

# OFFICE OF THE DEFENDER GENERAL

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**MEMO TO: House Judiciary Committee**

**RE: H.95 Juvenile Jurisdiction / Summary of Testimony**

**DATED: February 5, 2015**

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## TESTIMONY FROM THE OFFICE OF THE DEFENDER GENERAL

Good afternoon and thank you for once again inviting me to speak with you. The subject that I will be addressing today is one that I have spoken of before with this committee and goes back to a discussion which was first initiated a little over 20 years ago. From those initial discussions to the present day, this subject is one which commands my interest and one of which I never tire of discussing.

That being said, as I noted to you when I spoke with you a few weeks ago, I feel it is important to give a, hopefully, brief historical perspective of this issue to better inform today's discussion and, hopefully, give some idea of how we got here. When I first look at a bill that has been introduced I often ask myself two questions: **1) Why is it being introduced?** and **2) Why is it being introduced now?**

Hopefully, the brief history I will now give you will provide some guidance to answering those two questions.

First of all why is this bill being introduced? Of course, the best people to answer that question are the bill's sponsors. However, there is also a basic underlying reason behind the bill's introduction and that is that Vermont is one of only two states where a 16 or 17 year old can be charged in adult court for any crime, whether it is a misdemeanor or a felony. In this sense, Vermont is very much of an outlier in its treatment of delinquent youth. Also, as I will discuss later, all of the recent scientific evidence regarding adolescent brain development indicates there are notable differences between youth and adults and that youth respond much better and are much more successful when their cases are handled in juvenile as opposed to adult court. As I said this has been a topic of discussion in VT for at least the last 20 years.

The first time I became involved in a discussion of what was the appropriate court in which to address delinquent behavior by 16 and 17 year olds, and which governmental agency should supervise these youth, was in 1993 when there was a study committee set up study the issue.

Specifically, it was recognized at that time that no state department or agency wanted to take responsibility for 16 and 17 year old youth who became involved with the criminal justice system. The position of DCF (then SRS) was that their mission was more geared to child protection and not delinquency and it did not have the resources or tools to work with that population. Likewise, it was the position of DOC that its programs and practices were set up to deal with the adult population and they had neither the services nor the programming to address the needs of this population.

The first concrete step that actually attempted to address the needs of this particular group of youth and whether their cases should be handled in juvenile or adult court was the passage by this legislature in 1998 of the first "Youthful Offender." This legislation provided a mechanism for 16 and 17 year-olds who were originally charged in adult court with more serious crimes to be granted the special status of "Youthful Offender" which would allow their cases to be transferred to juvenile court, have juvenile court retain jurisdiction over them up to 19 years of age and, if successful, to avoid an adult criminal record. This law has been amended a few times and remains, with changes, the present law.

In 2002 the Legislature created the "Juvenile Justice Commission," consisting of the Commissioner of DOC, the Commissioner of DCF and the Director of Juvenile Justice to once again examine the issue of whether this age group should be charged in juvenile or adult court. In 2007, H. 52 was introduced by Reps. Flory, Jewett, Donahue and Grad which would have required all criminal proceedings against minors to be commenced in family (juvenile) court and granting the State's Attorneys the right to file a motion to transfer to district (Now Criminal Division) for serious felonies. That bill is very similar to the one you have before you now.

In 2008 there was an omnibus juvenile judicial proceedings act which rewrote the original juvenile proceedings act and also included language establishing a juvenile jurisdiction policy and operations coordinating council which was directed to file a report with this committee by Dec. 15, 2008.

I was a member of that council and the report it issued basically stated there was no consensus on the matter.

In 2010 statewide Diversion was awarded a grant by the Children and Family Council on Prevention Programs to examine how criminal cases involving 16 and 17 year olds were being handled by State's Attorneys and the judicial system. Diversion established the Diversion Enhancement Assessment Plan (DEAP) which had as its goals:

- 1) Increase resilience and decrease recidivism among youth diverted,
- 2) Increase the number of youth diverted,
- 3) Increase successful completion of Court Diversion contracts and;
- 4) Encourage eligible juveniles charged with a criminal offense to have their cases

originate in the Family Division (juvenile court) rather than the Criminal Division adult court).

In June, 2011 DEAP issued a Request for Proposal on behalf of the Jurisdiction Workgroup, a subcommittee of the granting source, the CFCPP, for a consultant to survey State's Attorneys regarding the "philosophical and practical reasoning for their filing and referral decisions for 16 and 17 year old youth charged with violating the law."

On November 20, 2011 consultant Erica Garfin submitted her final report entitled "A Study of Vermont State's Attorneys' Perspectives on Juvenile Jurisdiction."

The report indicated that some of the reasons the State's Attorneys chose filing charges against 16 and 17 year olds in adult as opposed to juvenile court were as follows:

- It had been and was the traditional way cases involving this age group were charged;
- The youth needed supervision past their 18<sup>th</sup> birthday, which even though it was possible with a youthful offender designation, the youthful offender procedure was rarely employed;
- It would diminish their discretion.

Ms. Garfin did a follow-up report which was published on June 27, 2014. **(Copy included in handout folder that was previously handed out.)**

Since that report issued in 2011 there has been considerable progress in some areas of the state with some State's Attorneys and protocols addressing the charging and choice of court for 16 and 17 year olds have been developed in at least four counties: Lamoille, Caledonia, Chittenden, and Windsor. There may be additional counties that have adopted similar protocols and if so I believe David can provide you with that information.

However, one needs to keep in mind that these changes are only local county-based protocols which could be changed at any time with a change of heart or a change of the elected State's Attorney. Likewise, being individualized by county there is no statewide policy which may create situations where 16 and 17 year olds in one county are charged as adults and in a neighboring county charged as adults in the Criminal Division for the same alleged delinquent behavior. This creates the potential for violations of equal protection under the law.

