimensions of juvenile court proceedings were quickly settled in the following year by the landmark decision in In re Gault.

(387 U.S. 1 (1967). In that case, the Court concluded that the 15-yearold defendant was denied his constitutional rights in his juvenile court trial in Arizona.

7. The Court specifically ruled that, in the factfinding stage of the process, juveniles charged with delinquency who are subject to incarceration are entitled to:

a. the assistance of a lawyer, including appointed counsel if indigent

b. written notice of the specific charges against them

c. the protection of the Fifth Amendment's privilege against self-incrimination

d. confrontation of the witnesses against them, including subjecting those witnesses to cross-examination.

8. Subsequent decisions by the Court have exposed some ambivalence concerning the due process model for juvenile justice, with the decisions in In re Winship, (397 U.S. 358 (1970)), and Breed v. Jones, (421 U.S. 519 (1975)), reaffirming the Kent-Gault expansionism, while the decisions in McKeiver v. Pennsylvania, (403 U.S. 528 (1971)), and Schall v. Martin, (467 U.S. 253 (1984)), asserted a more parens patriae view of the juvenile court process.

9. The Virginia General Assembly's reorganization of the court system in 1972 and 1973 created a statewide system of juvenile and domestic relations district courts.

10. Following a comprehensive drafting process over several years, the Virginia Supreme Court, in 1992, adopted the Juvenile and Domestic Relations District Court Rules as part eight of the Rules of the Virginia Supreme Court.

B. United States Supreme Court Decisions

1. In a series of more recent decisions, the United States Supreme Court has taken a renewed interest in the law's treatment of youthful defendants, holding that because of the fundamental differences between children and adults, our criminal justice system cannot

impose upon juveniles those punishments reserved for the worst adult offenders. More specifically, under the rubric of the Eighth Amendment, the Court has banned the imposition of the death penalty on juvenile offenders, (Roper v. Simmons, 543 U.S. 551, 578 (2005).), barred life without parole sentences for juveniles convicted of non-homicide offenses, (Graham v. Florida, 560 U.S. 48, 74-75 (2010) and struck down mandatory life without parole sentences for juvenile defendants. (Miller v. Alabama, 567 U.S. 460, 473 (2012). In 2016, the Supreme Court clarified in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), that the Miller ruling is to be retroactively applied.)

2. Relying on both the commonsense notion that children behave differently than adults and research that confirms the differences between children and adults, the Court has identified three primary attributes that distinguish juvenile offenders from adults.(Miller, 567 U.S. at 471-72) First, youths are immature and have an "underdeveloped sense of responsibility," making children more reckless and impulsive.(Id. at 471; see Graham, 560 U.S. at 68; Roper, 543 U.S. at 569.) Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and have less control over their environment and external influences. (Roper, 543 U.S. at 569; see Miller, 567 U.S. at 461, 471; Graham, 560 U.S. at 68.) Third, a juvenile's character is less "well formed" and his or her traits are "less fixed" than an adult's, increasing prospects for juvenile rehabilitation and reform. (Miller, 567 U.S. at 471-72; Graham, 560 U.S. 48, 72-73; Roper, 543 U.S. at 570.)

3. The Court held in Miller v. Alabama (Id. at 473) and Montgomery v. Louisiana (136 S. Ct. 718, 734 (2016) ("Miller did bar life without parole . . . for all but the rarest of

juvenile offenders, those whose crimes reflect permanent incorrigibility.") that unless a juvenile offender is proven to be permanently incorrigible, that offender cannot be sentenced to life without parole. In assessing permanent incorrigibility, the courts must consider factors including the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences[;] the family and home environment that surrounds him[;] the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him[;]" the ability of the young defendant to participate in his defense or negotiate with prosecutors; and "the possibility of rehabilitation." (Miller, 567 U.S. at 477-78).

C. Organization of The Juvenile Code

1. The juvenile and domestic relations district court law, chapter 11 of title 16.1 of the Virginia Code, (Va. Code § 16.1-226 et seq.) is fairly comprehensive, reflecting the fact that juvenile court law is largely statutory, with little reliance on case law. The code has three significant organizational characteristics:

a. it sets forth different procedural tracks that depend on whether the jurisdictional premise is delinquency, abuse or neglect, children in need of services, or children in need of supervision; (For example, section 16.1-278.2 of the Virginia Code delineates the dispositional alternatives for children found to be abused or neglected, section 16.1-278.4 describes dispositions for children in need of services, and section 16.1-278.8 addresses delinquency dispositions.)

b. it progresses chronologically through the process in an orderly sequence (For example, section 16.1-246 governs taking children into custody, section 16.1-

248.1 describes criteria for detention or shelter care, section 16.1-260 addresses intake, and section 16.1-266 provides for appointment of counsel)

c. wherever there are alternative courses of action, the least intrusive or restrictive alternative is listed first. (Section 16.1-247(E), for example, describes the options after a juvenile has been taken into custody under certain circumstances and provides first for release to parents, second for release on bail or recognizance, and only after consideration of those options, placement in shelter care or detention.)

D. Philosophy of The Juvenile Justice System

1. From the very first juvenile court in Chicago in 1899, the emphasis has been on treatment and rehabilitation rather than on punishment.

2. The Virginia General Assembly has similarly been concerned with the philosophy and purpose of the juvenile code. Section 16.1-227 of the Virginia Code expresses the legislature's intent in enacting the law

3. This law shall be construed liberally and as remedial in character, and the powers hereby conferred are intended to be general to effect the beneficial purposes herein set forth. It is the intention of this law that in all proceedings the welfare of the child and the family, the safety of the community and the protection of the rights of victims are the paramount concerns of the Commonwealth and to the end that these purposes may be attained, the judge shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.

4. This law shall be interpreted and construed so as to effectuate the following purposes:

a. To divert from or within the juvenile justice system, to the extent possible, consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs;

b. To provide judicial procedures through which the provisions of this law are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other rights are recognized and enforced;

c. To separate a child from such child's parents, guardian, legal custodian or other person standing in loco parentis only when the child's welfare is endangered or it is in the interest of public safety and then only after consideration of alternatives to out-of-home placement which afford effective protection to the child, his family, and the community; and

d. To protect the community against those acts of its citizens, both juveniles and adults, which are harmful to others and to reduce the incidence of delinquent behavior and to hold offenders accountable for their behavior.

E. Jurisdiction

1. Age Jurisdiction

a. The juvenile and domestic relations district court has jurisdiction primarily over matters involving juveniles, defined as persons under the age of 18. Jurisdiction is determined by the "age of the child at the time of the acts complained of in the petition."

b. There is no statutory minimum age for delinquency, or any other jurisdictional age limit, and it is debatable whether the common law minimum age of seven for criminal responsibility applies in the juvenile and domestic relations district court. The juvenile code does prescribe a minimum age of 11 for commitment to the state, but it is silent on the

jurisdictional age issue. However, if a person has reached the age of 21 without being tried as a juvenile, he or she should be tried as an adult, even if the offense occurred before that person's 18th birthday.

2. Territorial Jurisdiction (Venue)

a. When delinquency is alleged, the case must begin in the city or county where the alleged acts occurred unless the child and the commonwealth's attorneys for each jurisdiction consent in writing to the case being brought in the city or county where the juvenile resides. In all other cases involving children, the proceedings generally should begin in the city or county where the child resides or where the child is present.

3. Subject Matter Jurisdiction

a. In General. The juvenile and domestic relations district court in Virginia has jurisdiction over practically all matters affecting the family other than divorce and adoption. Section 16.1-241 of the Virginia Code governs the jurisdiction of the court.

b. Delinquency and Transfer. The court has original and exclusive jurisdiction over every charge against a juvenile (under the age of 18) that would be a crime if committed by an adult, whether a misdemeanor, felony, traffic violation, or refusal to take a blood or breath test, and regardless of whether the offense would be a violation of state or federal law or of a city, county, town, or service district ordinance. A single act appears to be sufficient. Delinquency does not include a "traffic infraction" as defined in section 46.2-100 of the Virginia Code.

c. The juvenile court can divest jurisdiction and transfer jurisdiction to the circuit court only after a transfer or certification hearing in accordance with section 16.1-

269.1(A) through (C) of the Virginia Code. Alternatively, a juvenile defendant may waive the right to be tried in juvenile court, but only after filing a waiver in writing and with the written consent of his or her counsel. In either of these instances, however, the case must first originate in juvenile court.

d. For children facing charges as adults, the court has varying degrees of jurisdiction. (See Va. Code § 16.1-269.1.) If the Commonwealth charges a juvenile with aggravated malicious wounding or with homicide, and the juvenile is 14 years of age or older, the court's jurisdiction is limited to holding a preliminary hearing to determine whether there is probable cause to certify the case to a grand jury. (Va. Code § 16.1-269.1(B).) If the Commonwealth charges the juvenile with one of a range of other serious felonies and moves to certify the case to circuit court, the court's jurisdiction is similarly limited. (Va. Code § 16.1-269.1(C).) For all other felonies, if a juvenile 14 years of age or older is charged with an offense that would be a felony if committed by an adult, the juvenile and domestic relations district court, on motion of the commonwealth's attorney, must hold a hearing to consider retaining jurisdiction or transferring the juvenile to the appropriate circuit court for criminal proceedings. (Va. Code § 16.1-269.1(A).) Transfer to the circuit court is subject to conditions set forth in section 16.1-269.1(A).

e. Section 16.1-241 provides that the juvenile and domestic relations district court's jurisdiction over an "ancillary charge," a delinquent act committed by the juvenile as part of the same act or transaction as a violent juvenile felony, is also divested when the principal charge is transferred or certified. (Va. Code §§ 16.1-241(A), -269.1(D).)

4. Duration of Jurisdiction

a. Once jurisdiction over the minor has been obtained by a juvenile and domestic relations district court, that jurisdiction may be retained until the person reaches the age of 21, except when custody is in the Department of Juvenile Justice or when jurisdiction has been divested by the circuit court in divorce proceedings pursuant to section 16.1-244.

II. THE ROLE OF THE LAWYER IN JUVENILE PROCEEDINGS

A. INTRODUCTION

1. A lawyer probably has no role more challenging than that of an attorney in the juvenile court. Whether appearing as a guardian ad litem in an abuse and neglect proceeding, defending a juvenile charged with delinquency, or representing the Commonwealth in a delinquency matter, the attorney faces enormous challenges.

III. COUNSEL IN DELINQUENY PROCEEDINGS

A. In General

1. The role of the lawyer representing a child in a delinquency proceeding is markedly different from that of a guardian ad litem. In fact, in a delinquency proceeding it is essential for the lawyer to remember that he or she is not serving as a guardian ad litem. A lawyer in a delinquency proceeding should represent the child in every way just as he or she would represent an adult for a similar charge.
2. The right to counsel is fundamental, as the Supreme Court of the United States indicated in Kent v. United States

B. Ethical Concerns

1. Legal Ethics Opinion No. 1798 provides, that a prosecutor "who accepts more cases than he can competently prosecute will be committing an ethical violation," and a footnote adds that "excessive caseloads for public defenders and court-appointed counsel raise the same ethical problems if each client's case cannot be attended to with reasonable diligence and competence."

C. Rule 8:6

1. Rule 8:6 states that "[t]he role of counsel for a child is the representation of the child's legitimate interests."

D. Juvenile Justice Standards

1. American Bar Association. Standard 3.1 of the ABA's Juvenile Justice Standards Relating to Counsel for Private Parties states the following in regard to representation of clients charged with delinquency:

a. Client's interests paramount.

b. Determination of client's interests.

i. Counsel for the juvenile.

2. National Advisory Committee for Juvenile Justice and Delinquency Prevention. In Standard 3.134 of the Standards for the Administration of Juvenile Justice, the committee offers the following guidance for lawyers:

a. Role of Counsel. The principal duty of an attorney representing the state in a family court matter is to seek justice.

3. Indigent Defense Commission. The Virginia Indigent Defense Commission was established in 2004 to oversee and support attorneys performing court appointed criminal defense work. The Commission has promulgated Standards of Practice for Indigent Counsel to further the goal of high quality legal representation for all criminal defendants.

E. Examples of Role Confusion

1. Scenario 1. Martha Smith is appointed to represent Thomas, who is charged with the possession of cocaine. Thomas was stopped by the police at 9:00 p.m. while walking down a well-lit street in a known drug area. Although the police did not know Thomas and had no specific information that Thomas was involved in drug activity, he turned and walked in a different direction when the police made eye contact with him. Based on this information alone, he was stopped and a full-blown search of his person was conducted. Cocaine was found in his undershorts. Unfortunately, as it turns out, Thomas has a serious drug problem and desperately needs help for his addiction. Should Martha make a motion to suppress?

a. Wrong Answer. Martha decides to forego making a motion to suppress because she fears the consequences to Thomas should she prevail. Knowing that a conviction is his only way to possible treatment, she makes a decision to act in Thomas' "best interest" by not making the motion. Thomas is never consulted regarding this decision.

b. Right Answer. Because Martha cares a great deal about what happens to Thomas, she struggles internally with this issue. She realizes that if her motion to suppress is granted, Thomas may not get the help he needs. She explains to Thomas his constitutional rights under the Fourth and Fourteenth Amendments and, at Thomas's direction, makes the motion to suppress. When she is successful and the charges against Thomas are dismissed, she

takes the time to talk with Thomas about how damaging drug use can be, and she tells him to contact her should he decide to seek help voluntarily.

2. Scenario 2. Henry is charged with auto theft. After 21 days of detention, Henry appears in court for his adjudicatory hearing. The commonwealth's attorney moves for a continuance because the victim has not appeared, although he had personal notice of the court date. In spite of the personal service and the nonappearance of the victim, a continuance is granted in the case. Henry's mother tells his attorney, Mike Brown, that she thinks it will do Henry some good to stay in the detention home. Henry, of course, would like to go home and assures Mike that he will abide by any rules that may be placed upon him as a condition of release. Should Mike make an argument that Henry be released from detention pending his next court date?

a. Wrong Answer. Realizing that Henry's mother probably knows best, Mike decides not to argue for his release from detention. Mike agrees with Henry's mother that another couple of weeks may make a lasting impression on Henry and keep him from committing other crimes in the future. In addition, Mike has no idea to whom Henry would be released since his mother doesn't want him home.

b. Right Answer. Because Mike is thoroughly familiar with the juvenile code, he knows that section 16.1-277.1 provides fairly strict time limitations within which juveniles who are being held in secure detention must be tried. Mike knows that a strong legal argument can be made for Henry's release. Realizing that he has not been appointed to represent Henry's mother, he argues for Henry's release and tells the court that Henry is willing to abide by any rules the court may impose as a condition of release. He makes the court aware

that Henry's mother will not accept him into her home and suggests alternative places for Henry to reside upon his release.

3. These scenarios show that raising legal arguments on behalf a child is not always easy or comfortable. Counsel will often feel personally ambivalent about arguments that must be made. Nevertheless, an attorney representing a child in delinquency proceedings may not disregard the wishes of the child in deciding which legal arguments to advance on his or her behalf.

F. Timing of Appointment

1. Counsel must be appointed before the detention hearing or the adjudicatory or transfer hearing. (Va. Code § 16.1-266(B); see Appendices 2-4 (DC-510 Summons), 2-5 (DC-513 Advisement and Request for Appointment of Counsel), 2-6 (DC-515 Waiver of Right to Be Represented by a Lawyer).)

G. Fees

1. If, after an investigation by the court services unit, the youth's parents are found financially able to pay for an attorney and refuse to do so, the costs of legal services may be assessed against the parents "in the maximum amount of that awarded the attorney by the court under the circumstances of the case." (Va. Code § 16.1-267(A).)

H. Duties Before Trial

1. Interviewing the Child

a. It is essential that counsel conduct an interview as soon as possible after being appointed, assigned, or retained since minors, who may be unusually vulnerable to police interrogation, may make confessions or casually waive rights.

b. Before the meeting, counsel should review the essential elements of the charge against the client and be prepared to answer, at least in a general way, questions about the kinds of things that can happen in court.

c. The bulk of the initial interview with a juvenile should be conducted in private without the presence of the parents. A private interview will preserve the attorney-client privilege and eliminate the client's fear about opening up in front of the parents.

d. Even though counsel has been appointed to represent the child, it is important to establish a positive, helpful relationship with the parents if possible.

e. Once everyone has relaxed (if that is possible under the circumstances), counsel may begin to explain his or her role in defending the client. As previously mentioned, it is good practice to let the parents know, in front of the child, that counsel has been appointed to defend the child.

f. It is very important for counsel to be sensitive to the parent's need to understand the charge against the child and to be included in what is happening with the child.

g. Once the child's parent or guardian has been excused, counsel should explain to the child why the parent or guardian has been asked to leave. Counsel should explain that his or her job is to defend the child, not the parent, and great care should be taken to explain the nature of the confidential relationship between counsel and the child in a way that the child can understand.

h. It may be worthwhile to use "small talk" at the onset of the interview to relax the juvenile and build rapport, but the lawyer must realize that topics natural for an adult—such as sports and weather—may not be equally comfortable for the child. The logical

tendency to ask about school as an “icebreaker” should be avoided or approached warily, because many juveniles in trouble have not had very good experiences in school and will tense up rather than relax by the introduction of the topic.

i. The attorney should be careful to use age-appropriate language without talking down to the juvenile.

j. After concluding the icebreaking phase, the attorney should do two things. First, he or she should explain to the juvenile in very concrete terms what the attorney’s role is and what his or her relationship is to the child.

i. Second, the attorney should explain how the interview is to be conducted—that the child should initially describe what has occurred, that counsel will ask some questions about the events and about the juvenile, and that, if appropriate, they will discuss some approaches to dealing with the situation before ending the interview “for today.”

k. Counsel should also take the time to explain the roles of everyone else who may be involved in the child’s case when it is heard in court.

2. Finding Additional Sources of Information

a. Court Services Unit Worker

b. Intake Officers

c. Investigative Officers

d. Probation Officers

3. Law Enforcement Officers

4. Potential Witnesses

5. Securing the Witness’s Presence

a. Witnesses identifies by the child should be contacted promptly and should be subpoenaed to ensure their attendance in court.

b. The issuance of subpoenas for witnesses and records is governed by Rule 8:13 of the Rules of the Supreme Court of Virginia and by section 16.1-265 of the Virginia Code.

c. Section 16.1-265 states that a minimum of five days must be allowed for compliance by the custodian of records when a subpoena duces tecum is issued, but unless a minimum of 14 days is allowed, the request may be subject to objection by the individual who receives it.

6. Reviewing the Court File

a. Juvenile Violation Report

b. Affidavit

c. Social Information

7. Identifying Experts

8. Requesting Discovery

I. Counsel's Role in the Detention Decision

1. Counsel must become involved as early as possible in representing the client charged with delinquency. An attorney who is retained, appointed, or assigned before the detention hearing should advocate strongly for the juvenile to be released to the parents or other appropriate pretrial detention alternative that ensures the child's safety and his or her appearance in court.

J. Transfer or Certification as an Adult

1. The prosecutor has the option of transferring or certifying for trial as an adult any juvenile age 14 or older who is charged with a serious offense or who is a chronic offender, and counsel should ascertain early whether the commonwealth's attorney intends to give notice for certification pursuant to section 16.1- 269.1(B) or (C) or to move for transfer under section 16.1-269.1(A).

K. The Adjudicatory Hearing

1. The role of the attorney at the adjudicatory hearing is essentially identical to representing an adult in a criminal trial.

L. The Disposition Hearing

1. At the dispositional hearing the lawyer for the juvenile should take the lead in identifying and securing admission to the least restrictive dispositional programs.

M. Post-Dispositional Review Hearing

1. The attorney should schedule a post-dispositional review hearing to monitor the delivery of services to the client.

IV. THE COMMONWEALTH'S ATTORNEY

A. Introduction

1. The role of the commonwealth's attorney in juvenile criminal proceedings is very different from that of a prosecutor in adult criminal proceedings.190 In juvenile proceedings, the commonwealth's attorney is not only a prosecutor but also often a mediator, counselor, and advisor.

B. Legal Advisor

1. To Police Officers.

a. The commonwealth's attorney often is contacted by police officers to discuss the facts of an investigation and whether there is probable cause. These discussions usually include the practicality of bringing charges and what the charges should be.

2. To Intake Officers.

a. The commonwealth's attorney is the inhouse advisor to the juvenile intake officers.

3. To the General Public

a. The commonwealth's attorney answers questions from citizens regarding problems concerning juveniles almost daily.

C. Pretrial Role

1. In General. The commonwealth's attorney often advises police officers, citizens, and school administrators to file petitions.

2. Charging Decision. The commonwealth's attorney should review the defendant's record to determine how to proceed:

a. with the charge as written

b. with a reduced or amended charge

c. with a transfer or preliminary hearing.

3. Notice Requirements. Notice of intent to proceed under section 16.1-269.1(C) "shall be filed with the court and mailed or delivered to counsel for the juvenile or, if the juvenile is not then represented by counsel, to the juvenile and a parent, guardian or other person standing in loco parentis with respect to the juvenile . . . ." In Karim v. Commonwealth, (22 Va. App. 767, 473 S.E.2d 103 (1996).) the court concluded that failure to satisfy the notice

requirement is a jurisdictional defect. A transfer under section 16.1-269.1(A) is initiated by motion of the commonwealth's attorney before a hearing on the merits of the case

D. Adjudicatory Role

1. In juvenile delinquency proceedings, the rules of court procedure and evidence are the same as in adult court.

E. The Dispositional Hearing

1. The prosecutor's participation at the dispositional hearing will vary from jurisdiction to jurisdiction. The commonwealth's attorney may appear at the hearing to make a recommendation regarding the disposition or to request special court orders such as restitution to the victim. In many cases, the commonwealth's attorney can offer or agree to alternative dispositions so that the rights of the victims are preserved and the best resolution for the child is reached.

