TESTIMONY OF PAMELA A. MARSH, Esq.

My name is Pam Marsh. I am an attorney in private practice in Middlebury. For over 20 years, my firm has served as the Juvenile Defenders in Addison County under contract with the Office of the Defender General, handling both CHINS (abuse/neglect & unmanageable child cases) and delinquencies. I serve on the Juvenile Jurisdiction Workgroup, the Justice for Children Task Force, and I chair the Vermont Bar Association Juvenile Law Section. I have a passion for ensuring that all youth under 18 are charged in the juvenile court system.

The purpose of the juvenile justice system as set forth in 33 V.S.A. § 5101(a)(2) is:

> (2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and to provide supervision, care, and rehabilitation which assure:
> (A) balanced attention to the protection of the community;
> (B) accountability to victims and the community for offenses; and
> (C) the development of competencies to enable children to become responsible and productive members of the community.

Under our current law, prosecutors have unfettered ability to file any charge, misdemeanor or felony, against 16 and 17 year olds in adult court, 33 V.S.A. § 5203(c), and must file any case involving a serious felony listed in V.S.A. § 5204(a) in adult court if the child is between 14 and 18 years of age. Cases against children between 10 and 14 years of age alleged to commit a listed offense must be filed in juvenile court, but may be thereafter transferred to adult court pursuant to § 5204(b), (c) and (d). Charges may be transferred from adult court to juvenile court pursuant to § 5203 (c) or as a youthful offender transfer pursuant to § 5281. However, in reality, too few motions to transfer get filed.

We are criminalizing children for (for the most part), minor property offenses, drug offenses, and school fights. Some counties offer pre-Diversion protocols (Chittenden for example). Some refer 16 and 17 year olds to Court Diversion programs if they pass the YASI screening with a low or low-moderate score. This is an appropriate way to resolve a case, provided that the county also uses pre-arraignment Diversion.[1] Some, such as Rutland County, file virtually all cases against 16 and 17 years olds in adult court, and leave it to attorneys to move to transfer down. Bennington, Lamoille and Caledonia Counties generally file misdemeanors (except traffic offenses) in juvenile court and felonies in adult court.

If a child is charged with a misdemeanor offense in adult court and the State is seeking a fine-only disposition, the child is not entitled to assignment of counsel. Often, parents who do not know and appreciate the consequences of adult convictions, encourage their son or daughter to "get it over with and take the consequences," without obtaining advice of counsel.

However, the consequences of a criminal conviction can be lifelong and severe. In today's economy, with many more job applicants than jobs available, employers are unlikely to hire a youth with a criminal conviction over a youth no criminal record. Even though adult records can be expunged under certain circumstances, the publicity given to arrests and arraignments can easily be accessed through Google and other search engines, even after a record is expunged. The Juvenile Law Section of the Vermont Bar Association developed an Information sheet for 16 and 17 year olds charged with criminal offenses several years ago. However, the Court Administrator's Office was

[1] With pre-arraignment Diversion, the case never gets entered into the adult criminal docket, so that it can be closed and expunged without any visible record. If a case is referred to Diversion post-arraignment, the arraignment is public record and the case shows as "referred to Diversion" until it is eligible for expungment.

unwilling to allow it to be placed in the courthouses to be picked up along with arraignment paperwork. Public Defenders often never meet with those minor misdemeanants who do not qualify for assignment of counsel.

There are been many studies showing that trying children in adult courts is not effective for either general or specific deterrence of criminal conduct.[2] The long term consequences of acquiring a criminal record as a youth carry many consequences that follow the youth for years. [3] Finally, youth are more susceptible to peer pressure, risk taking and deficiencies in judgment.[4]

The United States Supreme Court, in a series of decisions, has recognized that adolescent brains are not fully developed until their late teens or early twenties. In *Roper v. Simmons*, 542 U.S. 551, 125 S.ST. 1183 (2005), the Supreme Court held that the Eight Amendment prohibition against cruel and unusual punishment means that juveniles, even though committing heinous crimes such as murder, cannot be sentenced to the death penalty. In that decision, the Court wrote:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson, supra,* at 367; see also *Eddings, supra,* at 115–116 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and

[2] Childhood on Trial: The Failure of Trying and Sentencing Youth in Adult Criminal Court, Coalition for Juvenile Justice, 2005, pp. 23 – 39.
[3] "Consequences of Transfer," The Changing Borders of Juvenile Justice, Jeffrey Fagan and Franklin E. Zimring, eds., 2000.
[4] Elizabeth S. Scott, "Criminal Responsibility in Adolescence: Lessons from Developmental Psychology, Youth on Trial, A Developmental Perspective on Juvenile Justice, Thomas M. Grisso and Robert B. Schwartz, eds., 2000.

> irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying
> without parental consent. See Appendixes B–D, *infra.*
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> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra,* at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").
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> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).
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> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford,* 492 U. S., at 395 (Brennan, J., dissenting.)

543 U.S. 551, 569, 125 S.Ct. 1183, 1195 (2005).

*Roper* was followed by *Graham v. Florida*, in which the Supreme Court held that mandatory life without parole sentences imposed on non-homicide defendants who were juveniles at the time of their offense also violate the Eighth Amendment. 560 U.S. 48, 130 S.Ct. 2011 (2010). In *Miller v. Alabama*, the Court went on to hold that mandatory life without parole sentences imposed on children convicted of homicide violates the Eighth Amendment. 132 S.Ct. 2455 (2012). In all of these cases, the Court referred to the fact that juveniles have "diminished culpability and greater prospects for reform," they are less deserving of the most severe punishments.[5]

[5] *Miller,* supra.

You may wonder why I mention these cases, because Vermont does not have capital punishment for any defendants, nor mandatory life without parole sentences. It is the rationale behind these decisions, recognizing that juveniles are less culpable for their crimes – even serious ones – because adolescent brains are not capable of appreciating the consequences of their conduct, are more subject to impulsive acts and peer pressure than adults, and that they have a greater potential for rehabilitation.

In a case that is applicable to Vermont, *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) the Supreme Court held a child's age is relevant to the *Miranda* custody analysis, provided that the police officer was aware of the age, or it was objectively apparent.

Vermont is currently one of a handful of states that give prosecutors unfettered discretion to file criminal cases in adult court. A majority of states require filing of charges against children under 18 in juvenile court, but permit the State to move for a transfer to criminal court in serious cases. H. 618 requires the filing of all cases against youth under 18 in juvenile court. It extends the jurisdictional age for provision of services to age 21 for all juvenile delinquents, if the court makes a finding that the extension is in the best interests of the child. It eliminates transfers from juvenile court to adult court, and eliminates youthful offender status, inasmuch as it is not necessary if all cases against youth under 18 are filed in juvenile court. This is a great leap forward for Vermont.

How many cases will this bill likely effect? In FY 2013, 315 cases against 16 and 17 year olds were disposed of in the Criminal Division. 445 cases were disposed of in the Family Division. Only 12% of cases filed in the Criminal Division were transferred to

juvenile court. In FY 2012, 298 cases were disposed of in the Criminal Division, and 474 were disposed of in juvenile court.[6] We are not talking about huge numbers of cases inundating the Family Division.

I undertook a survey of the members of the Juvenile Law Section of the VBA on this bill, asking three questions: 1) Should the Juvenile Law Section take a position regarding H. 618? 13 respondents said yes; 1 said no. 2) If you answered Yes to Question 1, should the Section support the bill? 11 respondents said yes; two said no. The third question asked if the respondent was a judge, a prosecutor, or a defense attorney. Of the respondents, 11 identified themselves as defense attorneys, and 2 as prosecutors.

It may be that the support of at least some prosecutors could be gained by allowing them to file for transfer to the Criminal Division in the event of the commission of the offenses currently listed in § 5204(a). While I would prefer a bill that did not allow transfers up, passage of a bill with such transfers is preferable to the current state of affairs. Judges would have the opportunity to weigh the pros and cons of such motions, taking into account the research over the last 15 years, the principles set forth in *Roper* and its progeny, and the circumstances of the offense.

I hope the Committee will proceed forward with H. 618. If you can gain prosecutorial support by allowing transfer up, placing the burden on the prosecutor to prove that the services available through juvenile court are not sufficient to achieve the goals set forth in § 5101(a)(2), that the juvenile is not amenable to treatment in the juvenile justice system, and that the services available in the adult criminal system are

[6] Statistics from Theresa Lay-Sleeper, handed out at the January 14, 2014 meeting of the Juvenile Jurisdiction Workgroup.

needed for the protection of the public and the rehabilitation of the juvenile, I could support that. I should note, however, that I have successfully transferred cases from the Criminal Division to the Family Division by calling the local Probation and Parole Officer to testify about what level of supervision they would provide and what services they would provide, and then comparing that with the testimony of a worker from the Department for Children and Families. It is often more punitive and rehabilitative for the youth to obtain services from DCF than DOC.

Thank you for your time.