**Court data from 2011-2014 (shows that in 2014 there were still 433 charges filed in Criminal Division against 16 and 17 year-olds which were mostly public order or theft.)**

So, things are changing, but not everywhere in the state and not with the uniformity and clarity which is so important to have in matters regarding public policy and equal protection under the law. And that, in part, is my own answer to my own first question as to why have this legislation and why is it important.

**Update:** Last legislative session (2013-2014), a very similar bill was passed out of House Judiciary (H.618). It made its way to Senate Judiciary but was not passed out.

### **WHY IS THIS BILL BEING INTRODUCED?**

#### **UNIFORMITY STATEWIDE:**

The proposed change in H. 95 identifying the Family Division as the court of original jurisdiction for alleged criminal activity by 16 and 17 year olds would provide clarity and uniformity statewide for prosecutors. Granted it would diminish their discretion in charging decisions but still provides a clear mechanism for them to move to transfer to the Criminal Division (adult court) those cases involving serious crime and which are most appropriate for disposition in the adult criminal system. The difference that this bill makes is to state that for most delinquent activity on the part of this age group, that behavior and how to address it is much better suited to the Family Division as opposed to the Criminal Division.

#### **FOCUS ON REHABILITATION NOT PUNISHMENT / LESSEN COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION:**

One of the public policy decisions reflected in the proposal is it will afford to 16 and 17 year olds the protections of Family Court, perhaps the most important of which is the confidentiality of that court. If the minor's case were filed and adjudicated in the Criminal Division the youth would end up with an adult criminal record.

There are several long-term consequences that accompany an adult criminal conviction. An adult criminal conviction, even for a misdemeanor, a less serious crime such as retail theft, shoplifting, follows a person their entire life. Every time that minor or young adult later on applies for a job they will have to answer on an application for employment that they have a criminal record. Even if she or he were to have their record somehow expunged which is very unlikely, there is still, in this day and age, an internet record of the event.

There are other barriers that accompany an adult criminal conviction, besides a bar from employment, such as eligibility for public housing in some cases, ineligibility for federal student loans.

Furthermore, while the law requires that every young person that is the subject of a delinquency petition in the Family Division be assigned both an attorney and a guardian ad litem, there is no such comparable provision for cases handled in the Criminal Division, where if a defendant is told at his or her first court appearance, they will not be subject to imprisonment or a fine of over \$1000. If they plead guilty or are found guilty at trial, they do not qualify for the appointment of an attorney and, although a GAL is appointed, it is usually one of the child's parents, and not a GAL trained by the Court.

The most typical scenario where this seems to occur is where a 16 or 17 year old is charged in Criminal Division with possession of a drug. They are told that the worst that can happen is that

they will be given a fine and, therefore, an attorney is not assigned and the youth does not have the advice of a lawyer or given the information concerning the long term consequences of the adult conviction.

Often times, given the nature of youth, the 16 or 17 year old agrees to plead guilty and pay a fine with little or no thought to consequences. And that, in itself, is yet another reason why these cases are more appropriate for treatment in the Family Division.

#### RECOGNITION OF ADOLESCENT BRAIN DEVELOPMENT:

For the past few decades there has been a great deal of research regarding adolescent brain development and one of the main findings consistently in that research is that the brains of adolescents are not fully developed until roughly age 25. The pre-frontal cortex which is executive decision-making part of the brain is the last part of the brain to develop. It is responsible for what are referred to as executive functions, and such decision-making included the ability to weigh risk and assess long-term consequences. \*\*\*\*\*

As anyone who has children or has worked with children is aware this age group is very short-focused, wants things over immediately and rarely considers the negative consequences of their risky or careless behaviors. They also lack impulse control.

Children are not simply little adults and the adult criminal system does not work for youth. Statistics have shown that prosecuting youth in the adult system does not improve recidivism; exactly the opposite is true. There are much lower rates of recidivism for youth whose cases are processed through juvenile as opposed to adult courts. Youth who are placed with adult criminals simply become better criminals. A study of youth committing similar crimes in NY and NJ, some of whose cases were handled in juvenile and others whose cases were the subject of adult court proceedings showed that the recidivism rate for those youth treated in the juvenile system was much lower.

#### WHY THIS BILL NOW?

The second question I mentioned at the beginning of my conversation with you was why have this bill move forward now. First of all, as I noted earlier it has been the subject of discussion for over two decades. Importantly, in those two decades the criminal justice landscape regarding youth of these ages has changed dramatically as the result of adolescent brain development research, data regarding recidivism, data following changes in other states' laws, and federal legislation as well as U. S. Supreme Court decisions.

#### Vermont, as I stated earlier, is a notable outlier of what is going on in the rest of the country.

While there are several instances where I might see this as a good thing, this is not one of them.

In the past few years, Rhode Island, Connecticut, Massachusetts and New Hampshire have all extended their juvenile court jurisdiction so that older youth who previously would be automatically tried as adults no longer go straight into the adult system. In 2014 New Hampshire

Governor Maggie Hassan signed a bill to raise the age of juvenile court jurisdiction to 18 for both felonies and misdemeanors.

Legislative advocacy is occurring all over the country regarding this issue and I hope this body sees the value in this bill and the public policy it adopts which will once again recognize the value in acknowledging that children are different from adults and as such should be treated differently in Vermont's judicial system.

I believe the bill adequately addresses concerns over having a mechanism to transfer to the Criminal Division in cases where Criminal Division is the appropriate forum for certain youth involved in serious crime.

My office strongly supports H. 95 and urges you to move it forward and make it the law. The time has come.

Thank you,

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*Bob Sheil*, Juvenile Defender