2. The commonwealth's attorney also plays a primary role in determining whether a juvenile adjudicated delinquent of an offense that would require an adult to register as a sex offender must register. The court may, in its discretion, upon the motion of the commonwealth's attorney, order a juvenile over the age of 13 at the time of the offense to register as a sex offender if the court finds that the circumstances of the offense require registration.198 The factors to be considered in this determination are outlined in section 9.1-902(G) of the Virginia Code.

F. Post-Dispositional Proceeding

1. The commonwealth's attorney is usually not involved in a case after the dispositional hearing unless the child is in post-dispositional detention that requires 30-day reviews, or unless the defendant has been committed and a 60-day review is set.

V. SPECIAL LEGAL ISSUES WITH DELINQUENT YOUTH

A. In General

1. For children to properly exercise their rights, whether during the investigative, pretrial, or trial stage of the juvenile or criminal justice process, they should be able to understand those rights, appreciate their importance, and make rational decisions about them in accordance with the relevant legal standard.

B. Competency to Stand Trial

1. The determination of a juvenile's competence to stand trial, either in criminal or juvenile court, may be informed by consideration of the youth's mental health (as with adults) and capacity. Virginia's juvenile competency statute excludes a juvenile's age or developmental factors as the sole basis for incompetency to stand trial. (Va. Code § 16.1-356(F).)

C. Culpability

1. Regarding determinations of adolescents' culpability, courts typically consider several categories of mitigating factors: impaired decision-making capacity, usually due to mental illness or disability; the circumstances of the crime (for example, whether the juvenile was under duress); and an individual's character or likelihood of reoffending.

D. Malleability or Amenability to Treatment

1. Rehabilitative efforts are generally more effective during the juvenile years than later in life because the juvenile years are a time of great malleability; the adolescent responds more intensely to the surrounding environment, including family, peer groups, school, and other settings. Developmental factors should influence recommendations for age-appropriate treatment.

VI. PRETRIAL PROCEEDINGS

A. Discovery

1. Introduction

a. The fact that the juvenile justice process has elements of both criminal and civil proceedings has caused particular problems. When the transfer or certification of a juvenile to adult court is sought, the transfer or preliminary hearing is a particularly fruitful source of information on the strength of the prosecution's case. Rule 8:15 of the Rules of the Virginia Supreme Court, which pertains to all types of cases in the juvenile and domestic relations district court, allows for considerably more formal discovery than was previously available.

2. General Information

a. If the commonwealth's attorney has filed a motion to transfer or notice of intent to certify the case to the circuit court for trial as an adult or if the charged delinquent act would be a felony if committed by an adult, Rule 3A:11 governs the discovery procedures. In all other delinquency cases, Rule 7C:5 governing adult misdemeanor cases controls the discovery procedures. Juvenile defendants are essentially afforded the same rights of discovery as adult defendants.

b. The criminal discovery motion should also include a request for any exculpatory materials of which the Commonwealth is aware, although disclosures of exculpatory evidence are not contingent on the filing of a discovery request by the defendant.

3. Time of Motion

a. The defendant's written motion for discovery must be filed at least 10 days before the adjudication date. The motion must specifically state what information is requested.

4. Time, Place, and Manner of Discovery and Inspection

a. Rule 7C:5(e) provides that an order granting discovery must specify the time, place, and manner of making the discovery and the inspection permitted and may prescribe such terms and conditions as are just.

5. Failure to Comply

a. Rule 7C:5(f) provides that, if at any time during the course of the proceedings it is brought to the attention of the court that the prosecuting attorney has failed to comply with an order of discovery, the court is to order the prosecuting attorney to permit the discovery or inspection of the material not previously disclosed and may grant a continuance to the accused as it deems appropriate.

B. Motion Practice

1. Introduction

a. The informality of the juvenile justice process tends to discourage a formal motion practice in many jurisdictions. But the use of traditional pre-adjudication

motions drawn from criminal practice can serve to minimize the effect of harmful evidence on the trial judge if motions are heard by a different judge in the jurisdiction.

2. Motion to Suppress

a. A motion to suppress illegally obtained evidence may be used if the Commonwealth intends to use confessions and other statements, identifications (whether obtained through a lineup or showup or through the use of photographs, fingerprints, writings, or bodily substance samples), or physical evidence obtained through an illegal search and seizure.

3. Motion in Limine

a. It may be useful to file a motion to limit the scope of testimony at the adjudicatory hearing to exclude evidence that is potentially damaging or not relevant to the pending charges.

4. Motion for Severance

a. Because juveniles frequently commit offenses in groups, varying degrees of culpability may be assigned and widely disparate combinations of charges may be filed.

b. Although granting a severance is at the discretion of the judge, the motion's chance of success is improved if

i. the juveniles have inconsistent defenses

ii. evidence that is inadmissible against the client is admissible against a codefendant

iii. the right to cross-examination is to some extent limited.

5. Motion for Speedy Trial

a. A motion for a speedy trial is especially pertinent where the juvenile is in detention and the trial does not occur until after the time limits provided in section 16.1-277.1 of the Virginia Code. Unfortunately, that section seems to recognize only a single sanction— release from custody. Nevertheless, the basic constitutional guarantee to a speedy trial does apply. In Barker v. Wingo, (407 U.S. 514 (1972)), the United States Supreme Court delineated four considerations in determining whether the right to a speedy trial had been denied:

i. whether the length of delay is such as to cause concern

ii. the reasons for the delay

iii. whether the defendant asserted the right to a speedy trial

iv. whether prejudice to the accused resulted from the delay.

b. Because a juvenile's sense of time differs from an adult's, the length of the delay should weigh more heavily in juvenile cases. Although there are no Virginia cases involving purely juvenile speedy trial issues, other courts that have considered the issue have determined that the right to a speedy trial is enforceable in juvenile proceedings. In Hudson v. Commonwealth, a juvenile being tried as an adult after transfer could not claim a violation of the speedy trial statute where he agreed to setting the trial date beyond the five-month period.

6. Motion Concerning Petition and Summons

a. Although amendment is generally allowed rather liberally, defects in the petition or in the notice provided to the juvenile or parents should be addressed by a

pretrial motion. A motion for a bill of particulars may be especially appropriate where the petition is unclear or incomplete.

7. Motion for Change of Venue

a. Because there is no jury in juvenile court proceedings, and confidentiality protections for juvenile offenders have diminished the effect of pretrial publicity, a motion for change of venue may be of little value in the juvenile court.

b. Furthermore, relocation of the trial may facilitate the participation of witnesses. Virginia also permits a change in venue for disposition after adjudication to the locality where the juvenile resides. (Va. Code § 16.1-243(B).)

8. Motion for Continuance

a. Continuances tend to be liberally granted when requested for additional time to prepare a defense or similar concerns related to counsel's ability to provide an effective defense.

9. Motion for Appointed Expert or Investigator

a. Juvenile court matters can be every bit as complex as adult criminal court proceedings, and the need for an expert or an investigator may be just as great. The defense attorney should not hesitate to move for appointment of an expert where it is necessary to conduct additional scientific testing or examine a handwriting exemplar or where the case is particularly serious or complex. (Cf. Ake v. Oklahoma, 470 U.S. 68 (1985); see also Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996), cert. denied, 519 U.S. 1154 (1997); Barnabei v. Commonwealth, 252 Va. 161, 477 S.E.2d 270 (1996), cert. denied, 520 U.S. 1224 (1997).)

10. Motion to Dismiss for Double Jeopardy

a. In Breed v. Jones, (421 U.S. 519 (1979)), the United States Supreme Court held that the constitutional protection against double jeopardy applies to juvenile proceedings.

11. Motion to Recuse Judge

a. A motion to recuse a judge may be appropriate when the judge has participated in a pretrial proceeding in which evidence was presented that would not be admissible at trial. That evidence could include a probation report or social history, if the judge was exposed to the material before the proceeding to determine guilt or innocence.

b. Specific provisions exist for the recusal of a judge who presided over the transfer hearing, or appeal of a transfer decision. (Recusal is discussed in more detail in Chapter 7 of this book).

12. Motion for Physical or Mental Examination

a. Section 16.1-275 of the Virginia Code allows for a physical or mental examination of the juvenile and others pursuant to a motion by the juvenile's counsel or by the court sua sponte. Even if mental competence is not an issue, a mental examination can be extremely useful to buttress an argument that a confession or other waiver of rights was involuntary or unknowing or to provide evidence for a disposition hearing.

13. Motion for Competency

a. If the court, counsel for the juvenile, or the commonwealth's attorney believes that the juvenile lacks the capacity to understand the proceedings or assist his or her counsel, a motion for a competency evaluation should be made. (Va. Code § 16.1-356.)

b. If, based on the evaluator's opinion, the court finds that the juvenile is unrestorably incompetent, the court will order that the juvenile be committed pursuant to section 16.1-335 et seq. of the Virginia Code (if the defendant has turned 18 by the time of the competency determination, the commitment would be pursuant to section 37.2-814 et seq.); certified pursuant to section 37.2-806 of the Virginia Code; provided other services by the court; or released. . The criminal charges against an unrestorably incompetent juvenile must be dismissed one year from the date of the juvenile's arrest on a misdemeanor charge or three years from the date of the arrest on a felony charge. (Id.)

C. Arraignment

1. Rule 8:16 of the Rules of the Virginia Supreme Court provides for arraignment in a delinquency case to advise the juvenile of the charge against him or her.

VII. POLICE INVESTIGATIONS

A. Introduction

1. This section covers two broad, but related, areas of juvenile delinquency practice. The first part examines police investigations in general, with an emphasis on the unique ways in which law enforcement officials interact with the juvenile justice system. The second part deals more specifically with constitutional issues that arise in the representation of juvenile offenders.

B. Arrest

1. General Principles

a. Although traditional laws of arrest applicable to adults also apply to juveniles, section 16.1-246 of the Virginia Code defines very clearly the circumstances under which a child may be taken into immediate custody. Of particular significance for counsel representing a child who has been arrested, or taken into "immediate custody" as set forth in section 16.1-246, is what may occur after the arrest.

2. When Child May Be Taken into Immediate Custody

a. A child may be taken into immediate custody in the following situations:

i. Pursuant to a detention order issued by the judge of the juvenile and domestic relations district court, intake officer, or clerk (when authorized by a judge) or pursuant to a warrant issued by a magistrate;

ii. When a child is alleged to be in need of services or supervision and there is either a clear and substantial danger to the child's life or health or the assumption of custody is necessary to ensure the child's appearance in court;

iii. When a child commits a crime in violation of state, local, or federal law in the presence of the officer and the officer believes that taking the child into custody is necessary for the protection of the public interest;

iv. When a child has committed a misdemeanor offense involving shoplifting, assault and battery, or carrying a weapon on school property and the arrest is based on probable cause on reasonable complaint of a person who observed the alleged offense, even though the offense was not committed in the presence of the arresting officer;

v. When there is probable cause to believe that a child has committed an offense that would be a felony if committed by an adult;

vi. When there is probable cause to believe that a child committed to the Department of Juvenile Justice has run away or that a child has escaped from a jail or detention home;

vii. When there is probable cause to believe that a child is a runaway from a residential child-caring facility or home in which he or she had been placed by the court or any other agency authorized to do so;

viii. When there is probable cause to believe that a child has run away from home or is without adult supervision at such hours of the night and under such circumstances that the law enforcement officer reasonably concludes that there is a clear and substantial danger to the child's welfare; or

ix. When a child is believed to be in need of inpatient treatment for mental illness, and pursuant to an emergency custody order, as authorized by section 16.1-340 of the Virginia Code.

3. Duties of Person Taking Child into Custody

a. Once the child is taken into custody, the officer has certain options, as delineated in section 16.1-247 of the Virginia Code, based on the predicate for the action.

i. When Court is Open: When a child is arrested pursuant to a detention order and court is open, the officer must, with

all practicable speed, bring the child before the judge or intake officer. (Va. Code § 16.1-247(A).)

ii. When Court is Not Open: When a child is arrested pursuant to a detention order and court is not open, the person taking the child into custody must, with all practicable speed, release the child on bail or recognizance (where arrest was with a warrant) or place the child in detention, shelter care, or jail. (Va. Code § 16.1-247(D). Placement of a juvenile in jail is highly restricted and is subject to the provisions of section 16.1-249 of the Virginia Code.)

b. Adult Detained for Juvenile Offense

i. When an adult is taken into custody pursuant to a warrant, detention order, or capias that alleges an act committed when he or she was a juvenile, the provisions of section 19.2-119 et seq. pertaining to release on bail or recognizance apply. (Va. Code § 16.1-247(K). An intake officer has the authority to issue a capias for an adult under the age of 21 who is alleged to have committed, before attaining the age of 18, an offense that would be a crime if committed by an adult.)

e. Shoplifting, Assault, or Weapon at School

i. When Court Is Open. When a child has been taken into custody based on probable cause that he or she committed shoplifting, assault and battery, or carrying a weapon on school property and court is open, the officer has the same options as those listed in paragraph 6.203(C)(1). (Va. Code § 16.1-247(B)).

ii. When Court Is Not Open. When court is not open, the officer has the same options as those set forth in paragraph 6.203(D)(2). (Va. Code § 16.1-247(E)).

f. Probable Cause for a Felony

i. When Court Is Open. When a child has been taken into custody upon probable cause to believe that he or she has committed a felony and court is open, the officer has the same options as those listed in paragraph 6.203(C)(1). (Va. Code § 16.1-247(B)).

ii. When Court Is Not Open. When a child has been taken into custody upon probable cause to believe that he or she has committed a felony and court is not open, the officer has the same options as those listed in paragraph 6.203(D)(2) or after a detention order is issued pursuant to section 16.1-255. (Va. Code § 16.1-247(E)).

4. Counsel's Role in Ensuring Enforcement of Arrest and Detention Statues

i. Placement decisions, especially in a detention home or jail, are some of the most critical decisions that a juvenile court judge or intake officer can make.

ii. Counsel should always be sure that the placement, whether in secure detention or in an emergency shelter, is legally permissible and factually appropriate, based on the individual characteristics of the juvenile.

5. Remedy for Violation of Arrest and Detention Statues

i. Failure to conform strictly to the statutory requirements listed above does not prevent the Commonwealth from prosecuting unless the child was deprived of a constitutional right. (*Durrette v. Commonwealth*, 201 Va. 735, 113 S.E.2d 842 (1960)). In *Roberts v. Commonwealth*, (18 Va. App. 554, 445 S.E.2d 709 (1994); see also Rodriguez v. Commonwealth, 40 Va. App. 144, 578 S.E.2d 78 (2003)), the Virginia Court of Appeals held that the failure of police officers to comply with the requirements of section 16.1-247 was simply a procedural deficiency and was not of constitutional dimensions. Thus, the officers' failure did not affect the admissibility of Roberts' confession. (See Cary v. Commonwealth, 40 Va. App. 480, 579 S.E.2d 691 (2003); see also Commonwealth v. Johnson, Record No. 1244-99-1, 1999 Va. App. LEXIS 624 (Va. Ct. App. Nov. 9, 1999) (unpublished)). In light of this holding, it is even more difficult to argue that a deprivation of a constitutional right has occurred because of an officer's failure to follow the statutory procedures.

C. Interrogation of Juveniles; Confessions

1. In general –

a. Since juveniles often make incriminating statements when confronted by the police, it is absolutely essential that counsel representing children have a thorough understanding of the rules that govern the interrogation of juveniles.

b. Only a few courts have recognized the anomaly involved in treating a juvenile as inherently incompetent to make other critical legal decisions and yet allowing that juvenile to waive the right to counsel or the privilege against self-incrimination

c. Although it is true that juveniles have the same constitutional rights and protections as those afforded to adults in the context of interrogation and confession, the protections afforded to juveniles in this area should in practice actually be greater than for adults.

d. But the case law in Virginia on confessions by juveniles, although quite extensive, is not very protective of young people.

e. The Virginia courts have consistently upheld the confessions of juveniles as constitutional following motions to suppress such statements, even

when, for example, the factual situation involves telling a 15-year-old that he is an adult for these purposes and refusing to allow him to see his parent.

f. Counsel should ensure that both the waiver of constitutional rights and any following statements made by juvenile clients to the police were knowing and voluntary. Viewing any video or listening to recorded statements from the interviews should be part of counsel's trial preparation. Facts such as the age of the child, the demeanor of the officers, the length of the interrogation, and the absence of the child's parents should all be before the court.

2. Voluntariness's

a. The earliest United States Supreme Court cases focused on the question of the voluntariness of the confession as an essential element of Fourteenth Amendment due process protection. Later cases shifted that focus to the Sixth Amendment guarantee of the right to counsel and then to the Fifth Amendment privilege against self-incrimination, as in *Miranda v. Arizona*.28 *Brown v. Mississippi*29 was the first decision in which the Court expressed its concern with the admissibility of confessions in state prosecutions.

b. A little more than 20 years later, in *Fikes v. Alabama*, (352 U.S. 191 (1957)), the Court shifted its focus from the conduct of the police to the characteristics of the accused. The defendant in *Fikes* was an uneducated, intellectually disabled African-American who had confessed after days of questioning while detained in a prison far from his family and without the advice or guidance of counsel, family, or friends.

c. The Court in *Fikes* reviewed the confession cases following *Brown* and concluded that the overarching principle governing those cases was whether the "totality of circumstances" exhausted the accused of his ability to resist confessing. (Id. at 197-98). The totality of circumstances remains the critical test governing voluntariness determinations, and the cases have recognized three general factors in applying this test: police conduct, special characteristics of the accused, and the youth of the accused.

d. should examine: (i) the use of physical or psychological pressure; (ii) the isolation of the accused from counsel, family, or friends; (iii) the length of the interrogation; (iv) the deprivation of basic amenities such as food and drink, cigarettes, or sleep; and (v) the use of other similar techniques to overcome the will of the accused.

e. Another major factor to be weighed in the "totality of the circumstances" analysis is the special characteristics of the person interrogated. In *Fikes*, the Court looked at the defendant's mental deficiency and lack of education. (See also Davis v. North Carolina, 384 U.S. 737 (1966)). Apart from mental deficiency, the presence of mental illness or emotional disturbance is an important factor. In *Blackburn v. Alabama*, (361 U.S. 199 (1960)), the Court recited the defendant's mental history in considerable detail and judged that he was probably not mentally competent when he gave his confession.

f. The two earliest Supreme Court cases involving juveniles, even before *Kent v. United States*41 and *In re Gault*, (387 U.S. 1 (1967)), dealt with the admissibility of confessions obtained from youths tried as adults. In *Haley v. Ohio*, (332 U.S. 596 (1948)), a 15-yearold boy was arrested at midnight on a murder charge and

questioned by relays of police from shortly after his arrest until 5 a.m. without benefit of counsel or any family or friends to advise him. He signed a confession typed by police when confronted with the alleged confessions of his purported accomplices. The Supreme Court reversed his conviction on involuntariness grounds despite the fact that the boy was advised of his rights.

g. In *Gallegos v. Colorado*, (370 U.S. 49 (1962)), the Court applied the totality of the circumstances test to invalidate a confession and reverse the conviction of a 14-yearold defendant. Gallegos was arrested for assault and robbery and immediately admitted his complicity in the crimes. After being held for five days without seeing a lawyer, parent, or other friendly adult, he signed a formal confession. The victim thereafter died and Gallegos was charged with murder and convicted, with the crucial evidence being his confession.

h. In *Kaupp v. Texas*, (538 U.S. 626 (2003)), the Supreme Court overturned a conviction, describing the circumstances that led to that decision as follows:

A 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk." He was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned.

i. As noted above, the cases invalidating a confession and the ensuing conviction seldom contain only one element compelling a conclusion of involuntariness. Youth alone has not been considered sufficient to show involuntariness, and likely would not be except in an extreme case.

j. In the leading case of *West v. United States*, (399 F.2d 467 (5th Cir. 1968)), the principal question was the ability of a 16-year-old boy to waive his right to counsel and his right to remain silent after being fully advised of his rights. The court viewed the voluntariness and intelligence of the waiver within the context of the totality of the circumstances test and delineated some elements of that test:

Factors considered by the courts in resolving this question include:

1) age of the accused;

2) education of the accused;

3) knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent;

4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney;

5) whether the accused was interrogated before or after formal charges had been filed;

6) methods used in interrogation;

7) length of interrogations;

8) whether vel non the accused refused to voluntarily give statements on prior occasions; and

9) whether the accused has repudiated the extra-judicial statement at a later date.-

k. Although the confession and conviction were upheld in *West*, the same court, in *Cooper v. Griffin*, (455 F.2d 1142 (5th Cir. 1972); see also *Thomas v. North Carolina,* 447 F.2d 1320 (4th

Cir. 1971); In *re Thompson*, 241 N.W.2d 2 (Iowa 1976); *State in Interest of Holifield*, 319 So. 2d 471 (La. Ct. App. 1975); *Harvey v. State*, 207 So. 2d 108 (Miss. 1968)), invalidated confessions and granted habeas corpus relief for two brothers who had IQs of 61 and 67 and whose reading comprehension was not above the second or third grade level.

3. *Miranda* Issues

a. As noted previously, in the early 1960s a shift occurred in the Supreme Court's approach to evaluating confessions— away from voluntariness and toward a Sixth Amendment "right to counsel" analysis. Later in that decade, a further shift emphasized the Fifth Amendment privilege against self-incrimination. This latter emphasis has generally dominated confession admissibility determinations in the past three decades.

