

Alaska Criminal Justice Commission

Youth Justice Workgroup

Meeting Summary

Monday, May 11 2020, 10:00 a.m.

Via Zoom

Commissioner Present: Samantha Cherot

Participants: Renee McFarland, John Bernitz, Angela Hall, Suzanne LaPierre, Adam Barger, Tracy Dompeling, Patrick McKay, James Dold, Kathy Hansen, Preston Shipp, Eric Alexander, Kelly Goode, Chris Provost, Chanta Bullock

Staff: Barbara Dunham

Introductions

Samantha Cherot, Public Defender as well as ACJC Commissioner and workgroup chair, explained that a previous iteration of this workgroup had met in the past but she wasn't part of the Commission at the time. The Commission was now returning to some of the issues the workgroup discussed related to youth justice. The group left off looking at the juvenile auto-waiver statute, and had looked at removing certain Class B felonies from the statute as well as certain Class A felonies with conditions, and those offenses would still be subject to discretionary waiver. The group also looked at raising the age up to which juvenile jurisdiction may be waived to 26. This group also needed to discuss compliance with federal law and where to house youth, also keeping in mind what we are learning about the brain development of youth.

Tracy Dompeling, Director of the Division of Juvenile Justice (DJJ) said that DJJ definitely appreciated being part of previous discussion. When this group last met, the group had been talking about housing youth charged as adults at DJJ until conviction, which at that point was a best practice. In December 2018, Congress reauthorized the federal statutes related to juvenile justice (the JJDA), which requires states to house pretrial auto-waiver youth in youth facilities by 2021. DJJ intends to bring Alaska into compliance with the federal law, and this may be through an MOU with DOC first, with legislative changes to follow.

Child Sentencing Reform/Human Rights for Kids

Suzanne LaPierre from Human Rights for Kids (HRK) explained that HRK was formed by James Dold a couple of years ago, and was formally incorporated a year ago. HRK advocates for the rights of children in all kinds of areas; right now, the organization is focused on juvenile justice. They have been a part of introducing dozens of bills before Congress and state legislatures. They also submit amicus briefs to the Supreme Court. HRK has created a legislative blueprint for child justice reforms which was distributed to the group before the meeting; it has a number of model statutes. The main rationale for treating kids involved in the criminal justice system differently from adults was that in children, the prefrontal cortex is not fully developed. This inhibits their executive function making them less able to understand long-term consequences than adults, making them impetuous. Most people understand this intuitively and this is the

basis for restricting children from doing things like getting married, joining the army, signing contracts, etc.

Suzanne explained that case law began to recognize the special status of youth starting in the late 1980s. The latest US Supreme Court case on this topic was decided in 2016; it said prohibited mandatory life sentences without the possibility of parole for youth. The Court's reasoning was that children are less culpable than adults, and because culpability is what underlies the rationale for criminal sanctions, those sanctions shouldn't apply to children to the same degree as they do for adults. The opinion also noted that childhood criminal activity was also a failure of other actors around the child. Additionally, other rationales for criminal sanctions such as the idea of deterrence were not as effective for children. Life without parole also ignores a child's capacity for change. Children who engage in criminal activity often age out of crime, with diminishing recidivism rates as the person ages into adulthood.

State courts have gone further. Some have held that there is no reason to limit the Supreme Court's holding to only the most serious offenses, because the same rationales regarding culpability, deterrence, capacity for change, etc., apply regardless of the type of offense. For example the Washington Supreme Court recently dealt with a case in which two teens convicted of stealing Halloween candy were given 26- and 31-year sentences. The court held that the Eighth Amendment requires treating children differently.

Other considerations for treating youth differently include the high prevalence of ACEs among justice-involved youth and the overrepresentation of youth of color in the juvenile justice system.

Of HRK's slate of recommendations for reform, Ms. LaPierre thought these ideas in particular might be the most relevant for this group:

- Eliminate mandatory minimums for youth, or enact provisions that allow judges to ignore mandatory minimums. Many states have done or are considering this such as Nevada, Washington, Iowa, Virginia, and DC. In Virginia, judges have full discretion to ignore mandatory minimums if they find the child has ACEs. Other laws allow departure from a mandatory minimum if a child is convicted of retaliating against his or her abuser.
- *Miller* hearings. These hearings require judges to consider the special characteristics of youth, per the *Miller* decision, during sentencing for children facing long sentences or life without parole.
- Continued court jurisdiction. This would allow courts monitor youth sentenced as adults and allow the court to revise a sentence or parole eligibility after 15 years.
- Custodial interrogation rights. Children should have a right to an attorney and parents or guardians present, and interviews with law enforcement should be recorded.

James Dold explained that the legislative blueprint was developed with bipartisanship in mind. HRK has a bipartisan board of directors, comprised of six Republicans and five Democrats from around the country. On the organization's website there is a letter from former state representatives, one Republican and one Democrat, urging state legislatures to adopt these model laws. This is a bipartisan way to reform the juvenile justice system, and by highlighting this bipartisan support, HRK has been able to get buy-in

from legislatures around the country. The blueprint can also be foundation of broader criminal justice reforms.