In *Massiah v. United States*, (377 U.S. 201 (1964)), and *Escobedo v. Illinois*, (378 U.S. 478 (1964)), the Supreme Court rejected confessions on the basis of the Sixth Amendment's right to counsel. In *Massiah*, the defendant had been indicted on a federal narcotics charge, had retained counsel, and had been released on bail. During his period of freedom before trial, government agents secured incriminating statements via a radio transmitter installed in the car of a consenting friend. The statements were introduced at trial, and the defendant was convicted. The Supreme Court bypassed the Fourth Amendment issue but reversed on the ground that the use of an incriminating statement made by a person who has been indicted and in the absence of his attorney violates the Sixth Amendment right to counsel. In Escobedo, the defendant had been arrested for murder and released after his attorney secured a writ of habeas corpus. He was subsequently rearrested and interrogated despite his requests to consult with his attorney and the attorney's requests to consult with his

client. A statement was obtained and a conviction secured in part on the basis of the statement. The Supreme Court concluded that the statement should have been excluded because of the denial of the Sixth Amendment right to counsel as applied to the states through the Fourteenth Amendment. In Escobedo, the Court found that exclusion was compelled because:

c. The primacy of the Sixth Amendment analysis was short-lived, as the Supreme Court shifted its focus to the Fifth Amendment privilege against self-incrimination only two years later in *Miranda v. Arizona*. (384 U.S. 436 (1966)). In *Miranda*, Chief Justice Warren announced the Court's conclusion: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

d. In *Yarborough v. Alvarado*, (541 U.S. 652 (2004)), the Supreme Court reversed a grant of habeas corpus relief to a state prisoner convicted of committing a murder when he was 17 years old after he confessed during an interrogation without being advised of his *Miranda* rights.

e. The Court enumerated several factors that supported a finding that Alvarado was in custody:

1. He was interviewed at the police station;

2. The interview was lengthy, lasting two hours;

3. The officers did not tell Alvarado he was free to leave;

4. He was brought to the station by his legal guardians and did not come on his own accord; and

5. His parents asked to be present during the interview and were rebuffed.

On the other hand, there were factors that weighed against a finding that Alvarado was in custody:

1. The police did not transport him to the station or require him to be there at a particular time;

2. The police did not threaten him or suggest he would be placed under arrest;

3. His parents remained in the lobby during the interview, which suggested that the interview would not be lengthy;

4. The youth and his parents were told the interview would not take long;

5. The focus during the interview was on the principal in the crime, not Alvarado;

6. Alvarado was not threatened with arrest and prosecution but was appealed to in the interest of telling the truth and helping the police;

7. He was asked twice if he wanted to take a break during the interview; and

8. At the conclusion of the interview, he went home.

The Supreme Court concluded that the state court acted reasonably and the Court of Appeals should not have granted habeas corpus relief.

f. The Supreme Court addressed this same issue in *J.D.B. v. North Carolina*. (564 U.S. 261 (2011)). However in *J.D.B.* the juvenile was only 13 years of age. He was removed from his seventh grade classroom by a uniformed police officer and questioned in a closed-door conference room. He was not given any *Miranda* warnings. The case was remanded for consideration of the juvenile's age as a

factor in the custody analysis, noting that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." (*Id*. at 272). In *Novak v. Commonwealth*, (20 Va. App. 373, 457 S.E.2d 402 (1995)), however, the court concluded that a 16-year-old youth was not "in custody" at the time of his questioning and, therefore, the threshold for giving a *Miranda* warning was not crossed. (See also *Sneade v. Commonwealth*, No. 1105-99-2, 2000 WL 1486567 (Va. Ct. App. Oct 10, 2000)). Some jurisdictions have suggested that a juvenile should not be interrogated without his or her parents being present, and the Virginia Court of Appeals has stated that the absence of the parents would weigh against the admissibility of a confession. (*Grogg v. Commonwealth*, 6 Va. App. 598, 371 S.E.2d 549 (1988)). However, even a juvenile's request to see a parent will not necessarily render the juvenile's confession involuntary or coerced.

g. Virginia primarily uses the "totality of the circumstances" test to judge the voluntariness and intelligence of any waiver of rights by the juvenile pursuant to custodial interrogation. *Miranda* warnings must be understood to be effective, and an unintelligible advice of rights will invalidate a confession, as demonstrated by *Commonwealth v. Benjamin*, (28 Va. App. 548, 507 S.E.2d 113 (1998)), in which the recitation of the warning by the detective questioning the juvenile was "so jumbled and unintelligible" that the trial judge inquired whether the officer was "speaking in tongues.

h. In *Pritchett v. Commonwealth*, (263 Va. 182, 557 S.E.2d 205 (2002)), a case involving an allegedly intellectually disabled adult, the Virginia Supreme Court ruled that an expert should have been permitted to testify about the susceptibility of

intellectually disabled persons to suggestive police interrogation. A learning-disabled juvenile may also have difficulty comprehending the intricacies of the *Miranda* warning, and the learning-disabled child with an auditory perceptual problem may even hear the reverse of what is being said. Thus, "you have a right to remain silent" may be processed by the child as "you cannot remain silent." The disabled child may also react to an authority figure in a totally different manner than the nondisabled juvenile.

i. Juveniles may also be questioned by authority figures who are not law enforcement officers, such as a teacher or a principal. The courts generally hold that *Miranda* does not apply to such an interrogation and its warnings need not be given before questioning begins. (*See, e.g., Boynton v. Casey*, 543 F. Supp. 995 (D. Me. 1982); In re Gage, 624 P.2d 1076 (Or. Ct. App. 1980)). A closer question may be presented in the case of interrogation by a "school security officer" employed by a local school division, but at least one case has found that the presence of such an officer who did not participate in the interrogation is not a violation.

4. Violation of Statutes and Rules

a. **Violations of Statutes and Rules.** Juvenile law is largely predicated on statutes and court rules that specifically constrain the juvenile process with procedures and guidelines. Failure to comply with those mandates may make an arrest or custody illegal and thus render an ensuing confession inadmissible as the "fruit of the poisonous tree." (*See In re Appeal No. 245 (75)*, 349 A.2d 434 (Md. Ct. Spec. App. 1975) (relying on Brown v. Illinois, 422 U.S. 590 (1975)). An officer who takes a child into custody and fails to take the child to a juvenile judge or to the juvenile court "immediately" or "as soon as practicable" jeopardizes the admissibility of a subsequent confession. Virginia law requires that an officer taking a juvenile into custody take the child to

the court "with all practicable speed" and advise the parents of the action taken "in the most expeditious manner practicable." (Va. Code § 16.1-247). But in *Roberts v. Commonwealth*, (18 Va. App. 554, 445 S.E.2d 709 (1994); see also Commonwealth v. Johnson, Record No. 1244-99-1, 1999 Va. App. LEXIS 624 (Va. Ct. App. Nov. 9, 1999) (unpublished)), the Virginia Court of Appeals concluded that the alleged failure of the police to comply with section 16.1-247 of the Virginia Code did not prevent the admission of a confession obtained during police questioning following the noncompliance.

5. Attorney's Role

a. **In General.** If the attorney is fortunate enough to be retained or otherwise involved before any interrogation, the police should be notified immediately and advised that the juvenile is represented by counsel and that no interrogation should occur without the attorney's consent.

b. At trial, counsel should argue that both the waiver of rights and the confession itself were involuntary. The attorney should assert, if appropriate, that the requirements of *Miranda* were not complied with and that, even if they were, the child did not understand his or her rights.

c. Voluntariness. In deciding whether to challenge the voluntariness of a confession, counsel must conduct a thorough investigation of the circumstances surrounding the interrogation.

d. Waiver. A juvenile's waiver of rights must be both knowing and intelligent. Although some states do not allow a juvenile to waive his or her rights without the assistance of a parent or interested adult, Virginia does not follow this per se rule. (*Sneade v. Commonwealth*, No. 1105-99-2, 2000 WL 1486567 (Va. Ct. App. Oct. 10, 2000) (unpublished)).

i. Rule 8:17 of the Rules of the Virginia Supreme Court, which requires the court to inquire whether a waiver was "knowingly, voluntarily, and intelligently made," provides a basis of support for challenges to the validity of a youth's waiver of rights.

e. "Totality of the Circumstances." The "totality of the circumstances," not the existence of any one factor by itself, will govern whether or not the confession of a juvenile is admissible as evidence. A discussion of these issues in the context of Virginia law appears

in Ellen R. Fulmer, Comment, *Novak v. Commonwealth: Are Virginia Courts Providing Special Protection to Virginia's Juvenile Defendants?*, 30 U. Rich. L. Rev. 935 (1996).

i. Presence or Absence of a Parent, Guardian, or Other Interested Adult.

A. Although the presence of a parent has been found by the Virginia Court of Appeals to be desirable, confessions taken without the involvement of a parent are not per se inadmissible in Virginia. The Virginia Supreme Court ruled, in Jackson v. Commonwealth, (255 Va. 625, 499 S.E.2d 538 (1998).) that police interrogation of a 16-year-old juvenile without the presence of one of his parents did not violate his constitutional rights. In Potts v. Commonwealth,109 the juvenile requested to see his mother and a lawyer, but the interrogation continued and the ensuing confession was deemed admissible. In Belmer v. Commonwealth, 37 Va. App. 64, 553 S.E.2d 560 (2001) the Court of Appeals upheld the admissibility of statements the youth made to his mother and her boyfriend in the privacy of the interrogation room that were overheard by the detectives over an intercom.

B. Age of Child. There is no automatic age at which a child is deemed to be incapable of waiving the right to remain silent.

1. In Rodriguez v. Commonwealth,113 the Court of Appeals concluded that, although the defendant was only 14 years old, the evidence supported the trial court's conclusions that he knowingly, intelligently, and voluntarily waived his Miranda rights during his interrogation by the police and that his subsequent confession was voluntary.

C. Prior Police or Court Involvement. A good prosecutor will always bring the defendant's prior police involvement to the attention of

the court in support of the argument that the child was clearly aware of what his or her rights were simply by virtue of the amount of contact he or she has had with the juvenile justice system.

D. Intelligence and Educational Status of Child.

1. In Commonwealth v. Brown,117 the Court of Appeals affirmed the circuit court's decision to suppress a defendant's confession. The defendant was 15 years old when he was arrested, and the police knew that he had only an eighth grade education when they began questioning him, but they
were not aware that he functioned intellectually at the level of an 8-year-old. Commonwealth v. Brown Record No. 3062-01-2, 2002 Va. App. LEXIS 314 (Va. Ct. App. May 17,2002)(unpublished).

E. Emotional Maturity of Child. Many children who appear before the juvenile court suffer from serious emotional disabilities that significantly inhibit their ability to execute a valid waiver of rights.

F. Physical Condition of Child. Some of the first United States Supreme Court decisions dealing with the issue of the admissibility of confessions in state courts addressed situations in which police brutality was used to extract confessions from adult prisoners. Clearly, the use of force, whether real or threatened, is a significant factor in determining the validity of a child's waiver of rights.

G. Whether Child Was Under the Influence of Alcohol or Drugs. Highly relevant to the issue of whether a child executed a knowing and intelligent waiver is whether or not the child was under the influence of any substance, illegal or prescribed, that would affect his or her ability to clearly process what the Miranda warnings meant.

H. Methods of Police Interrogation Used.

i. The lengths to which the police may go to "encourage" the cooperative sharing of information are unclear.

ii. Another questionable police interrogation tactic is lying to the juvenile suspect to induce a confession or waiver of rights. In a series of cases, the Virginia Supreme Court and Court of Appeals have upheld the admissibility of confessions obtained during interrogations in which the juvenile suspect was lied to by the police. Roach v. Commonwealth, 251 Va. 324, 468 S.E.2d 98.

I. Whether Police Honored Child's Invocation of the Right to Remain Silent. Once a child has clearly stated an intention to remain silent or has expressed a desire to wait for the assistance of an attorney before making a statement, the police must scrupulously honor those requests. Potts v. Commonwealth, 35 Va. App. 485, 546 S.E.2d 229, aff'd en banc, 37 Va. App. 64, 553 S.E.2d 560 (2001) (where the juvenile did invoke his right to counsel but later initiated discussions with police).

J. Manner in Which Rights Were Given. How a child's rights have been communicated by the police is an important factor in determining whether a knowing and intelligent waiver has occurred.

K. If Juvenile Is a Foreign National. If the juvenile being questioned is a foreign national, the consulate for that nation should be contacted pursuant to the Vienna Convention on Diplomatic Relations. Vienna Convention on Diplomatic Relations, opened for signature April 18, 1961, 500 U.N.T.S. 95. But in Shackleford v. Commonwealth, the Virginia Court of Appeals and the Virginia Supreme Court ruled that the failure to contact the juvenile's national consulate did not affect the admissibility of a confession. *Shackleford v. Commonwealth*, 262 Va. 196, 547 S.E.2d 899 (2001), aff'g 32 Va. App. 307, 528 S.E.2d 123 (2000).

D. Search and Seizure Issues

1. General Principles. Children are entitled to the same general constitutional protections as adults against illegal search and seizure.

2. Stops Unique to Children

a. In General. The rules for determining when a juvenile may be subject to a Terry-like stop are the same as for adults.125 No child may be stopped by the police absent some reasonable, articulable suspicion of criminal activity.126 But there are two areas in which children are particularly vulnerable to Terry encounters with the police: (i) where there is a suspicion of a curfew violation, and (ii) where it is suspected that a child is in violation of the compulsory school attendance laws.

b. Curfew Violations. Although there is no statewide curfew for minors in Virginia, section 46.2-334.01 of the Virginia Code includes a curfew-like restriction on teenage drivers. It prohibits a driver under the age of 18 from operating a motor vehicle on the highway between the hours of midnight and 4:00 a.m., with exceptions for (i) driving to or from work; (ii) driving to or from activities supervised by an adult and sponsored by a school or a civil, religious, or public organization; (iii) driving while accompanied by a licensed parent, person acting in loco parentis, or adult spouse in the front passenger seat; or (iv) driving in cases of emergency, including volunteer emergency medical services activities. Violation of this restriction is a "secondary" offense for which an officer cannot make an initial stop—there must be probable cause to stop or arrest the driver for violation of some other Code provision or local ordinance.

i. The curfew ordinance adopted by the City of Charlottes-

ville was deemed constitutional by the Fourth Circuit Court of Appeals in Schleifer v. City of Charlottesville. *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998) (aff'g 963 F. Supp. 534 (W.D. Va. 1997)), cert. denied, 526 U.S. 1018 (1999).

ii. Counsel should also be prepared to question the arresting officer as to the basis for the officer's belief that the child was underage in the first place. If the officer had no articulable, factual basis for believing the child was underage, the stop may not satisfy the Constitution.

c. Violations of Compulsory School Attendance Laws. In Virginia, children under the age of 18 must attend school unless specifically authorized not to do so. Section 22.1-266 of the Virginia Code allows a law enforcement officer to pick up a child who he or she reasonably believes, by virtue of the child's apparent age and circumstances, to be truant from school and deliver the child to school.

3. Search and Seizure Issues

a. In General. The beginning point for any discussion of searches involving juveniles is the foundation of rules established in Fourth Amendment cases involving adult suspects.

b. Basic Framework. The basic framework of the law involving searches rests on the proposition that evidence seized in an unreasonable search by agents of the state is inadmissible. Within this framework, the following propositions may be found:

i. The presence of a valid warrant makes practically any search reasonable;

ii. Only searches conducted by state agents fall within the ambit of the Fourth Amendment;

iii. The search may be validated by voluntary consent;

iv. The suspect may waive his or her Fourth Amendment rights;

v. A warrantless search may be reasonable if:

a. It is incident to a lawful arrest;

b. It amounts to a seizure of evidence found in "plain view";

c. It is of an automobile;128

d. It is pursuant to "hot pursuit";

e. It is a "stop and frisk" search;

f. It is part of an investigation of past crimes; or

g. It is in a school setting and is performed by a school official acting reasonably under the circumstances.

c. Consent and Waiver. As with an adult, a warrantless search may be conducted with the juvenile's consent, and the products of that search may be admitted into evidence over objection. But consent obtained by trickery or coercion will not validate a search conducted without a warrant or with an invalid warrant.

i. The more common consent issue arises in connection with parental consent to a search of the child's property within the parents' home. There is little doubt concerning the validity of a search pursuant to parents' consent of areas in a home where

there is "common authority," such as living or dining rooms, a kitchen, hallways, or a basement. (United States v. Matlock, 415 U.S. 164 (1974).) Virginia cases also have upheld searches of the juvenile's room pursuant to parental consent. (Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965); Green v. Commonwealth, 223 Va. 706, 292 S.E.2d 605 (1982); Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 799 (1970); Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962).) There are a few cases, however, that focus more on the child's "expectation of privacy" in or "exclusive possession" of discrete portions of the premises or in a bureau, footlocker, or toolbox. (United States v. Block, 590 F.2d 535 (4th Cir. 1978); Reeves v. Warden, Md. Penitentiary, 346 F.2d 915 (4th Cir. 1965); In re Scott K., 595 P.2d 105 (Cal. 1979). Block and Reeves involved consent by parents of adult children and might be distinguishable on that ground.)

d. School Searches. A unique locus for searches involving juveniles is the search on school premises, which may include a search of the person or personal effects, vehicles on school grounds, a locked school locker, or a search using dogs. School searches have been scrutinized by courts with a variety of approaches, but the Supreme Court case of New Jersey v. T.L.O. has brought greater uniformity to the area.

i. Although there are still some questions left unanswered by the T.L.O. decision, the primary focus since the decision has been on the reasonableness of the search.

Because the Court held in T.L.O. that the Fourth Amendment applies to school searches and that school authorities conducting a search are acting as state agents, any further examination of the first two inquiries delineated above is foreclosed. The Court reserved judgment on locker and desk searches, although courts have tended to apply a more permissive standard for those searches than for searches of the person.

ii. Another inquiry the Court declined to address in T.L.O was the impact of police participation in a search as opposed to action exclusively by school personnel that is unsolicited and undirected by law enforcement officials.

iii. Courts have held that strip searches of school children and the use of trained dogs to sniff persons in a school setting are unreasonable searches, although the use of dogs to sniff students' lockers and automobiles in public areas may not constitute searches. (Safford Unified Sch. Dist. v. Redding, 557 U.S. 364 (2009); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980).) The Virginia Court of Appeals, in Duarte v. Commonwealth, (12 Va. App. 1023, 407 S.E.2d 41 (1991)). declined to extend a right of privacy comparable to that implied in the Fourth Amendment to the search of a dormitory room at a private college by school officials.

iv. In Vernonia School District 47J v. Acton, (515 U.S. 646 (1995). See Robert E. Shepherd, Jr., School Searches After T.L.O. and Vernonia School District, Crim. Just. 45 (Summer 1998); see also Board of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002), upholding a random drug-testing policy for all students participating in extracurricular activities.) the United States Supreme Court upheld a public school program requiring that students submit to suspicionless, random urine and blood tests as a condition of participation

in school-sponsored athletics. The court concluded that the testing constituted a search under the Fourth Amendment but that the program was reasonable in light of evidence that drug abuse by athletes was a problem in the district.

v. The United States Court of Appeals for the Fourth Circuit upheld the legality of a school search for a missing pair of tennis shoes in DesRoches v. Caprio, (156 F.3d 571 (4th Cir. 1998), rev'g 974 F. Supp. 542 (E.D. Va. 1997).) reversing the district court. The court concluded that the search of DesRoches's backpack was reasonable under the circumstances where there was an unsuccessful search of the eighteen other students in the class and individualized suspicion arose by the process of elimination. A random school search policy in the Norfolk City Schools has been upheld by the circuit court for that city. (Smith v. Norfolk City Sch. Bd., 46 Va. Cir. 238 (Norfolk 1998)).

e. Other Exceptions to the Warrant Requirement. In addition to the exceptions already noted, the United States Supreme Court has indicated that there are three separate bases for exceptions to the exclusionary rule involving the causal relationship between the unconstitutional act and the discovery of evidence:

i. the Independent Source Doctrine, (Murray v. United States, 487 U.S. 533 (1988)).

ii. the Inevitable Discovery Doctrine, (Nix v. Williams, 467 U.S. 431 (1984)).

iii. the Attenuation Doctrine. (Utah v. Strieff, 136 S. Ct. 2056 (2016)).

iv. The Virginia Supreme Court has also expanded the exceptions to a warrant to include situations in which the search warrant is defective, but one of the warrantless exceptions applied in that case to save the evidence from exclusion. (Commonwealth v. Campbell, Record No. 161676, 2017 Va. LEXIS 117 (Va. S. Ct. Dec. 14, 2017) (magistrate's incomplete faxing of the search warrant to the clerk's office did not require the exclusion of evidence where the exigent circumstances exception would have allowed for a warrantless search)).

E. Identification Issues Involving Juvenile Defendants

1. In General

a. Unlike adults, and in keeping with the concerns for confidentiality when children are involved, there are only certain circumstances under which a child's photograph and fingerprints may be taken

b. The Virginia Code is quite specific about the circumstances under which photographs and fingerprints of a juvenile may be taken.

c. Despite the limited rationale behind the limitations, the use of fingerprints or photographs by the police for identification purposes in violation of the statutory guidelines may result in the exclusion of the identification evidence. (State v. Lucas, 299 S.E.2d 21 (W. Va. 1982); State v. Van Isler, 283 S.E.2d 836 (W. Va. 1981)).

2. Lineups

a. The United States Supreme Court held in United States v. Wade150 that a pretrial confrontation between an accused and the accuser for identification purposes is

a critical stage of the proceedings to which the Sixth Amendment right to counsel applies. Gilbert v. California, (388 U.S. 263 (1967)), decided the same day as Wade, similarly excluded testimony of out-of-court identifications made without the presence of counsel. A third case, Stovall v. Denno, (388 U.S. 293 (1967)), concluded that Wade and Gilbert were not to be applied retroactively, but it also determined that an identification might be excluded if it was obtained through procedures that were "unnecessarily suggestive and conducive to irreparable mistaken identification." (*Id.* At 302.) The later case of Kirby v. Illinois, (406 U.S. 682 (1972)), limited the application of the right to counsel defined in Wade and Gilbert to identification procedures conducted after "adversary judicial criminal proceedings" have begun. In Drewry v. Commonwealth, (213 Va. 186, 191 S.E.2d 178 (1972)), the Supreme Court of Virginia held that counsel is not required at an out-of-court photographic identification. Most states have concluded that Wade, Gilbert, and Stovall apply to juvenile proceedings.

b. The suggestiveness of the lineup or showup is usually more of an issue in juvenile proceedings than the denial of the right to counsel. The police seldom have a sufficient number of youths available for a lineup who are similar enough in their physical characteristics to the accused to survive an attack predicated on undue suggestiveness.

3. Fingerprints

a. The statutory guidelines for taking fingerprints are set forth in section 16.1-299 of the Virginia Code. The police must take fingerprints of any juvenile taken into custody for a delinquent act that if committed by an adult would result in mandatory reporting to the Central Criminal Records Exchange (CCRE) pursuant to section 19.2-390(A) of the Virginia

Code. Fingerprint records must be maintained separately from adult records, and a copy must be filed with the juvenile court on CCRE-prescribed forms.

4. Photographs

a. The statutory guidelines for taking photographs in section 16.1-299 of the Virginia Code parallel the rules for taking fingerprints of juvenile offenders.

5. DNA Samples

a. If a juvenile 14 years of age or older is convicted of a felony or an act of delinquency that would be a felony if committed by an adult, a sample of the youth's blood, saliva, or tissue will be taken for DNA analysis. The procedures are governed by section 19.2-310.2 et seq. of the Virginia Code.

6. Attorney's Role

a. A lineup identification is subject to attack on several fronts. The lineup may have been conducted during a period of detention before the juvenile was taken "forthwith" to the juvenile court or before the parents were notified. Counsel may not have been provided for the juvenile, or a waiver of the right to counsel might be subject to attack on the same voluntariness and intelligence grounds used to challenge confessions.

7. Preparing for Motions to Suppress

a. Fact Investigation. Before filing a motion to suppress, counsel should conduct a thorough investigation into whether the motion is warranted. Although information gathered from the child is vital in determining the existence of any constitutional violations, information gathered from the child should not be the only fact investigation conducted.

b. Filing and timing of Motion. Unlike the rules that govern both general district courts and circuit courts, there is no requirement in the juvenile and domestic relations district court rules that motions to suppress be filed in writing with the court.

c. Preparing for the Hearing. Counsel should determine before the hearing the court's practice for scheduling motions to suppress. Some jurisdictions automatically schedule a hearing on the motion before the scheduled court hearing, and some schedule motions earlier on the same day as the court hearing.

F. The Commonwealth's Attorney

1. Consultation Between Police and Commonwealth's Attorney

a. Police conducting an investigation often seek the advice of the commonwealth's attorney. It is critical during the investigative stage of the proceedings for the commonwealth's attorney to ensure that the juvenile's constitutional rights are safeguarded to protect the integrity and viability of the Commonwealth's case.

VIII. TRANSFER OF JUVENILES FROM THE JUVENILE COURT AND HANDLING JUVENILE CASES IN THE CIRCUIT COURT

A. Purpose of Transfer of Jurisdiction

1. The process for transferring jurisdiction from the juvenile courts to circuit courts for certain juvenile offenders was developed to address the class of offenders who, by virtue of their age, past record, or the gravity of the charged offense, or for a combination of these factors, require the harsher treatment inherent in the adult system.

B. Jurisdiction of the Juvenile Court Over Delinquency

1. Exclusive Original Jurisdiction

a. The juvenile and domestic relations district court is given "exclusive original jurisdiction" over matters and proceedings involving a child "[w]ho is alleged to be abused, neglected, in need of services, in need of supervision, a status offender, or delinquent except where the jurisdiction of the juvenile court has been terminated or divested." (Va. Code § 16.1-241(A)(1)). A "delinquent child" is defined in the Code as "a child who has committed a delinquent act or an adult who has committed a delinquent act prior to his eighteenth birthday, except where the jurisdiction of the juvenile court has been terminated under the provisions of § 16.1-269.6." (Va. Code § 16.1-228). A "delinquent act" is defined as:

i. an act designated a crime under the law of the Commonwealth, or an ordinance of any city, county, town, or service district, or under federal law,

ii. a violation of § 18.2-308.7, or (iii) a violation of a court order as provided for in § 16.1- 292, but shall not include an act other than a violation of § 18.2-308.7, which is otherwise lawful, but is designated a crime only if committed by a child. For purposes of §§ 16.1- 24 and 16.1-278.9, the term shall include a refusal to take a breath test in violation of § 18.2-268.2 or a similar ordinance of any county, city, or town. (Id.)

b. The definition of "violent juvenile felony" includes a first offense charged against a youth who is 14 years of age or older of capital murder, first and second degree murder, murder by lynching, felony murder, felonious injury by mob, abduction, aggravated malicious wounding, malicious wounding, poisoning, products adulteration, robbery, carjacking, rape, forcible sodomy, or object sexual penetration and also includes the manufacture, distribution, or possession with intent to manufacture, sell, give, or distribute controlled substances, imitation controlled substance, methamphetamine, or steroids provided

that the juvenile has twice previously been found delinquent for that offense after the age of 14. (Va. Code §§ 16.1-228, -269.1(B), (C). The juvenile court only lacks original jurisdiction over the offenses listed in section 16.1-269.1(B), not over the offenses listed in subsection (C), unless the Commonwealth has elected to give notice of intent to transfer the juvenile to circuit court.)

2. Effect of Previous Transfer

a. A juvenile who has been transferred and convicted as an adult in a circuit court will thereafter be treated as an adult for delinquency charges still pending in juvenile court and for future alleged criminal acts. (Va. Code § 16.1-271. These subsequent charges would presumably be filed in the general district court or handled through direct indictment. *See Broadnax v. Commonwealth*, 24 Va. App. 808, 485 S.E.2d 666 (1997)).

C. Philosophy of the Juvenile Code

1. In Virginia, the expressed legislative intent is that the juvenile code be construed liberally and as remedial in character. All juvenile court proceedings are focused on the welfare of the child and the family, the safety of the community, and the protection of the rights of victims as the paramount concerns of the state. (Va. Code § 16.1-227).

D. Waiver of Juvenile Court Jurisdiction by Juvenile

1. Requirements for Valid Waiver

a. The Virginia Code provides that a juvenile has the right to waive the jurisdiction of the juvenile court and have his or her case transferred to the circuit court for trial as an adult if:

i. the youth is 14 years of age or older

ii. he or she is charged with an offense that could be punished by confinement in a state correctional facility if committed by an adult; (In other words, the child must be charged with a "felony" equivalent, and not a "misdemeanor" offense. See also Va. Code § 18.2-8 (definition of a felony for an adult)).

iii. the election to waive juvenile court jurisdiction is made in writing by the juvenile, with the written consent of counsel. (Va. Code § 16.1-270. See Appendix 7-1 (DC-517 Waiver of Jurisdiction)).

2. Decision to Waive

a. In most cases, there is little advantage in waiving the juvenile court's jurisdiction because of the absolute right to appeal any conviction in a juvenile court and obtain a trial de novo in the circuit court, with either a jury or bench trial. The only practical purpose for a juvenile to waive the jurisdiction of the juvenile court would be to obtain an immediate jury trial in the circuit court without first trying the case in the juvenile court. Juveniles have also elected waiver in situations involving an insanity defense in the juvenile court. (See Chatman v. Commonwealth, 260 Va. 562, 538 S.E.2d 304 (2000); see also D.L.G. v. Commonwealth, 60 Va. App. 77, 724 S.E.2d 208 (2012) (holding that it was not an equal protection violation to deny a juvenile defendant being tried in juvenile court the right to raise an insanity defense when he could have waived the jurisdiction of the court and raised the defense while being tried as an adult)).

E. Certification of Transfer to the Circuit Court for Trial as an Adult

1. Age of the Juvenile

a. The Virginia Code provides that certification or transfer to the circuit court cannot take place unless the juvenile is 14 years of age or older, (Va. Code § 16.1-269.1.) and this requirement is jurisdictional. (Lee v. Jones, 212 Va. 792, 188 S.E.2d 102 (1972)). The age of the child is determined as of the time of the commission of the offense, not at the time of trial. (Va. Code §§ 16.1-269.1(D), -241(A). The burden is apparently on the defendant to establish that he or she is under the age of 18 at the time of the offense where the evidence is conflicting. Winston v. Commonwealth, 26 Va. App. 746, 497 S.E.2d 141 (1998); see also Hall v. Commonwealth, Record No. 2902- 07-3, 2009 Va. App. LEXIS 73 (Feb. 17, 2009)).

2. Grade or Nature of the Offense

a. To certify or transfer a juvenile from the juvenile court, he or she must be charged with a violent juvenile felony as defined by statute or with "an offense which would be a felony if committed by an adult." (1 Va. Code § 16.1-269.1(A). The definition of "violent juvenile felony" is contained in section 16.1-228. See also Va. Code § 18.2-8 (definition of a felony)).

3. Certification or Transfer Must be Initiated by Notice or Motion of the Commonwealth's Attorney

a. The juvenile court must conduct a preliminary hearing pursuant to section 16.1-269.1(B) when a juvenile is charged with the most serious violent felonies.

b. Transfer under section 16.1-269.1(A) can only be initiated "on motion of the attorney for the Commonwealth."

c. Some guidance to the prosecutor in exercising discretion on this critical issue. The standards developed by the National District Attorneys Association provide

that prosecutors should seek transfer only if the gravity of the current alleged offense or the record of previous delinquent behavior reasonably indicates that the treatment services and dispositional alternatives available in the juvenile court are inadequate for dealing with the youth's delinquent behavior or protecting the safety and welfare of the community. (National District Attorneys Association, National Prosecution Standards, Standard 11 Juvenile Justice 4-11.6 and 4-11.7 (Revised 2016); see also James Shine & Dwight Price, "Prosecutors and Juvenile Justice: New Roles and Perspectives," in Ira Schwartz, ed., Juvenile Justice and Public Policy 101 (1992)).

4. Defense Counsel's Role in Influencing the Decision of the Prosecutor

a. Given the high stakes for the juvenile client, it is incumbent upon the defense lawyer to begin work immediately on any case in which transfer or certification is a possibility.

b. When the qualifications of section 16.1-285.1(A) have been met, the juvenile court judge has discretion to sentence and incarcerate a juvenile as a serious offender in a facility operated by the Department of Juvenile Justice for a longer determinate period-up to sever years or the age of 21. (Va. Code § 16.1-285.1).

5. Procedural Requirements for Certificate or Transfer to the Circuit Court

A. Right to Notice. The Virginia Code requires that notice be given to the child and the at least one of the child's parents, a guardian, a legal custodian, or other person acting in a parental role, or to the child's attorney. (Va. Code § 16.1-269.1(A)(1), (C)).

b. Notice requirements are contained in section in 16.1-269.1.

c. In Nelson v. Warden of Keen Mountain Correctional Center, (262 Va. 276, 552 S.E.2d 73 (2001)), the court ruled that a defendant cannot overturn his or her criminal conviction unless he or she has objected to the lack of notice in the trial court and preserved the error in the record.(Id.) The ruling in Nelson made it clear that the Virginia Supreme Court found parental notice to be a procedural and not a jurisdictional matter, and this has had a profound impact on post-Baker jurisprudence in the commonwealth.(Id). Following the Nelson decision, the court again addressed the issue in Shackleford v. Commonwealth, (262 Va. 196, 547 S.E.2d 899 (2001), where the defendant had made proper objection to lack of parental notice before indictment. This decision seems to close the door to these types of appeals as the court observed that section 16.1-269.1(E) of the Virginia Code "cured the defect raised in Shackleford's objection before he made the objection." (Id. at 205-06, 547 S.E.2d at 905).

c. The timing of these objections is critical as counsel will be caught between the "waiver" effected by section 16.1-269.6(E) if these are not made before arraignment and the "cure" of section 16.1-269.1(E) if these are not raised before indictment.

B. Right to Counsel. The juvenile and the juvenile's parents must be advised of the child's right to an attorney before a detention review hearing or an adjudicatory or transfer hearing.

b. Before a child who has been charged with an offense that would be a felony if committed by an adult may waive his or her right to counsel, he or she must consult with an attorney appointed by the court, and the court must

determine that the waiver is free and voluntary. This waiver must be in writing and be signed by both the juvenile and the attorney with whom the juvenile consulted.(Va. Code § 16.1-266(C)(3)).

F. Role of Counsel in the Transfer Process

1. Ethical Considerations

a. Rule 8:6 of the Rules of the Supreme Court of Virginia states that the "role of counsel for a child is the representation of the child's legitimate interests." (The comment to the Rule refers to Virginia's Standards of Practice for Indigent Defense Counsel, which includes standards for attorneys who represent juveniles either in delinquency proceedings or proceedings to determine if a child is in need of services or supervision. The standards are available online at www.vadefenders.org/wp-content/uploads/2017/07/SOP-9-29-16.pdf. The ABA Standards include the Rule's quoted definition of determining the "legitimate interests." IJA-ABA Juvenile Justice Standards Annotated, Standards Relating to Counsel for Private Parties, standard 3.1 (1996). For a fuller discussion of the role of counsel generally, see Chapter 2 of this book).

2. Relationship with Court Staff

a. In a section 16.1-269.1(A) transfer proceeding, it is particularly important for the attorney to develop a positive relationship with the members of the probation staff who prepare the transfer report. That relationship may provide counsel the opportunity to furnish information.

3. School and Medical Records

a. School and medical records often contain information about a child relevant to the transfer criteria.

4. Review of Court Files

a. Counsel should be sure to review the juvenile court's file for the intake sheet for the present charge and any prior court contacts. Counsel should know that the court maintains both a legal file with the formal petitions and a "social file," which may contain psychiatric or psychological reports, educational evaluations, and probation investigations and reports, as well as notations from previous probation supervision.

5. Lay Witnesses

a. To establish that transfer to the circuit court is appropriate for children who are accused of certain serious felonies, the prosecution must prove that it would not be proper to try the child as a juvenile. Defense counsel may be able to counter an argument for transfer by demonstrating the success of a prior treatment program or the ability of the child to respond to available treatments. Therefore, teachers, guidance counselors, coaches, youth club volunteers, ministers, priests, rabbis, or others who have contact with the child may be effective witnesses at the hearing.

6. Expert Witnesses

a. Assuming that a proper evidentiary foundation has been presented, a mental health expert may be qualified to give an opinion regarding a juvenile's amenability to treatment.(Va. Code §§ 8.01-401.1, -401.3.) Expert witnesses may be particularly valuable if the child has a past history of abuse or other medical, psychiatric, or educational problems.(See generally Marty Beyer, Juvenile Justice Update: Expert Evaluations of Juveniles at Risk of Adult Sentences, 18 ABA Child L. Prac., No. 2 (Apr. 1999); Marty Beyer, Recognizing the Child in the Delinquent, Ky. Child. Rts. J. (Spring 1999)).

7. Virginia Department of Juvenile Justice

a. Witnesses from the Virginia Department of Juvenile Justice, especially from the Central Admission and Placement unit in Bon Air, Virginia, may be particularly useful in addressing the availability of facilities and the appropriateness of those facilities for a particular child.

G. The Transfer Report

1. Contents of the Report

a. A transfer study and report must be completed before a transfer to circuit court can take place.[48] The report must focus on facts relevant to the propriety of treatment and may include much of the child's social history, such as physical, mental, and social conditions and personality profile. In addition, the report must include an assessment of any affiliation with a criminal street gang as defined by section 18.2-46.1.

2. Transfer Report Must Be in Writing

a. All elements of the report must be in writing pursuant to the Virginia Code. (Va. Code § 16.1-269.2(B); Tilton v. Commonwealth, 196 Va. 774, 85 S.E.2d 368 (1955)).

3. Filing and Access

a. The Virginia Code has an explicit requirement that the transfer report be filed with the court and made available to the attorneys no later than 72 hours before a hearing. (Va. Code §§ 16.1-237, -269.2(B), -274; see also Va. R. 8:5).

H. Child's Testimony at Transfer Hearing

a. Statements made by a juvenile during a transfer hearing cannot thereafter be admitted against the child in any criminal proceedings following transfer, except for purposes of impeachment. (Va. Code § 16.1-269.2(A)).Therefore, counsel should consider the strategic importance of allowing the juvenile to testify and admit guilt during the transfer hearing and use this as an opportunity to explain his or her behavior or to express remorse about the offense.

I. Effect of Procedural Irregularities

a. The Virginia Supreme Court has held that procedural irregularities in transfer proceedings will not be jurisdictional in nature, nor will they divest the circuit court of jurisdiction over the juvenile. (The only exception is a defect as to the juvenile's age at the time of the offense. See Va. Code § 16.1-269.1(E). *Shackleford v. Commonwealth*, 262 Va. 196, 547 S.E.2d 899 (2001). But violations of due process would clearly seem to be jurisdictional and prevent a valid transfer to the jurisdiction of the circuit court. (*Lee v. Jones*, 212 Va. 792, 188 S.E.2d 102 (1972). It is clear under Virginia law that a transfer after adjudication in the juvenile court violates the prohibition against double jeopardy. (*Breed v. Jones*, 421 U.S. 519 (1975). The Virginia Code clearly states that a transfer hearing must be held "prior to a hearing on the merits."(Va. Code § 16.1-269.1(A). But counsel should be aware that section 16.1-269.1(E) of the Virginia Code states that indictment of the juvenile in the circuit court cures any jurisdictional defect that may have occurred in the juvenile court proceedings. Whether this includes defects of constitutional proportion is an open question after the Nelson decision. (*Nelson v. Warden of Keen Mt. Corr. Ctr.,* 262 Va. 276, 552 S.E.2d 73 (2001); *Moore v. Commonwealth,* 259 Va. 405, 527 S.E.2d 415 (2000), rev'd on other grounds, *Pope v. Commonwealth*, 37 Va. App. 451, 559 S.E.2d 388 (2002). The Virginia Court of Appeals has held that a juvenile does not have a constitutional right to a transfer hearing when the defendant was certified to the grand jury on a murder charge and the juvenile court determined probable cause and that the juvenile was 14 years of age at the time of the offense. (*Rodriguez v. Commonwealth*, 40 Va. App. 144, 578 S.E.2d 78 (2003)).

J. Certification of Juveniles for Trial as Adults Pursuant to Section 16.1-269.1(B) and (C)

1. Preparation for Certification Hearings

a. Given the extraordinarily high stakes of certification hearings, the standards urge counsel to prepare as for an adjudicatory hearing. (Virginia Standards of Practice for Juvenile Defense Counsel, Performance Standard 17. The Standards of Practice for Indigent Defense Counsel, which include the standards for juvenile defense counsel, are available at www.vadefenders.org/wp-content/uploads/2017/07/SOP-9-29-16.pdf.).

2. Certification Pursuant to Section 16.1-269.1(B)

a. Under section 16.1-269.1(B) of the Virginia Code, the circuit court has jurisdiction, without any precipitating action by the commonwealth's attorney, over the trial of juveniles

14 years of age or older as adults if they are charged with capital murder, (Va. Code § 18.2-31), first or second degree murder, (Va. Code § 18.2-32.), murder by lynching, (Va. Code § 18.2-40.), or aggravated malicious wounding.(Va. Code § 18.2-51.2). For these categories of offenses, the juvenile court's role is limited to conducting a preliminary hearing.

3. Certification Pursuant to Section 16.1-269.1(C)

a. The first tier of "legislative waiver" represented by section 16.1-269.1(B) of the Virginia Code is joined by a second tier of "prosecutorial waiver" in section16.1-269.1(C). Under subdivision (C) of the section, the commonwealth's attorney can trigger a transfer by giving seven days' written notice of intention to proceed against a youth 14 years of age or older for a variety of "violent" offenses, such as felony murder, (Va. Code § 18.2-33), felonious injury by mob, (Va. Code § 18.2-41) abduction, (Va. Code § 18.2-48), malicious wounding, (Va. Code § 18.2-51), malicious wounding of a police officer, (Va. Code § 18.2-51.1), poisoning, (Va. Code § 18.2-54.1), products adulteration, (Va. Code § 18.2-54.2), robbery, (Va. Code § 18.2-58), carjacking, (Va. Code § 18.2-58.1), rape, (Va. Code § 18.2-61), forcible sodomy, (Va. Code § 18.2-67.1), or object sexual penetration.(Va. Code § 18.2-67.2). The subsection also includes the nonviolent felonies of manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute, a controlled substance or imitation controlled substance, (Va. Code § 18.2-248), methamphetamine, (Va. Code § 18.2-248.03), or anabolic steroids (Va. Code § 18.2-248.5) when the juvenile has twice been previously convicted of such charge after the age of 14. If the commonwealth's attorney gives the appropriate notice, the matter will be tried in the circuit court after a preliminary hearing in the juvenile court. (Va. Code § 16.1-269.1(C). The statute now includes a requirement of notice to counsel for the juvenile.)

4. Judicial Ruling Against Certification

a. If the juvenile court judge, acting under subsection (B) or (C) of section 16.1-269.1 of the Virginia Code, does not find probable cause or the charge is dismissed, the Commonwealth nevertheless may seek direct indictment in the circuit court. (Va. Code § 16.1-269.1(D)). If the proceeding in the juvenile court is terminated by nolle prosequi, however, any subsequent indictment would have to follow a preliminary hearing in the juvenile court. (Id.)

K. Necessary Court Findings for Transfer Under Section 16.1-269(A)

1. Probable Cause

a. The court must initially find that there is "probable cause . . . to believe that the juvenile committed the delinquent act as alleged or a lesser included delinquent act which would be a felony if committed by an adult."(Va. Code § 16.1-269.1(A)).

2. Age

a. The court must find that the juvenile was 14 years of age or older at the time of the commission of the offense in order for transfer to take place. (Va. Code § 16.1-269.1(D)).

3. Juvenile is Not a Proper Person to Remain Within the Jurisdiction of the Juvenile Court

A. Definition. Section 16.1-269.1(A)(4) of the Virginia Code focuses on whether the youth is "not a proper person to remain within the jurisdiction of the juvenile court," as opposed to the issue of amenability to treatment. The court must consider:

1. The juvenile's age;

2. The seriousness and number of alleged offenses, with greater weight given to certain violent offenses;

2. Whether the juvenile can be retained in the juvenile justice system long enough for effective treatment;

3. The services and dispositional alternatives available in both the juvenile and criminal justice systems;

4. The juvenile's record and previous history relating to prior contacts with the courts and other antisocial behavior;

5. Whether the juvenile has previously absconded from a juvenile facility;

6. Whether the juvenile has previously absconded from a juvenile facility;

7. The extent of any intellectual disability or mental illness;

8. School record and education;

9. Mental and emotional maturity; and

10. Physical condition and maturity.

B. Burden of Proof. The burden of proof is defined in the statute as preponderance of the evidence. (Va. Code § 16.1-269.1(A)(4)).

5. Competency to Stand Trial, Mental Illness, an Intellectual Disability

A. Competency. There is a statutory presumption of competency that a juvenile seeking to assert incompetence may overcome by a preponderance of the evidence. (Va. Code § 16.1-269.1(A)(3))If a juvenile does not raise the issue of his or her competency to stand trial, the statute does not require an explicit finding of competency by the court. (*Panameno v. Commonwealth*, 255 Va. 473, 498 S.E.2d 920 (1998).

B. Intellectual Disability. Although the term "intellectual disability" is not defined in the Virginia transfer statute, section 37.2-100 of the Virginia Code defines it as

> a disability, originating before the age of 18 years, characterized concurrently by (i) significant subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning, administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as

expressed in conceptual, social, and practical adaptive skills.

C. Mental Illness, Insanity, and Mental or Emotional Maturity. Although transfer or certification statutes do not affirmatively address the role of an insanity defense, in juvenile proceedings, both of Virginia's appellate courts have ruled that the defense is not available in juvenile court proceedings. (*Commonwealth v. Chatman*, 260 Va. 562, 538 S.E.2d 304 (2000). Chatman arose from a juvenile appeal of a delinquency case to circuit court. *See also D.L.G. v. Commonwealth*, 60 Va. App. 77, 724 S.E.2d 208(2012), which makes it clear that juvenile defendants do not have a constitutional right to raise an insanity defense in juvenile court). Section 16.1-269.1(A)(4)(g) allows the court to consider the juvenile's intellectual disability or mental illness; section 16.1 269.1(A)(4)(i) also allows the court to consider the juvenile's psychological or emotional maturity levels. However, this section does not apply to certification hearings. If this is a viable issue, counsel should move for an evaluation as early as possible in the proceedings. These issues must be affirmatively raised by the juvenile. (Panameno v. Commonwealth, 255 Va. 473, 498 S.E.2d 920 (1998)). Section 16.1-356 would also allow a psychological evaluation to address the issue of competency to stand trial.

L. Court Conclusions

a. The court should express the findings on transfer in writing. (*Kent v. United States*, 383 U.S. 541, 553 (1966); *Pollard v. Riddle*, 420 F. Supp. 175 (E.D. Va. 1976), vacated in part and aff'd in part, 551 F.2d 308 (4th Cir. 1977)).

b. The Court of Appeals has ruled that the failure of a court to make specific findings regarding intellectual disability was cured by indictment in the circuit court. (*Scott v. Commonwealth*, 31 Va. App. 461, 524 S.E.2d 162 (2000)).

M. Review of Decision on Transfer or Certification

1. Commonwealth's Attorney's Options on Juvenile Court's Refusal to Certify

a. If the juvenile court does not certify a case pursuant to subsection (B) or (C) of section 16.1-269.1, the commonwealth's attorney may seek a direct indictment in the circuit court under section 16.1-269.1(D).

2. Commonwealth's Attorney's Right to Review of Juvenile Court Decision to Retain Jurisdiction After Transfer Hearing

a. If the juvenile court decides to retain jurisdiction and try the child as a juvenile, the commonwealth's attorney is given a statutory right to have this determination reviewed by the circuit court. (Va. Code § 16.1-269.3). The prosecutor may seek review in any case, must notify the juvenile court of the intention to seek that review within 10 days after the juvenile judge's final determination to retain the case, and must also provide counsel for the juvenile a copy of that notice. (Id.)

3. Defense Methods for Review of Decision to Transfer

a. The juvenile has the right to appeal a decision by the juvenile court to transfer the case under section 16.1-269.1(A) by noting an appeal within 10 days after the juvenile court's final decision to transfer. (Va. Code § 16.1-269.4)).

4. Procedure for Review

a. Within seven days after receiving the commonwealth's attorney's or juvenile's notice to seek review in the circuit court, the clerk of the juvenile court must forward to the circuit court all the papers connected with the case, including the transfer report, and a written court order stating the court's reasons for its decision on transfer. (Va. Code § 16.1-269.6(A)). Within 45 days after receipt of this documentation, when practicable, the circuit court must consider the records and reports and hold a hearing to take further evidence on transfer, but without redetermining probable cause. (Va. Code § 16.1-269.6(B)). The court may then enter an order either remanding the case to the juvenile court or advising the commonwealth's attorney that an indictment may be sought from the grand jury. (Id.)

6. Appeal from Circuit Court to Court of Appeals

a. The circuit court's rulings regarding transfer may be appealed in due course through an appeal of the judgment of the circuit court after trying the juvenile. (*Grogg v. Commonwealth*, 6 Va. App. 598, 607-08, 371 S.E.2d 549, 553-54 (1988). That appeal is like any other appeal from a criminal conviction and is not an appeal as a matter of right under section 17.1-405(e) simply because it initially involved the "control or disposition of a child." (Id.)

b. The question of the propriety of an interlocutory appeal following the circuit court's decision on transfer has not yet been presented and resolved, although it would be possible under section 17.1-408.

N. Bail or Detention Pending Circuit Court Hearing

1. Bail.

a. Virginia is one of the few states that allow bail for juveniles, (Va. Code § 19.2-119), and section 16.1-269.2(C) provides that the juvenile court must set bail for the juvenile pursuant to chapter 9 of title 19.2 whether the case has been retained or transferred to the circuit court.

2. Detention Versus Jail

a. A juvenile may be detained in only a juvenile detention facility and, except for very narrowly defined instances, may not be placed in an adult jail or adult detention facility.

3. Speedy Trail Requirements

a. When a juvenile court transfers a youth to the circuit for trial as an adult and remands the youth to jail, the finding of probable cause in the preliminary hearing triggers the start of the five-month limit for trial to commence under section 19.2-243 of the Virginia Code. (*Price v. Commonwealth*, 25 Va. App. 655, 492 S.E.2d 447 (1997), aff'd, 256 Va. 373, 506 S.E.2d 317 (1998); *see also Commonwealth v. Hutchins*, 260 Va. 293, 533 S.E.2d 622 (2000); *Heath v. Commonwealth*, 32 Va. App. 176, 526 S.E.2d 798 (2000) (en banc), aff'd, 261 Va. 389, 541 S.E.2d 906 (2001)).

O. Trial in Juvenile Court if Jurisdiction is Retained

1. Judge

a. If the juvenile court retains jurisdiction over the case, the judge who conducted the transfer hearing cannot then hear the juvenile delinquency case over the objection of any interested party. (Va. Code § 16.1-269.3). Attorneys frequently waive this right to request a new judge, since a judge who has just retained jurisdiction over the case is usually not going to deal with the juvenile too harshly.

2. Time Limitations

a. If the juvenile is continuously in detention, the dispositional hearing must be completed within 30 days after the transfer hearing, unless the time is extended by the judge for good cause shown. (Va. Code § 16.1-277.1). If the juvenile is not in detention, a transfer or adjudicatory hearing must be held within 120 days from the date of the filing of the petition or petitions. (Id. The section only applies to matters within the juvenile court's jurisdiction and not to time spent in jail after transfer to the adult court. *Williams v. Commonwealth*, 33 Va. App. 725, 536 S.E.2d 916 (2000). The only sanction for violation of the statute appears to be release of the youth from detention, although under appropriate circumstances a motion for dismissal of the charges might be in order).

P. Trial in the Circuit Court as an Adult

1. Strategies for Representing the Juvenile in Adult Criminal Proceedings

a. The lawyer in such a case should attempt to "recapture" as much of that childhood as possible.

c. The lawyer should begin general preparation for handling juveniles' cases in adult criminal courts by becoming familiar with the mythology about the "epidemic" of serious juvenile crime supposedly sweeping America, as if juvenile crime is anything new.

d. The defense lawyer should develop an extensive social history on the youthful client, especially concerning such family factors as whether there is any history of abuse or neglect of the minor or broader family violence.

e. In serious cases, a complete physical examination and psychological work-up may be helpful, including a neurological examination if there is any history of head trauma.

f. The lawyer should also develop an extensive educational history, being especially conscious of the possibility of developmental, emotional, or learning disabilities. (See supra ¶ 7.603). The lawyer should review any prior court history to determine whether the child was victim of abuse, neglect, or dependency or the subject of any petitions for delinquency or status offenses.

g. Having developed an extensive history on the youth, the lawyer should consider consulting with experts on adolescence to prepare a developmental assessment. (See supra ¶ 7.606).

2. Procedure for Determining Guilt or Innocence

a. Juvenile criminal cases that are heard in the circuit court, whether transferred or on appeal, are the only criminal cases in Virginia in which the jury determines guilt and the judge decides the sentence. The Virginia Code provides that a jury can decide only the question of guilt or innocence, and sentencing is handled by the judge except in capital cases. (Va. Code § 16.1-272).

3. Admissibility of Evidence

a. As previously noted, statements made by the juvenile during the transfer hearing cannot be used against the child in the circuit court except for impeachment purposes.

4. Sentencing

a. Except in capital cases, sentencing of juveniles is done by the judge, even when a jury has tried the case and decided the issue of guilt.

b. A juvenile who is convicted of a crime that requires a mandatory minimum adult sentence must receive that sentence. (*Brown v. Commonwealth*, 279 Va. 210, 688 S.E.2d 185 (2010)). In these cases, the circuit court does not have discretion to sentence the juvenile under section 16.1-272(A)(2) to alternative juvenile punishments that would otherwise be available.

5. Capital Cases and Life-Without-Parole Sentences

a. In Roper v. Simmons, (543 U.S. 551 (2005), the United States Supreme Court affirmed a decision by Missouri's Supreme Court setting aside a death sentence for a juvenile who was 17 when he committed a murder and resentenced him to life in prison without possibility of parole. The Court held that the Eighth Amendment's prohibition against cruel and unusual punishment extended to enforcing the death penalty against offenders who were under 18 when their offenses had been committed. The majority surveyed state law on the matter and concluded that a national consensus existed

to support this ruling.

b. While the death penalty may no longer be imposed on juvenile defendants following Roper, life without parole sentences may still be used in circumscribed situations. First, in Graham v. Florida, (560 U.S. 48 (2010), the United States Supreme Court held that juveniles convicted of non-homicide crimes are not eligible for life without parole sentences. However, in *Angel v. Commonwealth*, (281 Va. 248, 704 S.E.2d 386 (2011)), the Virginia Supreme Court applied Graham to Virginia's sentencing scheme and held that because Virginia offers those non-homicide defendants the opportunity to seek geriatric parole, it is constitutionally permissible to continue to impose these sentences on juvenile defendants for crimes other than homicide. (Unfortunately, this case did not appear to involve any briefing or record on the factors that the United States Supreme Court has found decisive or compelling in distinguishing between adult and juvenile defendants. Since Angel, the United States Supreme Court has also issued the *Miller v. Alabama*, 567 U.S. 460 (2012), decision, which only reinforces those points. Defense attorneys are urged, therefore, to continue to challenge such sentences).

d. Following Graham, in *Miller v. Alabama*, (567 U.S. 460 (2012), the United States Supreme Court banned the automatic imposition of life without parole sentences on juvenile defendants, holding that those sentences can only be imposed after a sentencing court has the opportunity to consider the individualized, mitigating factors associated with the juvenile defendant's youthfulness.

e. Accordingly, practitioners should be sure to raise Miller if their clients are charged with capital murder or violations of sections 18.2-67.5:3[146] or 19.2-297.1.[147]

f. In *Montgomery v. Louisiana*, (136 S. Ct. 718 (2016)), the United States Supreme Court addressed whether its holding in Miller was to be applied retroactively and gave states the option of either resentencing the defendants who have petitioned for habeas relief or allowing the petitioners to be considered for parole in cases where the original sentences did not consider the Miller factors. (Id. at 736.). In *Malvo v. Mathena*, (254 F. Supp. 3d 820 (E.D. Va. 2017), Lee Boyd Malvo had filed two writs of habeas corpus for review of his Virginia sentences in the D.C. sniper cases, and the district court vacated both sentences based on the directives contained in Montgomery and Miller. Virginia takes the position that, because Malvo would still be eligible for geriatric release, the Virginia sentences were not constitutionally defective. This case, and also a parallel petition filed in Maryland that denied habeas relief, are presently on appeal to the Fourth Circuit.

7. Juvenile Dispositions

a. Section 16.1-272 of the Virginia Code authorizes the circuit court judge to use a juvenile disposition for a juvenile tried and convicted as an adult following transfer pursuant to section 16.1-269.1(A).

b. In *Bullock v. Commonwealth*, (48 Va. App. 359, 631 S.E.2d 334 (2006), and again in Brown v. Commonwealth, (279 Va. 210, 688 S.E.2d 185 (2010)), the 2004 amendment to section 18.2-53.1 was subjected to the same interpretation requiring that the mandatory minimum be imposed in those cases, despite the juvenile sentencing provisions, although both the Court of Appeals and the Virginia Supreme Court stated that the judge still had discretion to sentence the juvenile under the juvenile sentencing options for any other charges as long as the whole term was served. The court in Brown also stated that, although the punishment under section 18.2-53.1 must run consecutively with the sentence for the primary felony, there is no requirement that the mandatory sentence run consecutively with any other sentence for a crime other than the primary felony. Therefore, the court concluded that section 18.2-53.1 does not specifically prohibit multiple sentences for the use or display of a firearm from being run concurrently with each other.

8. Adult Sentencing

a. The judge likewise has the option to sentence the juvenile transferred under section 16.1-269.1(A) as an adult.

b. One study has demonstrated that a juvenile incarcerated in an adult institution is five times more likely to be the victim of a sexual assault than when placed in a juvenile correctional facility. (Schiraldi, Vincent, & Zeidenberg, The Risks Juveniles Face When They Are Incarcerated with Adults (1997); Martin Forst et al., Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy, 14 Juv. & Fam. Ct. J. No. 1, at 9 (1989)).

c. Sections 19.2-311 through 19.2-316 of the Virginia Code provide an effective tool for sentencing the transferred juvenile if adult treatment is deemed appropriate. Those sections apply specifically to the juvenile certified for trial as an adult who is convicted of a felony not punishable as a Class 1felony or of a misdemeanor and who is deemed to be capable of rehabilitation. (Va. Code § 19.2-311(B). The commitment is for an indeterminate period not to exceed four years.

9. Circuit Court Sentencing in Violent Juvenile Felony

a. When a case has been certified to the circuit court under subsection (B) or (C) of section 16.1-269.1, the court may fix an adult sentence and impose that sentence or suspend the adult sentence conditioned upon successful completion of terms and conditions that may be imposed upon a delinquency disposition in juvenile court including, but not limited to, commitment under section 16.1-278.8(A)(14) or section 16.1-285.1 of the Virginia Code. (Va. Code § 16.1-272(A)(1)). The court may also impose an adult sentence but order that a portion of it be served in a juvenile correctional facility. (Va. Code §§ 16.1-272, -285.2).

9. Serious Offender Review Hearings and Section 19.2-303

a. As described above, a serious offender review hearing provides a sentencing court that has imposed a mix of juvenile and adult time, or even just imposed juvenile time, the opportunity to subsequently modify its original sentencing decision, even suspending all or some of the previously imposed adult time. (Va. Code § 16.1-285.2(E).

b. Section 16.1-285.1 provides that juveniles sentenced as "serious offenders" are entitled to a sentence review hearing two years after their first sentencing date and every year thereafter. (Va. Code § 16.1-285.1(F).

c. Before the commitment review hearing, the Department of Juvenile Justice must provide the court with a progress report that describes the juvenile defendant's progress toward any treatment goals and objectives, including a summary of his or her educational progress, the potential for danger to the juvenile or the community upon release, and a comprehensive aftercare plan. (Va. Code § 16.1-285.2(A), (B). Subsequently, in determining whether to modify the original sentence, the court must consider this progress report and may consider additional evidence from (i) probation officers, the juvenile correctional center, treatment professionals, and the court service unit; (ii) the juvenile and the juvenile's legal counsel, parent, guardian, or family members;

d. In light of this evidence, the court then considers the following factors: (i) the experiences and character of the juvenile before and after commitment, (ii) the nature of the offenses that the juvenile was found to have committed, (iii) the manner in which the offenses were committed, (iv) the protection of the community, (v) the recommendations of the Department, and (vi) any other factors the

court deems relevant. (Va. Code § 16.1-285.2(D).

e. In addition to the authority granted under the serious offender statute, a court also has the authority under section 19.2-303 of the Virginia Code to modify a sentence involving active Department of Corrections time as long as the defendant has not yet started serving this sentence. Specifically, section 19.2-303 provides that

> [i]f a person has been sentenced for a felony to the Department of Corrections but has not actually been transferred to a receiving unit of the Department, the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may, at any time before the person is transferred to the Department, suspend or otherwise modify the unserved portion of such a sentence.

Q. Sex Offender Registration

a. Following the decisions in Graham v. Florida (560 U.S. 48 (2010)), and Miller v. Alabama, (567 U.S. 460 (2012)), at least two courts have held that mandatorily imposing sex offender registration is also a violation of the Eighth Amendment's prohibition on cruel and unusual punishment. (ee, e.g., In re C.P., 967 N.E.2d 729 (Ohio 2012); In the Interest of J.B., CP-67-JV-000072602010 (York, Pa. Nov. 4, 2013). A copy of In the Interest of J.B. is available at http://jlc.org/blog/juvenile-court-judgefinds-pennsylvania-juvenile-sex-offender-registration-law-unconstitutional.)

R. Appeal

a. Consideration should always be given to an appeal in a case that was transferred over the juvenile's objection, and care should be taken to preserve all the relevant issues for appeal.

IX. THE ADJUDICATORY HEARING

A. Introduction

a. The adjudicatory hearing is the stage of the juvenile court process that most resembles the fact-finding phase, or trial, in other legal proceedings.

B. Petition and Notice of Charges

1. The Petition or Initial Pleading

a. The Virginia Code specifies the format of the petition and requires that it be verified. (Va. Code § 16.1-262; see Appendix 5-1 of Chapter 5).

b. The petition must be sufficiently specific in a delinquency case to give the juvenile notice of the charges against him or her,"that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding," and to determine whether the double jeopardy clause has been violated. (See Gault, 387 U.S. at 33).

2. Summons

a. After the filing of a petition, the court directs the issuance of a summons. (Va. Code § 16.1-263; see Appendix 2-4 in Chapter 2 for an example of a Summons). The summons should be directed to: (i) the child, if 12 years of age or older; (ii) at least one parent, guardian, legal custodian, or other person standing in loco parentis (if a custodian who is not a parent is summoned, a parent must also be summoned); and (iii) other persons whom the court deems proper and necessary parties to the proceedings. (Va. Code § 16.1-263). The summons should also (i) require persons summoned to appear personally before the court at the time fixed to answer or testify as to the allegations of the petition; (ii) advise the parties of their rights to counsel pursuant to section16.1-266 of the Virginia Code; and (iii) have a copy of the petition enclosed for the initial proceeding. The summons must give notice that if the juvenile is committed to the Department of Juvenile Justice or to a secure local facility, at least one parent or other person who is legally obligated to care for or support the juvenile may be required to pay a reasonable sum for the juvenile's support and treatment pursuant to section 16.1-290. (Va. Code § 16.1-263(B).

b. The court may also use notice of hearing instead of a summons to notify parties and others of the pendency of a hearing. (See Appendix 8-1 (DC-512 Notice of Hearing). The notice is given to a parent or custodian when an emergency removal hearing is scheduled pursuant to section 16.1-252(A).

c. Any party, other than the child, may waive service of a summons by a written stipulation or by voluntary appearance at the hearing. (Va. Code § 16.1-263(D).

3. Service of Summons

a. Service of a summons may be made by sheriffs or their deputies, police officers, or any other suitable person designated by the court. (Va. Code § 16.1-264(B).

4. Parental Notice

a. Cases involving transfer or certification hearings require that a summons be issued to at least one parent of the juvenile who is the subject of the proceeding and also that notice be given of all subsequent hearings. (Va. Code § 16.1-263; see also Va. Code § 16.1-269.1(A). The right to notice is further discussed in paragraph 7.505(A) of Chapter 7).

5. Prisoner as Party or Witnesses

a. For proceedings in which a prisoner's presence is required as a party or a witness, the judge may issue an order to the Director of the Department of Corrections or the administrator of a correctional institution to deliver the prisoner to the sheriff of the jurisdiction for transportation to the court. (Va. Code § 16.1-276.2). As an alternative, telephonic or video and audio communications may be used to provide for the appearance of a prisoner at the hearing. (Va. Code § 16.1-276.3).

C. Subpoenas

a. Upon application of a party and pursuant to the Rules of the Virginia

Supreme Court, the clerk is to issue, or the court on its own motion may issue, subpoenas requiring the attendance and testimony of witnesses and production of records, documents, or other tangible objects at any hearing. (Va. Code § 16.1-265; see also Va. R. 8:13).

D. Procedure in Criminal Cases Involving Adult Defendants

a. When an adult is tried in juvenile court for an offense such as a crime against a child or for an intrafamily offense, the procedures to be followed are those applicable in the trial of cases in general district court. (Va. Code § 16.1-259(A).

b. Proceedings in cases of adults under the age of 21 who are alleged to have committed, before attaining the age of 18, an offense that would be a crime if committed by an adult must be commenced by the filing of a petition. (Va. Code § 16.1-259(C).

c. Proceedings for violations of probation or parole in cases of adults under the age of 21 where jurisdiction is retained pursuant to section 16.1-242 must be commenced by the filing of a petition. (Va. Code § 16.1-259(D).

E. Physical and Mental Examinations and Competence

1. Physical and Mental Examinations (Va. Code § 16.1-275).

a. The court may have any child within its jurisdiction examined and treated by a physician or at a local mental health center. The Commissioner of Behavioral Health and Developmental Services will provide a list of appropriate mental health centers in the Commonwealth. If no appropriate mental health facility is available locally, the court may order the child to be examined and treated by a physician or psychiatrist or examined by a clinical psychologist. Upon written recommendation of a physician or psychiatrist, the court may send the child to a state mental hospital for not more than 10 days to obtain a recommendation for treatment. The child may not be held or cared for in a maximum security unit with adults alleged to be criminally insane, and the child should be kept separate and apart from such adults.

2. Temporary Placement with Department of Juvenile Justice

a. If a child is found to be delinquent for a committable offense, he or she may be placed in the temporary custody of the Department of Juvenile Justice for not more than 30 days for diagnostic assessment services after the adjudicatory hearing and before final disposition, on a space-available basis as determined by the department. (Id.)

3. Mental Competency

a. A juvenile who is mentally ill, mentally incompetent, or intellectually disabled should be dealt with on that basis rather than on the basis of delinquency or as a child in need of services or in need of supervision.

4. Physical Competency to Commit Sex Offenses

a. There is a rebuttable presumption that a juvenile over the age of 10 but younger than12 is not physically capable of committing a rape, (Va. Code § 18.2-61(B)), although there is no

comparable presumption articulated either by statute or case law regarding other sex offenses such as sodomy and the like.

5. Admission of School Records to Determine Intent

a. In any proceeding in which a juvenile is alleged to have committed a delinquent act that would be a misdemeanor if committed by an adult and that act was alleged to have been committed

i) at school during school hours and during school-related or school-sponsored activities,

ii) on a school bus,

iii) at another location being used solely for a school-related or school-sponsored activity, the juvenile may introduce into evidence any document relevant to whether the juvenile acted willful and intentionally if the document relates to:

1) An Individualized Education Program developed pursuant to the federal Individuals with Disabilities Education Act;(20 U.S.C. § 1400 et seq.)

2) A Section 504 Plan prepared pursuant to section 504 of the federal Rehabilitation Act of 1973; (29 U.S.C. § 794.)

3) A behavioral intervention plan as defined in 8 VAC 20-81-10; or

4) A functional behavioral assessment as defined in 8 VAC 20-81-10. (Va. Code § 16.1-274.2(A).

F. Advice of Trial Rights for Juveniles Charged with Delinquency

a. Rule 8:17 of the Rules of the Virginia Supreme Court adds a significant new dimension to the adjudicatory hearing in a delinquency case. It provides that the court must advise the juvenile during his or her first appearance of certain rights, including:

(i) the right to counsel;

(ii) the right to a public hearing;

(iii) the right to the protection of the privilege against self-incrimination;

(iv) the right to confront and cross-examine witnesses;

(v) the right to present evidence; and

(vi) the right to appeal the court's final decision.

G. Burden of Proof and Evidentiary Rules

1. Burdens of Proof.

a. The burdens of proof applicable in certain types of cases are not generally specified but would appear to be as follows, depending on the nature of the proceedings:

1. Delinquency cases—reasonable doubt following In re Winship; (397 U.S. 358 (1970).
2. Child in need of supervision cases—clear and convincing evidence in accordance with *Grigg v. Commonwealth*; (224 Va. 356, 297 S.E.2d 799 (1982).
3. Termination of residual parental rights—clear and convincing evidence; (Va. Code § 16.1-283(B); *Santosky v. Kramer*, 455 U.S. 745 (1982).
4. Abuse and neglect—preponderance of the evidence; (*Wright v. Arlington Cnty. Dep't of Soc. Servs.*, 9 Va. App. 411, 388 S.E.2d 477 (1990).
5. Other cases—probably preponderance of the evidence, although this is uncertain as to children in need of services or status offenders.

2. Evidentiary Rules

a. The due process standard of fundamental fairness applies and would preclude admission of inadmissible evidence such as hearsay at the adjudicatory hearing. (Gilbert v. Commonwealth, 214 Va. 142, 198 S.E.2d 633 (1973). In a delinquency case, the evidentiary rules generally applicable to adult criminal proceedings would seem to govern the admission of evidence.

H. Procedures

a. The due process standard of fundamental fairness applies to juvenile court proceedings. Consequently, the adjudicatory hearing should have a certain degree of formality in spite of the traditional parens patriae atmosphere of the court.

I. Admissions and Guilty Pleas

1. Possible Pleas and Inquiry into Guilty Plea

a. Rule 8:18 of the Rules of the Virginia Supreme Court makes clear that the permissible pleas in a delinquency case are "guilty," "not guilty," "nolo contendere," or "no plea," which will be treated as a denial of the allegations.

2. Plea Bargaining, Cooperation/Immunity Agreements, and he Decision to Pled Guilty

a. Although the appropriateness of plea bargaining was long controversial in the

juvenile justice system, the American Bar Association Standards Relating to Adjudication recognize the practice, legitimize it, and urge that it be regulated.[56] Rule 8:18 attempts to do that, although it does not explicitly refer to the existence of an agreement to plead guilty nor does it call for the court to inquire into the existence of such an agreement.

b. A plea bargain may include an agreement by the Commonwealth to refrain from seeking a transfer to adult court. It may also include the dismissal of multiple charges in favor of fewer petitions, the substitution of a lesser charge that would entail fewer consequences, or an agreement for a particular disposition that is recommended to the court by both the defense and the Commonwealth.

c. Plea agreements in the juvenile court may also require the juvenile to stipulate to facts sufficient to find guilt. This is equivalent to a plea of nolo contendere and is frequently used when there is an agreement to defer a finding of guilt as permitted by section 16.1-278.8(A)(5) of the Virginia Code.

d. In *Lampkins v. Commonwealth*,[59] the Court of Appeals ruled that a cooperation/immunity agreement between the Commonwealth and the juvenile was a contract between the parties, not subject to the same analysis as plea agreements, and the government bears the burden of establishing a breach by the juvenile. Because the Commonwealth failed to establish that breach, the court concluded that due process required the enforcement of the agreement, granting immunity from prosecution. (Id. at 723-24, 607 S.E.2d at 729.)

J. Plea of Infancy

a. No subsequent court decision has specifically rejected the continued applicability of the common law infancy defense described in *Law v. Commonwealth*, (75 Va. 885 (1881)), to juveniles below the age of 14 involved in juvenile delinquency cases. (Cf. Lee v. Nationwide Mut. Ins. Co., 255 Va. 279, 283, 497 S.E.2d 328, 330 (1998). At common law, juveniles under the age of 7 were conclusively presumed to be incapable of criminal behavior, and children between the ages of 7 and 14 were presumed to be incapable, with the prosecution having the burden to rebut the presumption. The closer the juvenile was to the age of 7, the more difficult it was to rebut the presumption. (See Robert E. Shepherd, Jr., Juvenile Justice: Rebirth of the Infancy Defense, Crim. Just. 45 (Summer 1997).

K. Contempt of Court

a. A juvenile court has the power to punish for contempt pursuant to section 16.1-69.24 of the Virginia Code, with a maximum jail sentence of 10 days for an adult. (1980-81 Report of the Attorney General 214). Section 16.1-292 gives further contempt authority, including the power to place a juvenile in detention for up to 10 days for summary contempt. A juvenile can be found guilty of direct contempt in a circuit court for deliberately failing to honor a witness subpoena, and the matter need not be referred to the juvenile court for the filing of a petition. (*Wilson v. Commonwealth*, 23 Va. App. 318, 477 S.E.2d 7 (1996).

L. Jury Trial

a. Currently, there is no recognized constitutional right to a jury trial in the juvenile court. (*McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Note that the Kansas Supreme Court ruled that juveniles do have a right to a jury trial as a result of changes in Kansas legislation. In re L.M., 186 P.3d 164 (Kan. 2008). But there is a statutory right to a jury in the circuit court on the issue of guilt or innocence after a transfer of jurisdiction by either the juvenile court or by the juvenile pursuant to section 16.1-269.1 of the Virginia Code. (Va. Code § 16.1-272). The juvenile can also elect to transfer the case pursuant to section 16.1-270. In addition, upon appeal of a

delinquency case, a trial de novo may be held in the circuit court before a jury on the issue of guilt or innocence. (Va. Code § 16.1-296(C). The Virginia Code also provides for a jury of 12 if the alleged delinquent act would be a felony if committed by an adult, and a jury of 7 in all other cases. *(Id.)*

M. Right to Public Trial and Presence of Child

1. Right to a Public Trial in Delinquency Proceedings

a. A juvenile charged with delinquency or a traffic infraction has a right to a public trial unless the right is expressly waived. (Va. Code § 16.1-302. This represents a major departure from the practice before the general revision of the juvenile code in 1977. But in many courts there has been little change in practice since the revision because of the architectural arrangement of the court rooms or, perhaps, tradition).

2. Right to Public trial in Criminal Proceedings

a. An adult charged with a crime in the juvenile court has a right to a public trial unless the right is expressly waived.

3. Right to Be Present

a. Pursuant to section 16.1-302 of the Virginia Code, a juvenile charged with delinquency or a traffic infraction and an adult charged with a crime have a right to be present at trial, although that right may be waived in connection with a traffic infraction.

4. Protecting Confidentiality of Closed Proceedings

a. The court may protect the confidentiality of closed juvenile court proceedings without violating the First Amendment as long as no effort is made to punish or prohibit disclosure by the media of information lawfully obtained. (Va. Code § 16.1-305(B1); 1980-81 Report of the Attorney General. A more complete discussion of the confidentiality provisions may be found in Chapter 18 of this book). But a dissenting opinion in the Virginia Supreme Court case of *Hertz v. Times-World Corp*, (259 Va. 599, 528 S.E.2d 458 (2000) (4-3 decision). The trial court's opinion may be found at 50 Va. Cir. 25 (Bedford 1999), questions whether the press can be properly excluded from juvenile proceedings involving adults charged with crime or juveniles over the age of 14 charged with felonies without written findings sufficiently detailed to permit a reviewing court to determine whether closure was proper.

5. Court Reporters and Transcripts

a. Rule 8:11 of the Rules of the Virginia Supreme Court deals with the use of court reporters and the preparation of transcripts. Rule 8:11 primarily tracks Rule 7A:4, which pertains to reporters and transcripts in the general district court, while distinguishing between those proceedings that are confidential under the juvenile code and those that are open to the public.

6. Right of Victims to Be Present at Trial

a. The victim of an offense has the right to remain in the courtroom during any delinquency proceeding, and if the victim is a child, an adult chosen by the victim may be present in addition to or in lieu of the child's parent or guardian. (Va. Code § 16.1-302.1). The court can exclude the victim

only if a determination is made, in the court's discretion, "that the presence of the victim would impair the conduct of a fair trial."*(Id.)*

N. Double Jeopardy

a. The Double Jeopardy Clause of the United States Constitution applies to proceedings in the juvenile court, so that the potential deprivation of liberty in an adjudicatory or dispositional proceeding in juvenile court bars a later proceeding in a court of record based on the same facts. (*Breed v. Jones*, 421 U.S. 519 (1975); see also *Lewis v. Howard*, 374 F. Supp. 446 (W.D. Va.), aff'd, 504 F.2d 426 (4th Cir. 1974). The Commonwealth had prevailed in the Supreme Court of Virginia. *Lewis v. Commonwealth*, 214 Va. 150, 198 S.E.2d 629 (1973).

X. THE DISPOSITION HEARING

A. Philosophy of Disposition

a. As set forth in section 16.1-227 of the Virginia Code, the juvenile court system is designed to:

1. Divert from or within the juvenile justice system, to the extent possible and consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs;

2. Provide judicial procedures through which the provisions of the law are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other rights are recognized and enforced;

3. Separate a child from his or her parents, guardian, legal custodian, or other person standing in loco parentis onlywhen the child's welfare is endangered or it is in the interest of public safety and then only after consideration of alternatives to out-of-home placement that afford effective protection to the child, the family, and the community; and

4. Protect the community against those acts of its citizens, both juveniles and adults, that are harmful to others, and reduce delinquent behavior and hold offenders accountable for their behavior. Section 16.1-227 focuses very clearly on balancing

b. The Virginia Code basically adheres to a community-based, family-focused dispositional philosophy that favors sentencing alternatives that keep the child in the family unit or at least in his or her home community.

c. Thus, to be effective, a disposition should:

1. Occur in the least restrictive environment;

2. Provide for rehabilitation of the juvenile;

3. Modify the juvenile's behavior;

4. Prevent recidivism;

5. Provide punishment or accountability for the delinquentact;

6. Protect the public;

7. Deter the juvenile and others from committing futureoffenses; and

8. Provide restitution to victims.

B. Venue for Disposition

d. Disposition will likely occur in the adjudicating court, but it may be transferred to the jurisdiction where the child resides. (Va. Code § 16.1-243(B)(1). Although the statute requires originals of all legal and social records to accompany the transfer, the statute now provides that "records imaged" from the originals are considered "originals" under this code section. Va. Code § 16.1-243(C). The transfer may be on motion of the court or of any "party," for good cause shown, and may occur at any time after adjudication.

C. Court Services Unit Procedures Following the Adjudicatory Hearing

1. Case Assignments

a. Usually the probation supervisor is alerted immediately following the adjudication of a case, and a probation officer is assigned to the child.

2. Juvenile under Court-Ordered Supervision

a. When the juvenile is not in detention pending the social history investigation, the court may require that the youth be supervised by a probation officer.

D. Information Necessary to Make an Effective Disposition

1. Social History

a. A social history is not mandatory except as required by section 16.1-278.7 upon commitment to the Department of Juvenile Justice. It may be ordered after adjudication and before final disposition of any delinquency case, except where the offense is a traffic infraction, a violation of the game and fish laws, or a violation of an ordinance regulating surfing or curfew. (See Appendices 9-1 (DC-542 Order for Investigation and Report) and 9-2 (Sample Social History (CANS) Report). The investigation for the social history may, and for the purposes of section 16.1-278.8(A)(14) or (A)(17) must, include the physical, mental, and social conditions and personality of the child and the facts and circumstances surrounding the violation of

law, but it is usually not limited to this information. (Va. Code § 16.1-273.)

b. The normal elements of a social history include:

1. The present problem;

2. Previous problems, including intakes, any nolle prosequi record, child abuse complaints, or domestic violence;

3. Pending problems, such as complaints filed at intake orunder investigation at the present time;

4. Family background:

    a. Mother;

    b. Father;

    c. Siblings; and

    d. Other significant parties (grandparents, step-parents, guardians, live-in boyfriends/girlfriends, etc.);

5. Home and neighborhood and their impact on the juvenile's behavior;

6. Religious influences (degree of influence on the family);

7. The client's background:

8. General physical description and attitude (this will also include any statements made on the presenting incident);

9. Education, such as classroom grades and behavior, scores from standardized tests, and impressions from teachers and counselors;

10. Health from birth to present, including traumas, substance abuse, etc.;

11. Interests and activities; and

12. Employment;

13. Summary and impressions, including the child's strengths and weaknesses;

14. A trauma history or Adverse Childhood Experiences (ACE) score; and

15. Recommendations

c. A victim impact statement, (Va. Code § 19.2-299.1.), must be included in some form

in the social history, upon motion of the commonwealth's attorney with the consent of the victim. The court on its own motion may require a victim impact statement "if the court determines that the victim may have suffered significant physical, psychological, or economic injury as a result of the violation of law." (Va. Code § 16.1-273(B).

d. The social history investigation, if ordered, must include a drug screening.

e. Abbreviated social history reports are permitted at the discretion of the Director of Court Services and are likely to be used in jurisdictions where the caseload is extremely high or where they are used in adult cases.

f. The clerk must furnish a copy of the social history no later than 72 hours before the dispositional hearing. (Va. Code § 16.1-274). Rule 8:5 of the Rules of the Virginia Supreme Court requires that the court furnish the social history to counsel, and it must be provided by mail upon counsel's request.

2. Court Ordered Evaluations

a. Pursuant to section 16.1-275 of the Virginia Code, the court may order a child before the court to be examined and treated. The child may be physically examined and treated by a physician or examined and treated at a local mental health center.

3. Diagnostic Assessment by Department of Juvenile Justice (Va. Code § 16.1-275.)

a. The court may order that the child be placed in the temporary custody of the Department of Juvenile Justice for diagnostic assessment after an adjudication of guilt in a delinquency case.

4. Child Development Clinic Evaluation

a. Child Development Clinics are operated by the State Department of Health and provide evaluations for a nominal fee or no fee if the parents are indigent.

5. Substance Abuse Evaluation

a. The local community services boards and certain court services units have substance abuse counselors on staff who can evaluate the need for inpatient or outpatient substance abuse treatment. (See Appendix 9-6 (Sample Substance Abuse Evaluation).

b. As noted in paragraph 9.401, every social history investigation must include a drug screening and, if necessary, an assessment by a certified substance abuse counselor.

E. Placement of Child Pending Disposition

a. A child held in secure detention after the adjudicatory hearing, or after a decision by the court not to transfer, must be released from detention if the dispositional hearing is not completed within 30 days from the date of the adjudicatory or transfer hearing. (Va. Code § 16.1-277.1(C). Section 16.1-277.1(D) of the Virginia Code states that secure detention may be extended for a reasonable time for good cause shown, provided the basis for the extension is recorded in writing and filed among

the papers of the proceeding. The child may be released on bond, may be released to his or her parent or guardian on terms and conditions, may be released to a relative or suitable person, may be placed with social services, or may be placed in shelter care pending the dispositional hearing. (Va. Code §§ 16.1-248.1, -278.8).

F. The Defense Counsel at Disposition

1. Role of Counsel

a. The role of counsel at disposition, as defined by the IJA-ABA Juvenile Justice Standards, is

> essentially the same as at earlier stages of the proceeding: to advocate, within the bounds of the law, the best outcome available under the circumstances according to the client's view of the matter . . . . Counsel may, of course, appropriately advise a client with respect to community or correctional therapeutic services that may be of long-term benefit; where circumstances warrant, counsel may also urge the client to accept these services or programs as part of a dispositional plan. Discharge of this counseling function must, however, be distinguished from the actual decision, which is for the client to make. Once full advice is given, the lawyer's own opinion of the client's needs or interests is subordinated to the client's definition of those interests, and the lawyer-client relationship generally demands that counsel advocate the client's desires as strenuously as possible. (IJA-ABA Standards Relating to Counsel for Private Parties, Standard 9.3(a) cmt. (1980). The 1996 version of the standards, published without the comments, is available online at www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf).

2. Preparing for the Dispositional Hearing

a. In order to effectively advocate for clients at the dispositional hearing, counsel should begin preparing from the first meeting with the client. Counsel should be creative in gathering social information and exhibits and witnesses for possible use at the dispositional hearing.

3. Nature of the Hearing

a. The dispositional hearing should be a proactive, participatory hearing in which witnesses are called and testimony is presented.

4. Social History Report can and Should Incorporate Counsel's Input

a. Since many judges allow, and sometimes require, social histories to include a recommendation for disposition, it is essential that counsel be aware of the importance of having input into this recommendation.

5. Person Who Prepares Report Should Be Present at Hearing

a. The court services unit staff member who prepares the report should be present at the dispositional hearing and should be available for cross-examination on the thoroughness and accuracy of the report.

6. Relationship between Defense Counsel and Probation

a. It is important to contact the assigned caseworker to discuss the case and establish a rapport and relationship.

7. Counsel Should Learn About Dispositional Options and Procedures

a. The lawyer needs to be fully aware of the powers and duties of the family assessment and planning team.

b. Counsel should also know what treatment options are available in the community and check in periodically to see how things are progressing during the case investigation.

8. Reviewing the Social History

a. The social history should address the physical, mental, and social conditions and personality of the child and the family as well as the facts and circumstances surrounding the violation of law. (Va. Code § 16.1-273). Specific factors that should be addressed in the social history, and which counsel should consider highlighting at the dispositional hearing, include, but should not be limited to:

1. Age and educational background of the offender;

2. Prior court record;

3. Family and peer relationships and their effect on the juvenile;

5. Possible history of substance abuse by the child;

6. Whether the child is enrolled in school or employed;

7. Whether the child is receptive to treatment;

8. Whether the child has a supportive family;

9. Whether there is an absent parent;

10. Seriousness of the crime and whether it was violent or nonviolent;

11. Impact of the crime on the victim;

12. The community's response to the crime;

13. Whether the offender is learning disabled or emotionally disturbed;

14. Availability of resources in the community to deal withthe juvenile's problems;

15. Whether the child poses a high or low risk to re-offend;

16. The reason the child committed the crime: for instance, to gain attention or support a drug habit;

17. The child's strengths and weaknesses;

18. Prior trauma history; and

19. The Department of Juvenile Justice Youth Assessment Screening Instrument. (See Appendix 9-8 (Department of Juvenile Justice Youth Assessment Screening Instrument).

9. Interagency Multidisciplinary Teams

a. An evaluation of the child's service needs should be made by a team of qualified personnel from mental health, juvenile probation, social services, local school division, and other appropriate public or private agencies.

10. Resource Directory

a. Agencies should cooperate and share resources, and they are encouraged to publish a directory for referral purposes.

G. Role of the Prosecutor in Disposition

a. Typically, in cases in which the underlying offense would be a felony if committed by an adult, the court services unit has prepared a social history on the child that is available at the time of the disposition.

b. The most significant difference between a pre-sentence report and a social history is that the person preparing the social history makes a recommendation as to the disposition of the case.

c. The commonwealth's attorney should receive the social history and review it before the dispositional hearing. Based on the information provided, the prosecutor should determine what disposition is in the best interests of the child and the citizens of the Commonwealth, with special regard to any victim of the underlying offense.

H. Dispositional Hearings

a. The judge's basic concern in dispositional hearings is to ensure that the

disposition is realistically related to the causes of the juvenile's behavior as well as to the specific offense committed. Therefore, the dispositional hearing should be a proactive, participatory hearing in which witnesses are called and testimony is presented.

b. The purpose of the hearing is to develop a dispositional order that will serve as an individualized treatment plan in the rehabilitation of the offender. The rights of the victim and the safety of the community must be balanced with the offender's right to rehabilitation and treatment.

c. Counsel should consider asking the court to appoint a guardian ad litem for the juvenile if counsel believes that a substantial conflict exists between the parent or parents and the juvenile.

X. DISPOSITIONAL ATERNATIVES

A. Delinquency

a. The dispositional alternatives available following an adjudication of delinquency are varied and are to be considered in order of intrusiveness, with the least intrusive alternative first. (See Va. Code § 16.1-227; Appendix 9-7 of Chapter 9 (DC-569 Adjudication and Disposition Order—Delinquency).

b. Dispositional alternatives available to the court are as follows:

1. Enter an order pursuant to section 16.1-278 of the Virginia Code.[2] This section authorizes the court to order a public agency to provide services otherwise mandated by state or federal law. Although rarely used to argue for "nontraditional services," this provision is modeled after section 255 of the New York Family Court Act and has been successfully argued in other jurisdictions to require agencies to provide services, such as adequate housing and specialized programs, that may not routinely be provided by the agency.[3]

2. Permit the juvenile to remain with his or her parent subject to conditions imposed on the child and parents. (Va. Code § 16.1-278.8(A)(2).

3. Order the parent of a juvenile living with that parent to participate in rehabilitative programs or be subject to other conditions. (Va. Code § 16.1-278.8(A)(3).

4. Defer disposition for a specific period established by the court to reflect the gravity of the offense and the juvenile's history, with dismissal of the charges if the juvenile exhibits good behavior during the period of deferral. (Va. Code § 16.1-278.8(A)(4).

5. Defer disposition and place the youth in the temporary custody of the Department of Juvenile Justice (DJJ) to attend a boot camp if bed space is available and the juvenile (i) is otherwise eligible for commitment to DJJ; (ii) has not previously been and is not now being convicted of a violent juvenile felony; (iii) has not previously attended a boot camp; (iv) has not previously been committed to and

received by DJJ; and (v) has had an assessment by DJJ or its contractor considering the appropriateness of a boot camp placement. If the juvenile withdraws, removes, or refuses to comply with the conditions of participation, he or she will be returned to court for a new disposition consistent with what could have been imposed initially. (Va. Code § 16.1-278.8(A)(4a). This provision remains in the Virginia Code despite the fact that juvenile boot camps that were operated by the Department of Corrections no longer exist, although there are some privately-run boot camp programs available for paying clients. (Section 66-13(B) of the Virginia Code allows DJJ to contract with private entities for this option).

6. Refer the youth to a drug court, if the locality has established a drug court as a specialized program in the juvenile court. (See Va. Code § 18.2-254.1).

7. Defer disposition for a specific period established by the court to reflect the gravity of the offense and the juvenile's history, without a determination of guilt and, with the consent of the juvenile and attorney, place the juvenile on probation under appropriate limitations and conditions and dismiss the proceedings when the terms and conditions have been met. (Va. Code § 16.1-278.8(A)(5).

8. Order a noncustodial parent to participate in rehabilitative programs or be subject to other conditions designed for the rehabilitation of the juvenile and determined to be in the juvenile's best interests, where it is reasonable to expect that the parent can comply with the order. (Va. Code § 16.1-278.8(A)(6).

9. Place the juvenile on probation subject to conditions and limitations. (Va. Code § 16.1-278.8(A)(7). A probation condition that would require a juvenile to attend Sunday school is unconstitutional and unenforceable. (*Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946)).

10. Place the juvenile on probation and order treatment for drug or alcohol abuse or dependence in a program licensed by the Department of Behavioral Health and Developmental Services. (Va. Code § 16.1-278.8(A)(7a). These placements must be reviewed at 30-day intervals. (*Id.)*

11. Impose a fine not to exceed $500. (Va. Code § 16.1-278.8(A)(8).

12. Suspend the juvenile's driver's license or impose a curfew on the juvenile as to the hours during which he or she may operate a motor vehicle. (Va. Code § 16.1-278.8(A)(9).

13. Require the juvenile to make restitution or reparation for damages or loss caused by the offense. (Va. Code § 16.1-278.8(A)(10), (B).

14. Require the juvenile to participate in a public service project. (Va. Code

§ 16.1-278.8(A)(11).

15. In the case of a traffic violation, impose only those penalties that could be imposed on an adult.[20] If incarceration is the penalty, confinement must be limited to that permitted by the juvenile code. (*Id.)*

16. Transfer legal custody to a relative or other qualified individual. (Va. Code § 16.1-278.8(A)(13)(a).

17. Transfer legal custody to a licensed child welfare agency or facility. (Va. Code § 16.1-278.8(A)(13)(b).

18. Transfer legal custody to a local board of social services. (Va. Code § 16.1-278.8(A)(13)(c).

19. Unless waived by agreement of counsel upon consideration of the results of the social history and victim impact statement, commit the juvenile to the DJJ, but only if the child is 11 years of age or older and then only for certain offenses. (Va. Code § 16.1-278.8(A)(14); see Appendix 10-1 (DC-572: Juvenile Commitment Order). The offense must be one that would be (i) a felony if committed by an adult, (ii) a Class 1 misdemeanor if committed by an adult and the juvenile has previously committed an offense that would be a felony if committed by an adult, or (iii) a Class 1 misdemeanor if committed by an adult and the juvenile has previously been adjudicated delinquent on three or more occasions for offenses that would be Class 1 misdemeanors if committed by an adult and each of those offenses was not part of a common act or scheme. (*Id).* The court services unit will maintain contact with the child during the child's commitment. (Va. Code § 16.1-293.) If the child was in the custody of a local department of social services when committed and has not attained the age of 18, the local department of social services will resume custody of the child upon release unless an alternative arrangement is approved and communicated in writing to social services before the child's release. (*Id).* Within 60 days of an order of commitment, the court may reopen the case and modify or revoke its order. (See Department of Juvenile Justice Data Resource Guide Fiscal Year 2015, http://www.djj.virginia.gov/pdf/about-djj/DRG/FY2015_DRG.pdf). Beginning in 1993, the DJJ used administrative length-of-stay guidelines to establish a minimum period of incarceration within the department based on the severity of the offense, the chronicity of delinquent behavior, and aggravating and mitigating factors. Offense severity was classified according to four levels based on the gravity of the offenses, with the minimum period of stay in a facility determined from a point score assigned to the most serious present and prior offenses. In 2015, the DJJ revised the length-of-stay guidelines based upon research that indicated that longer periods of time in direct care lowered a juvenile's chance of success in the community when controlling for offense, risk, and protective factors. The new guidelines balance the risk of re-arrest and offense severity. Risk is

determined using a validated risk assessment instrument—the Youth Assessment and Screening Instrument (YASI). The revised guidelines incorporate seven primary length of stay ranges; from 2-4 months to 9-15 months. Treatment overrides could extend a juvenile's length of stay beyond those primary ranges.[30] Despite these changes to DJJ guidelines, and except for murder and manslaughter, the maximum stay pursuant to an indeterminate commitment is still 36 continuous months or until the juvenile's 21st birthday, whichever occurs first. (Va. Code § 16.1-285).

20. Commit the juvenile to a detention home or other secure facility for juveniles for a period not to exceed six months. (Va. Code §§ 16.1-278.8(A)(16), -284.1(A). A juvenile may only be confined under this Code section to a facility that has an approved post-dispositional program. (Va. Code § 16.1-284.1(D). This option may be used if (i) the juvenile is 14 years of age or older; (ii) the offense would be punishable by confinement if committed by an adult; (iii) the juvenile has not previously been and is not currently adjudicated delinquent based on a violent juvenile felony or found guilty of a violent juvenile felony; (iv) the juvenile has not been released from the custody of the DJJ within the previous 18 months; (v) the interests of the juvenile and the community require legal restraint or discipline; and (vi) other placements will not serve the best interests of the juvenile. (Va. Code § 16.1-284.1(A). If the period of confinement in a detention home or other secure facility will exceed 30 calendar days, the court must commit the juvenile to the DJJ if the eligibility requirements of section 16.1-278.8(A)(14) are met but suspend that commitment, specifying the conditions for the juvenile's completion of one or more community or facility based treatment programs. (Va. Code § 16.1-284.1(A), (B). The case must be reviewed at least once every 30 days and at other times upon request of the juvenile's probation officer. (Va. Code § 16.1-284.1(C). The juvenile's appearance at the mandatory review hearing may be by personal appearance before the judge or by use of two-way electronic video and audio communication. (Va. Code § 16.1-284.1(C1).

21. Unless waived by agreement of counsel upon consideration of the results of the social history and victim impact statement, commit the juvenile age 14 or older to the DJJ as a serious juvenile offender for a specified determinate period not to exceed seven years or until the youth's twenty-first birthday, whichever occurs first. (Va. Code §§ 16.1-278.8(A)(17), -285.1(C). In the juvenile court, the youth must be adjudicated guilty of an offense that would be a felony if committed by an adult and either: (i) the juvenile is on parole for a felony; (ii) the juvenile was committed to the DJJ within the immediate past 12 months for a felony; (iii) the current felony offense is punishable by greater than 20 years' imprisonment if committed by an adult; or (iv) the juvenile has been previously adjudicated delinquent for an offense punishable by 20 or more years' imprisonment for an adult.

The court must find that commitment under this section is necessary to meet the rehabilitative needs of the juvenile and would serve the best interests of the community. (Va. Code § 16.1-285.1(A). Before commitment, the court must consider: (i) the juvenile's age; (ii) the seriousness and number of present offenses, including the manner of commission of the offenses, whether the offenses were against property or the person, whether they involved use of a firearm or other dangerous weapon, and the nature of the youth's participation in the offense; (iii) the record and previous history of the juvenile in a number of specifics; and (iv) the length of stay estimated by the DJJ. (Va. Code § 16.1-285.1(B). The court must further find that the interests of the youth and the community require that the juvenile be placed under legal restraint or discipline and that the juvenile is not a proper person to receive treatment or rehabilitation through other juvenile programs or facilities. (Id). The court may also order a period of parole supervision following release, but the total period of commitment and parole supervision may not exceed seven years or extend beyond the juvenile's twenty-first birthday, whichever occurs first. (Va. Code § 16.1-285.1(C). The court retains continuing jurisdiction over the juvenile, and the DJJ may petition for an earlier release when good cause supports that request, but the court must review the commitment for the first time at least 60 days before the second anniversary of the commitment and annually thereafter. (Va. Code § 16.1-285.1(F). See Appendix 10-2 (DC-568 Juvenile Commitment Review Hearing Order). The court thus has more control over the juvenile under this option than when an indeterminate commitment is made to the department. The procedures and criteria for the release and review hearing are specified in section16.1-285.2 of the Virginia Code. Section 16.1-272 of the Virginia Code allows for a juvenile to be sentenced both as an adult and as a serious juvenile offender. If a juvenile is convicted by the circuit court of any felony other than a violent juvenile felony, the circuit court may sentence or commit the juvenile offender in accordance with the criminal laws of the Commonwealth or may deal with the juvenile as prescribed by the juvenile disposition statutes, including, but not limited to, commitment as a serious juvenile offender. (Va. Code § 16.1-272(A)(2). The circuit court is not compelled to review the results of a social history investigation and drug screening that was completed pursuant to section 16.1-273. (Va. Code § 16.1-272(A). The judge is not prohibited from combining sentences by the word "or" appearing in section 16.1-272(A)(2). (*Jackson v. Commonwealth*, 29 Va. App. 418, 512 S.E.2d 838 (1999). For a juvenile convicted in circuit court of a violent juvenile felony, the judge may order that the juvenile serve a portion of the sentence as a serious juvenile offender and the remainder as an adult. (Va. Code § 16.1-272(A)(1). The court may also require the adult portion of the sentence to be suspended conditioned upon completion of terms that may be imposed in a juvenile court in a delinquency case, including commitment under section 16.1-278.8(A)(14) or 16.1-285.1. (Id.) Alternatively, the court may require that the youth serve the entire sentence as an adult. (Va. Code §§ 16.1-272(A), -285.2(E).

22. Require the juvenile to participate in a gang-activity prevention program. (Va. Code § 16.1-278.8(A)(19).

22. When the court is sentencing an individual over the age of 18 for an offense that was committed before the age of 18, impose a jail sentence consistent with the penalties authorized if the crime had been committed by an adult, provided that the total jail sentence imposed cannot exceed 36 continuous months and any fine imposed cannot exceed $2,500. (Va. Code §§ 16.1-278.8(A)(15), -284).

23. Impose a penalty pursuant to the "abuse and lose" provision of the law restricting or denying driving privileges. (Va. Code §§ 16.1-278.8(A)(18), -278.9; see Appendices 10-3 (DC-576: Driver's License Denial Order); 10-4(DC-577: Driver's License Suspension Order and Entry into Services Program), 10-5 (DC-578: Restricted Driver's License). According to an opinion of the Attorney General of Virginia, the court may not accept a plea agreement whereby the petition is continued without a finding and is ultimately dismissed without an operator's license suspension. (1997 Report of the Attorney General 80. See Va. Code § 16.1-278.9. The statute also requires the suspension at the time that the court makes a finding sufficient to adjudicate the child as delinquent).

B. Children in Need of Services

a. Dispositions for children in need of services (CHINServs) are similar to those for delinquency except that no probation or fine may be ordered and no secure placements may be made, such as commitment to the DJJ. (Va. Code § 16.1-278.4; see Appendix 10-6 (DC-570 Generic Juvenile Court Order). A judge may order the local department of social services to place a youth in a residential treatment facility. (*S.G. v. Prince William Cnty. Dep't of Soc. Servs.*, 25 Va. App. 356, 488 S.E.2d 653 (1997).

C. Children in Need of Supervision

b. Before disposition for an adjudicated child in need of supervision (CHINSup), the court must direct an appropriate public agency to evaluate the child's service needs using an interdisciplinary approach that involves the local department of social services, the community services board, the schools, the court services unit, and other appropriate public and private agencies, which as a team must file a written report for the court and counsel. (Va. Code § 16.1-278.5(A).

D. Status of Offenders

a. The same dispositions are available for a status offender as for a child in need of services. (Va. Code § 16.1-278.6. These dispositions specifically apply to curfew and tobacco law violations.)

E. "Abuse and Lose" Provisions

1. In General

a. Section 16.1-278.9 of the Virginia Code provides for the mandatory loss of

driving privileges for a juvenile who is at least 13 years old at the time certain offenses are committed or certain conduct occurs.

2. Underlying Offenses or Conduct

a. Under section 16.1- 278.9, The court must make a finding of facts sufficient to convict the juvenile of one or more of the following offenses before the mandatory loss of driving privileges is imposed:

1. A violation of section 18.2-266 or a similar local ordinance (driving under the influence of alcohol);

2. A violation of section 18.2-268.2 (refusal to take a breath test);

3. A felony violation of any of the drug-related offenses contained in sections 18.2-248, 18.2-248.1, or 18.2-250;

4. Any misdemeanor violation of any of the drug-related offenses contained in section 18.2-248, 18.2-248.1, or 18.2-250, or a violation of section 18.2-250.1;

5. A violation of section 4.1-305 (purchase or possession of alcohol) or section 4.1-309 (unlawful drinking or possession of alcohol on public school grounds);

6. A violation of section 18.2-388 or a similar local ordinance (public intoxication);

7. A violation of section 18.2-308.7 (unlawful use or possession of a handgun) or section 18.2-308.8 (possession of a "streetsweeper");

8. A violation of section 18.2-83 (bomb threat); or

9. Failure to comply with school attendance and meeting requirements (section 22.1-258);(Va. Code § 16.1-278.9(A1). or

10. Refusal to take a blood test by a child who is at least 13 years of age in violation of section 18.2-268.2 (implied consent). (Va. Code § 16.1-278.9(A2).

3. Mandatory Loss of Driving Privileges

a. Under section 16.1-278.9, the length of the juvenile's license suspension is determined by the charged offenses. If the juvenile is charged with DUI, (Va. Code § 18.2-266 or the equivalent local ordinance), refusal of a blood or breath test, (Va. Code § 18.2-268.2), a felony drug offense, (Under Va. Code §§ 18.2-248, -248.1, or -250), or making a bomb threat, (Va. Code § 18.2-83), a first offense requires a loss of driving privileges for one year or until the juvenile is 17, whichever is longer. (Va. Code § 16.1-278.9(A). For a second or subsequent offense under any of these sections, the denial of driving privileges is increased to one year or until the child is 18, whichever is longer. *(Id.)*

b. When the juvenile is charged with a misdemeanor drug offense, (Under Va. Code §§ 18.2-248, -248.1, -250, or -250.1), the purchase or possession of alcohol, (Va. Code §§ 4.1-305, -309.), or unlawful use or possession of a handgun, (Va. Code §§ 18.2-308.7, -308.8), the license suspension lasts for six months if the juvenile already has a driver's license or for the six months following the age of 16 and three months when he or she is not yet licensed. (Va. Code § 16.1-278.9(A).

c. For charges involving handguns, (Va. Code §§ 18.2-308.7, -308.8), the prescribed loss of license is not less than 30 days. But if the gun involved was concealed or was a "streetsweeper", (A striker 12), or a semi-automatic folding-stock shotgun, the mandatory denial of driving privileges is for two years, either from the date the finding is made or from the date the juvenile reaches the age of 16 years and three months.

d. A juvenile's failure to comply with school attendance requirements, (Va. Code §§ 16.1-278.9(A1), 22.1-258), can also result in a denial of driving privileges of 30 days for a first offense or, for a second or subsequent offense, one year or until the child reaches the age of 18, whichever is longer. As with the other license denials, if the juvenile is not currently licensed, the suspensions take effect when he or she attains the age of 16 and three months.

e. If a court finds that a child at least 13 years of age has refused to take a blood test in violation of section 18.2-268.2, the court must order that the child be denied a driver's license for a period of one year or until the juvenile reaches the age of 17, whichever is longer, for a first such offense or for a period of one year or until the juvenile reaches the age of 18, whichever is longer, for a second or subsequent such offense.

4. Report to DMV

a. Even if the sentencing for the delinquent act is deferred, the statute requires the immediate loss of license upon a finding sufficient to convict on any of these charges.

5. Issuance of Restricted License

a. Upon a demonstration of hardship, the court may grant the juvenile a restricted permit to operate a motor vehicle for any of the purposes set forth in section 18.2-271.1(E), except that no restricted license will be issued for travel to and from school when school transportation is available, nor when the finding involves certain offenses, including alcohol, firearm, and truancy offenses. (Va. Code § 16.1-278.9(D).

6. Withdrawal of License Denial Order

a. The court has the power to review and withdraw any order denying driving privileges entered under section 16.1-278.9 after 90 days have passed from its date of issuance, but if the offense was a second or subsequent offense, then one year must pass before that review. (Va. Code § 16.1-278.9(E).

7. Deferral

a. The Virginia Code provides that, in the case of a juvenile charged with the purchase, possession, or consumption of alcohol, or public intoxication, the court is allowed to impose the

license sanctions and defer disposition of the delinquency charge until a specified later time without a judgment of guilt. The court can either enter a judgment of guilty when the case is heard or defer disposition of the delinquency charge, which may later be discharged and dismissed in the case of a first violation. (Va. Code § 16.1-278.9(A), (F).

8. Other Statutory License Suspensions

a. Other statutory license suspensions also apply to juvenile offenders. [84]

F. Additional Considerations

1. Duration of Commitments

a. All commitments, except those under sections 16.1-284.1 and 16.1-285.1 of the Virginia Code, are for an indeterminate period not to extend beyond the juvenile's twenty-first birthday. The indeterminate commitments are limited to 36 continuous months (except in cases of murder or manslaughter) or to age 21, whichever comes first. (Va. Code § 16.1-285).

2. Department of Juvenile Justice Length-of-Stay Guidelines

3. Cost of Private Placements

a. When the court determines that the behavior of a child within its jurisdiction is such that it cannot be dealt with in the child's own locality or with the resources of that locality, the judge must refer the child to the locality's family assessment and planning team for study and to have the team make a recommendation for services. Based on this recommendation, the court may take custody and place the child in a private or locally operated public facility or nonresidential program with funding in accordance with the Children's Services Act. (Va. Code § 16.1-286).

4. Protection of Religious Affiliations

G. Delinquency Dispositional Alternatives—Program Examples

1. Diversion

a. An informal disposition outside of adjudication may be developed, (It is imperative that a practitioner research programs available in the jurisdiction in which he or she is practicing. The programs noted below by name or concept may not exist in each locality or be working under the name provided.), using such remedial programs as:

A. Law-Related Education. Generally, an eight-week program of classes taught by a probation department familiarizes the youth with the legal system and teaches legal, moral, and ethical values.

B. Community Service Programs. The offender is assigned to work for a governmental or nonprofit organization for a certain number of hours (related to the child's offense) as a penalty, with the program being monitored by the probation department or a community

volunteer action coordinator. (Va. Code § 16.1-278.8(B).

C. Restitution. The offender is required to reimburse the victim's loss by paying the victim for damages or by working directly for the victim. (Va. Code § 16.1-278.8(A)(10), (B).)

D. Teen Court or Youth Court.[94] There is no statutory authority for such a procedure in Virginia at the present time, and it would not be legal without such.[95] In other jurisdictions, teen courts are used to give juvenile offenders an opportunity to clear their records by performing community service or other tasks ordered by the court staffed by other teens with a judge present to oversee the proceedings. Some also have an educational component to teach students about the criminal justice system.

E. Juvenile Court Conference Committee. This group is composed of lay volunteers who analyze diversion cases and make recommendations to the intake officer.

F. Alternative Dispute Resolution Programs. These programs include mediation between the child and the child's family or mediation between the juvenile offender and the victim. (National Council of Juvenile and Family Court Judges, Court-Approved Alternative Dispute Resolution: A Better Way to Resolve Minor Delinquency, Status Offense and Abuse/Neglect Cases (1989).

G. Restorative Justice. Restorative justice is a philosophy based on a set of principles for responding to harm and wrongdoing that is victim-centered and focuses on offender accountability to those who were harmed and to the laws or rules that were broken. The formal process is facilitated by trained neutral facilitators who bring together the perpetrator with those who have been harmed by the wrongdoing to discuss the incident and create an agreement for reparation of the injury. (See https://www.fcps.edu/resources/student-safety-wellness/restorative-justice.)

2. Remaining at Home

a. A court may enter an order for the child to participate in rehabilitative programs and permit the child to remain at home subject to court-ordered behavioral rules and conditions enforced by the parents. (Va. Code § 16.1-278.8(A)(3). The offender in this situation often is not on formal probation. Typical rules may include "house arrest" and rules that the offender may not have contact with individuals who adversely influence the youth.

3. Parent Participation

a. The court may order the parent of a child who lives with the child to

participate in rehabilitative programs, co-operate in the child's treatment, or be subject to specified conditions and limitations designed for the rehabilitation of the child and the parent. (Va. Code § 16.1-278.8(A)(3).

4. Deferral of Disposition

a. The court may defer disposition for a period and dismiss charges if the offender shows good behavior.

5. Probation

a. Probation is one of the most common dispositional alternatives and can be tailored by the court to fit the juvenile's situation. The court may place a juvenile on active probation, imposing conditions of varying intensity that range from monthly counseling to daily contact with a probation officer. Probation may include placing the juvenile on supervised or unsupervised status or imposing strict behavioral rules, such as curfew, house arrest, mandatory school or work attendance, or "no contact" rules for peers who are seen as a negative influence.

6. Drug Court/Behavioral Health court Dockets

7. Fines

a. The court must consider whether any court-ordered fines will actually be paid by the parent or the juvenile.

8. Driver's License Suspension

a. Suspending a youth's driver's license is a particularly effective sanction for all types of juvenile offenses.

9. Out-of-Home Placement

a. This alternative involves placement with a variety of individuals or groups: (i) a relative, such as another parent; (ii) a DSS foster care home; (iii) therapeutic foster care, a specialized foster care placement; (iv) a therapeutic group home, such as a "Teaching Family Model" home, where a trained couple and their own children reside in a home-like environment with a maximum of six children under their care; (v) a "Family Operated Group Home" (FOGH), a staff-run group home; (vi) "Crisis/Emergency Shelters"; and (vii) pre-dispositional and post-dispositional group homes.

b. A less conventional potential placement is "Outward Bound," a program that began in the 1940s and is based on the philosophy that overcoming the fear and challenges posed by the wilderness would provide a carryover benefit in everyday behavior and foster receptiveness to change.

c. Another out-of-home alternative involves placement in a residential treatment facility, which may be short-term, such as the 28-day inpatient substance abuse programs, or long-term, such as 12- to 18-month placements for the emotionally disturbed, substance abuse rehabilitation

programs like “Straight,” or sex offender programs.

10. Post-Dispositional Detention

a. A sentence to post-dispositional detention generally involves the use of the local detention facility and programs that are situated in the facility.

11. Commitment to State Juvenile Correctional Facility

a. Commitment to a state juvenile correctional facility may involve the use of an indeterminate sentence to the DJJ, which has the authority to release the child at any time, or a determinate sentence under which the youth is committee for a specific minimum period. (Va. Code §§ 16.1-285, -285.1(C).

12. Serious or Habitual Offender Programs

a. Section 16.1-330.1 of the Virginia Code authorizes the establishment of “Serious or Habitual Offender Comprehensive Action Programs” in localities that choose to participate.

13. Third Party Compliance Orders

a. The court may order third parties to comply with the offender’s treatment plan and may enter rehabilitative orders against the parent or custodian of a juvenile offender. (Va. Code § 16.1-278.8(A)(3), (6).

14. Parental Responsibility

a. Non-indigent parents may be required to contribute to the juvenile’s support during a DJJ commitment or other placement commensurate with their ability to pay, which may be determined after an investigation and hearing. (Va. Code § 16.1-290).

15. Aftercare or Parole

a. A child released from a DJJ commitment is usually returned to the locality of his or her residence subject to aftercare or parole rules. (Va. Code §§ 16.1-285.2(B), -293).

H. Child in Need of Services or Supervision Disposition

a. The dispositional programs listed above are equally applicable to juveniles adjudicated as children in need of services or in need of supervision, except for those programs that involve the use of secure placements or fines.

I. The Role of the Court and Counsel in the Children’s Services Act

a. Pursuant to the Children’s Services Act, (Va. Code § 2.2-5200 et seq.), the governing body of each locality in Virginia (or combination of localities) must appoint a community policy and management team (CPMT) that has the following mandatory members, and which may have additional

appropriate representatives:

(i) at least one elected or appointed official of the governing body of a locality that is a member of the team,

(ii) the court services unit director,

(iii) the community services board director,

(iv) the department of social services director,

(v) the head of the local school division,

(vi) the health department director,

(vii) a parent representative, and

(viii) a representative of a private organization that provides local child or family services and which has a local office. (Va. Code § 2.2-5205.)

b. The statutory duties of the CPMT are to:

1. Develop interagency policies and procedures to govern the provision of services to children and families in the community;

2. Develop interagency fiscal policies governing access to the state pool of funds by the eligible populations, including immediate access to funds for emergency services and shelter care;

3. Establish policies to assess the ability of parents or legal guardians to contribute financially to the cost of services to be provided and, when not specifically prohibited by law or regulation, provide for appropriate financial contribution from the parents or legal guardians using a sliding fee scale based on ability to pay;

4. Coordinate long-range, community-wide planning that ensures the development of resources and services needed by children and families in the community;

6. Establish policies governing referrals and reviews of children and families to the FAPTs or a collaborative, multidisciplinary team process approved by the Council, including a process for parents and persons who have primary physical custody of a child to refer children in their care to the teams, and a process to review the teams' recommendations and requests for funding;

7. Establish quality assurance and accountability procedures for program use and funds management

8. Establish procedures for obtaining bids on the development of new services;

9. Manage funds in the interagency budget allocated to the community from the state pool of funds, the trust fund, and any other source;

10. Authorize and monitor the expenditure of funds by each FAPT or a collaborative, multidisciplinary team process approved by the Council;

11. Submit grant proposals that benefit the community to the state trust fund and enter into contracts for the provision or operation of services upon approval of the participating governing bodies;

12. Serve as the community's liaison to the Office of Children's Services, reporting on its programmatic and fiscal operations and on its recommendations for improving the service system, including consideration of realignment of geographical boundaries for providing human services;

13. Collect and provide uniform data to the State Executive Council as requested by the Office of Children's Services;

14. Review and analyze data in management reports provided by the Office of Children's Services to help evaluate child and family outcomes and public and private provider performance in the provision of services to children and families through the Children's Services Act program. Every team must also review local and statewide data provided in the management reports on the number of children served, children placed out of state, demographics, types of services provided, duration of services, service expenditures, child and family outcomes, and performance measures. Additionally, teams must track the use and performance of residential placements using data and management reports to develop and implement strategies for returning children placed outside of the Commonwealth, preventing placements, and reducing lengths of stay in residential programs for children who can appropriately and effectively be served in their homes, relatives' homes, family-like settings, or their communities;

15. Administer funds pursuant to section 16.1-309.3;

16. Upon approval of the participating governing bodies, enter into contracts with other CPMTs to purchase coordination services, provided that funds described as the state pool of funds under section 2.2-5211;

17. Submit to the Department of Behavioral Health and Developmental Services information on children under the age of 14 and adolescents of age 14 through 17 for whom an admission to an acute care psychiatric or residential treatment facility, exclusive of group homes, was sought but was unable to be obtained by the reporting entities. Such information must be gathered from the FAPT or other participating community agencies. Information to be submitted must include:

a. The child's or adolescent's date of birth;
b. Date admission was attempted; and
c. Reason the patient could not be admitted into the hospital or facility

18. Establish policies for providing intensive care coordination services for children who are at risk of entering, or are placed in, residential care through the Children's Services Act program; and

19. Establish policies and procedures for appeals by youth and their families of decisions made by FAPTs regarding services to be provided to the youth and family pursuant to an individual family services plan developed by the FAPT. Such policies and procedures do not apply to appeals made pursuant to section 63.2-915 or in accordance with the Individuals with Disabilities Education Act or federal or state laws or regulations governing the provision of medical assistance pursuant to Title XIX of the Social Security Act. (Va. Code § 2.2-5206).

b. The responsibilities of the FAPT are to "assess the strengths and needs of troubled youths and families who are approved for referral to the team and identify and determine the complement of services required to meet these unique needs." (Va. Code § 2.2-5208.) The statutory duties of the FAPT are to:

1. Review referrals of youths and families to the team;

2. Provide for family participation in all aspects of assessment, planning, and implementation of services;

3. Provide for participation of foster parents in the assessment, planning, and implementation of services when a child has a program goal of permanent foster care or is in a long-term foster care placement;

4. Develop an individual family services plan for youths and families reviewed by the team that provides for appropriate and cost-effective services;

5. Identify children who are at risk of entering, or are placed in, residential care through the Children's Services Act program who can be appropriately and effectively served in their homes, relatives' homes, familylike settings, and communities;

6. Where parental or legal guardian contribution is not specifically prohibited by law or regulation, or has not been ordered by the court or by the Division of Child Support Enforcement, assess the ability of the parents or legal guardians to contribute financially to the cost of services, using a standard sliding fee scale based on ability to pay, and provide for appropriate financial contribution from parents or legal guardians in the individual family services plan;

7. Refer the youth and family to community agencies and resources in accordance with the individual family services plan;

8. Recommend to the CPMT expenditures from the local allocation of the state pool of funds; and

9. Designate a person who is responsible for monitoring and reporting, as appropriate, on the progress being made in fulfilling the individual family services plan developed for each youth and family, such reports to be made to the team or the responsible local agencies. *(Id.)*

XI. POST-DISPOSITION PRECEEDIGNS AND APPEALS

A. Court Review of the Disposition Order

a. The court retains the power to review an order of commitment on its own motion or on the motion of any party and may revoke or modify a prior order. (Va. Code § 16.1-289; see Appendix 11-1 (DC-630 Motion to Amend or Review Order). If the commitment is to the Department of Juvenile Justice, this power terminates 60 days after the date of the order of commitment. (Va. Code § 16.1-289).

b. The juvenile and domestic relations district court may reexamine and modify its disposition order even after the final order is made. This is yet another manifestation of the juvenile justice system's focus on rehabilitation and the child's welfare as primary concerns.

B. Motions to Reconsider Participation in Programs

a. A motion to reconsider participation in programs may be filed by any party ordered to participate in therapy, counseling, or similar continuing programs, and the motion must be heard within 30 days. The motion may be filed whether the court order being challenged was interlocutory or final, and the court's decision on the motion is appealable. (Va. Code § 16.1-289.1).

C. Serious Offender Review hearing

a. The Department of Juvenile Justice must petition the committing court for determination as to the continued commitment of each juvenile offender sentenced

under the Serious Offender Statute. (Va. Code § 16.1-285.1). The department may petition the court for the early release of a serious offender when there is good cause for release. (See Appendices 11-2 and 11-3 (Examples of Early Release Petitions for Juvenile and Circuit Court).

b. The department must petition the court at least 60 days before the second anniversary of the serious offender's date of commitment and 60 days before each annual anniversary thereafter. (Va. Code § 16.1-285.1(F).

c. A serious offender progress report must accompany each petition and contain the following information:

1. The offender's juvenile correctional facility and living arrangements;

2. The services and treatment programs offered to the juvenile;

3. An evaluation of the juvenile's progress toward achieving the treatment goals and objectives;

4. A summary of the juvenile's educational progress;

5. The juvenile's potential for danger to the community or himself or herself; and

6. A comprehensive aftercare plan for the juvenile. (Va. Code § 16.1-285.2(B).

c. Within 30 days of receiving a petition for a serious offender review hearing from the department, the court must schedule a hearing and appoint counsel for the juvenile. (Va. Code § 16.1-285.2(A).

d. In determining its final order, the court must consider the following factors:

1. The experiences and character of the juvenile before and after commitment;

2. The nature of the offenses committed by the juvenile and the manner in which these offenses were committed;

3. The protection of the community;

3. The recommendations of the department; and

4. Other factors deemed relevant by the court. (Va. Code § 16.1-285.2(D).

d. After considering these factors, the court has several options for disposing of the petition. The court may order the release of the juvenile serious offender under prescribed terms and conditions, release the juvenile to the Department of Corrections to serve any remaining adult time, or order that the juvenile remain in the

custody of the Department of Juvenile Justice.

D. Reentry and Transition Planning

a. Section 16.1-293.1 requires the Board of Juvenile Justice, after consultation with the Department of Behavioral Health and Developmental Services and other related agencies, to promulgate regulations for planning for and providing mental health, substance abuse, or other therapeutic treatment services for persons returning to the community following commitment to a juvenile correctional center or post-disposition detention.

E. Proceedings to revoke or Modify Orders of probation, Protective Supervision, or Parole

a. The proceeding may be begun by the officer taking the juvenile into physical custody, since probation officers are given the power to arrest,[20] or by filing a petition with the court alleging a violation. Section 16.1-248.1 of the Virginia Code makes clear that a juvenile may be detained pending a hearing when he or she has been charged with a probation or parole violation and the underlying offense was a Class 1 misdemeanor or a felony, or if the juvenile has violated any of the provisions of section 18.2-308.7, and the other criteria for pretrial detention are met.

b. Juvenile probation revocation proceedings are frequently analogized to those for adult probationers. Thus, under Gagnon v. Scarpelli,[21] the juvenile would be entitled, after due notice, to a hearing at which he or she has the right to be present, to present evidence, to cross-examine witnesses, and to be represented by counsel. (Va. Code § 16.1-266. Rule 8:21, which used to explicitly control at a probation hearing, was stricken by order dated March 29, 2011, and the nearly identical language contained in 16.1-291 that said "[p]roceedings to revoke or modify probation, protective supervision or parole shall be governed by the procedures, safeguards, rights and duties applicable to the original proceedings" was deleted in 2001).

c. Although the Virginia Court of Appeals held in Pannell v. Commonwealth[23] that section 16.1-291 of the Virginia Code required proof beyond a reasonable doubt with evidence that would be admissible at the adjudicatory hearing, the Virginia Supreme Court disagreed and ruled that the statute's reference to "the procedures, safeguards, rights and duties applicable to the original proceedings" referred to the disposition hearing, and a lesser quantum of proof was sufficient to support revocation. (Commonwealth v. Pannell, 263 Va. 497, 561 S.E.2d 724 (2002).

d. In keeping with the special vocabulary of the juvenile system, the term "aftercare" is sometimes used to describe what is called parole in the adult criminal system, although "parole" is increasingly used in place of the earlier distinctive term.

F. Contempt for Violation of Court Order

a. The court has the power to punish summarily for contempt and to punish those who violate its orders. The court can punish a juvenile summarily for contempt by confinement in a juvenile detention facility but not a jail. (Va. Code § 16.1-292).

G. Appeals

1. Juvenile Appeals

a. Courts have concluded, however, that the Equal Protection Clause requires that a juvenile convicted of delinquency be given the same opportunity to appeal that an adult criminal defendant has. Virginia law clearly provides that right. (Va. Code § 16.1-296; Va. R. 8:20; Va. R. 8:17).

b. An appeal may be taken to the circuit court within 10 days of entry of a final judgment, order, or conviction and is heard there on a de novo basis.in the circuit court, a trial by jury on the question of guilt or innocence may be had on motion of child, the commonwealth's attorney, or the judge. If the jury finds the juvenile guilty, the judge of the circuit court will determine the disposition. (*Id.)*

2. Termination of Parental Rights

a. Appeals of orders terminating residual parental rights pursuant to section 16.1-283 of the Virginia Code must be heard on the merits by the circuit court within 90 days of the perfecting of the appeal, and appeals to the Virginia Court of Appeals from the circuit court involving termination of parental rights must be given precedence on the docket. (Va. Code § 16.1-296(D).

H. Habeas Corpus and Collateral Review

a. Juveniles are generally entitled to use the same procedures as adults for collaterally attacking their convictions or in seeking affirmative or extraordinary relief. Thus, a juvenile may seek release from custody pursuant to a writ of habeas corpus, challenge the jurisdiction of the court trying him or her by seeking a writ of prohibition, or secure legislatively mandated services through a petition pursuant to section 16.1-278.

I. Litigation Concerning Conditions of Confinement

1. Introduction

a. Most juvenile institutional litigation can be grouped into categories that fit into a mnemonic device developed by the Youth Law Center and the National Center for Youth Law. The initials C.H.A.P.T.E.R.S. stand for issues categorized as: classification and separation issues; health care; access; programming; training and supervision of employees; environmental issues; restraint, punishment, and due process; and safety issues.

2. Classification and Separation

a. Questions regarding classification and separation of juveniles in institutions generally focus on issues of age, gender, race, category of offense, or propensity for violence.

3. Health Care

a. Courts have been concerned with a variety of health care issues. First is the presence or absence of admission screening for health and psychological problems and risks, a concern that has grown with the increase in HIV-positive youths. (*D.B. v. Tewksbury*, 545 F. Supp. 896 (D. Or. 1982); *Ahrens v. Thomas*, 434 F. Supp. 873 (W.D. Mo. 1977); *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976).

4. Access to Counsel

a. Juvenile institutional litigation that focuses on access to counsel has been more successful than similar cases involving adults because of the expectation that the child will be successfully reintegrated into the family upon release and, generally, after a shorter period of incarceration. (*Ahrens v. Thomas*, 434 F. Supp. 873 (W.D. Mo. 1977); *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), rev'd on procedural grounds, 535 F.2d 864 (5th Cir. 1976), rev'd on procedural grounds, 430 U.S. 322 (1977).

5. Programs

a. Access to programs in correctional and detention facilities is a prominent issue fIn juvenile litigation because of the rehabilitation and treatment focus of the juvenile justice system, and because incarcerated youths, unlike many adults, are still entitled to educational services. Much of the litigation focuses on the right of educationally handicapped and emotionally disturbed young people to obtain needed services. (Individuals with Disabilities Education Act (formerly "EHA"), 20 U.S.C. § 1400 et seq.; *Willie M. v. Hunt*, 657 F.2d 55 (4th Cir. 1981); *Andre H. v. Sobol*, No. 84 Civ. 3114 (DNE) (S.D.N.Y. 1990); *Green v. Johnson*, 513 F. Supp. 965 (D. Mass. 1981). Other cases have addressed issues such as (i) access to exercise and recreation, noting that children have a special need for these activities; (*D.B. v. Tewksbury*, 545 F. Supp. 896 (D. Or. 1982). (ii) the use of juveniles for forced labor; (*Wheeler v. Glass*, 473 F.2d 983 (7th Cir. 1973); *King v. Carey*, 405 F. Supp. 41 (W.D.N.Y. 1975). and (iii) compelled participation in religious activities.[61]

6. Training and Supervision of Employees

a. Courts have expressed particular concern about such inappropriate practices as "hog-tying," the use of cattle prods, tying children to their beds, and imposing long periods of isolation without any contact with a psychologist or other trained staff member. (*Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex.1974), rev'd on procedural grounds, 535 F.2d 864 (5th Cir. 1976), rev'd on procedural grounds, 430 U.S. 322 (1977); *Lollis v. New York State Dep't of Soc. Servs*., 322 F. Supp. 473 (S.D.N.Y. 1970), modified by 328 F. Supp. 1115 (S.D.N.Y. 1971). Courts have also universally condemned the use of corporal punishment as a means of correction, (Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974); State ex rel. K.W. v. Werner, 242 S.E.2d 907 (W. Va. 1978). and have insisted on a disciplinary system that affords due process to incarcerated juveniles. (H.C. v. Jarrard, 786 F.2d 1080 (11th Cir. 1986).

7. Environmental Issues

a. Implicit in much of this discussion is the principle that juveniles institutionalized for either treatment and rehabilitation or punishment are entitled to be protected and kept safe from unreasonable risks. A proper classification system avoids mixing violent, aggressive, or older juveniles with those who are nonviolent, submissive, or younger.

8. Restraints, Punishments, and Due Process

a. Courts have expressed particular concern about such inappropriate practices as "hog-tying," the use of cattle prods, tying children to their beds, and imposing long periods of isolation without any contact with a psychologist or other trained staff member. (*Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex.1974), rev'd on procedural grounds, 535 F.2d 864 (5th Cir. 1976), rev'd on procedural grounds, 430 U.S. 322 (1977); *Lollis v. New York State Dep't of Soc. Servs.*, 322 F. Supp. 473 (S.D.N.Y. 1970), modified by 328 F. Supp. 1115 (S.D.N.Y. 1971). Courts have also universally condemned the use of corporal punishment as a means of correction, (*Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974); *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (W. Va. 1978). and have insisted on a disciplinary system that affords due process to incarcerated juveniles. (H.C. v. Jarrard, 786 F.2d 1080 (11th Cir. 1986).

9. Safety

a. Implicit in much of this discussion is the principle that juveniles institutionalized for either treatment and rehabilitation or punishment are entitled to be protected and kept safe from unreasonable risks. A proper classification system avoids mixing violent, aggressive, or older juveniles with those who are nonviolent, submissive, or younger.

10. Conclusion

a. In establishing guidelines for humane and caring treatment in institutions for delinquent youths, the courts increasingly have adopted standards promulgated by professional authorities for determining the characteristics of a properly designed and run facility. The IJA/ABA Standards have particularly relevant volumes on architecture of facilities, corrections administration, dispositions, monitoring, and planning for juvenile justice.

J. The Right to Treatment

a. The adjudication and disposition of a juvenile charged with delinquency does not always terminate counsel's responsibility. As previously discussed, the nature of the case may dictate an appeal or recourse to another means of post-disposition review of the conviction. In addition, even though there may be no procedural error justifying an appeal or habeas corpus petition, or no basis for a review of the disposition order entered by the court, the attorney may still need to monitor the juvenile's placement in a secure correctional or private treatment facility to ensure the youth's safety or promised treatment.