James explained that the blueprint also calls for establishing a minimum age limiting application of the juvenile justice system to very young children. The juvenile justice system should not sweep in children at a young age, as it can lead to adverse outcomes. Even very conservative states such as Louisiana, Arkansas, and Texas have minimum ages for juvenile justice involvement. Younger children with behavior issues should be subject only to parental discipline or treated as children in need of aid as necessary.

Kids under 14 who are accused of serious crimes should, according to the blueprint, never be transferred to or prosecuted in the adult system. In recent years some states have been moving that floor up; for example, California moved the minimum age for adult prosecution up to 16. The higher up that age is moved, the better off the children will be long-term. Obviously there will be public safety situations. In California there are mechanisms extending the age of jurisdiction for the juvenile court as necessary. It's ideal to have the system be as flexible as possible.

James encouraged the Commission to take a look at the automatic transfer provision. Having judges take a look at all potential transfer cases would be best. That may not be politically possible, but if Alaska is going to have an automatic transfer, he suggested it should at least have a reverse waiver hearing automatically at the beginning of the case, so that a judge may determine whether the adult system is appropriate. If kids going are to be tried as adults, judge should also be required to look at ACEs and early childhood trauma.

James explained that many states are also now taking a look at abolishing the felony murder rule for children. (The felony murder rule holds anyone involved in a crime that results in death criminally liable, even if the person did not directly cause the death.) In those cases, courts should look at the intent of the child.

HRK also has recommendations regarding conditions of confinement. The blueprint calls for limiting solitary confinement for children, a recommendation that stems from the federal First Step act. Solitary confinement should not be used for a punitive response for children. It may be needed for other specific circumstances, but its use should be limited to what is provided for in federal regulations. One problem with having kids housed with adults, in addition to being a PREA violation, is that it often means kids are held in solitary confinement for safety reasons.

The most recent authorization of the JJDPa calls for kids to be held in juvenile facilities pretrial regardless of what system they're being tried in, although it also has failsafe considerations for judges so that if necessary, kids can be confined in an adult facility. But the best practice is to move completely away from holding kids in adult jails pretrial. Conservative states such as Kentucky have led the way on this. Often kids housed in adult facilities don't have the same access to programming as the adults do (also for safety reasons).

James encouraged using the model law as a reference, and said he was also happy to provide examples of this legislation from other states. Samantha said the group would appreciate that.

Campaign for the Fair Sentencing for Youth/ Saving Our Loved Ones Group

Preston Shipp with the Campaign for the Fair Sentencing of Youth (CFSY) explained that CFSY was founded in 2009. Its focus is on eliminating extreme sentences, specifically life without parole and de facto life without parole. In recent years the US has seen a remarkable trend away from extreme sentences for youth, with 26 states having abolished life without parole and 6 more not doing so in practice. These states have been influenced by the Supreme Court cases Suzanne mentioned, and not just the mandates of the opinions but their accompanying reasoning. CFSY also focuses on putting in place age-appropriate alternatives. Children, even those who commit violent crimes, have a profound capacity to make positive changes. We simply don't know who a 15-year-old is going to be in 25 years.

Preston explained that he did not start as a reformer and in fact attended law school in order to be a prosecutor. He believed in tough sentences, and thought that if someone was old enough to commit a crime, they were old enough to go to jail for it. He worked for the Tennessee Attorney General's office, and did his fair share of prosecuting 16-year-olds. He did not hesitate to advocate for sentences amounting to de facto life without parole.

That changed when Preston started teaching a law class in a women's prison in Tennessee. Interacting with the students expanded his understanding. One of his students was a woman who received a life sentence as 16-year-old due to the felony murder rule. He started to understand that who she became as a person was more than the girl who had been convicted of that crime. He wanted her to succeed.

Similarly, Preston also prosecuted Cyntoia Brown, who was convicted at age 16 of killing a man who had hired her as a prostitute and caused her to fear for her life. She later showed up in one of Preston's classes, and she had made amazing strides. At the time of her prosecution, he couldn't tell that 16-year-old Cyntoia would become 30-year-old Cyntoia. He became convinced that there needed to be a way to give second chances to those who won't be a threat. He was not advocating that the prison doors should automatically swing open after 20 years, but there should be an opportunity to revisit a person's case at that point, similar to what Virginia has done.

Eric Alexander, also with CFSY, said that he liked to think that his own story shows that incarcerated children can be redeemed. As a teenager, he stood outside as a lookout for a friend who was robbing a store, without realizing his friend had a gun. His friend killed a store employee, and Eric, charged with murder on the felony murder rule, agreed to plead guilty and receive two 25-year sentences with the possibility of parole to avoid a life without parole sentence. He finished high school in prison. His early life had a lot of trauma; he experienced domestic violence and joined a gang at age 14. He was an intelligent child and was never violent, but his home life led him to join a gang, to be part of a group of other kids going through the same things he was. As a teen, he felt like adults would talk at him rather than talk to him.

While Eric was incarcerated he began to focus on what happened in his life that led to his incarceration, and he began to draft a youth program. He encouraged his peers to start talking about what they would have wanted to do if they hadn't been incarcerated. Many had big dreams. They began to form healing circles. The prison administration saw these efforts, and lowered the security level of those who took classes. After spending 10 years in prison, Eric came home, and began to implement the programs he developed in prison. He became a household name in the Tennessee school system, speaking at schools and working with families. He founded a national network of people who had been incarcerated as children, the

Incarcerated Children's Advocacy Network (ICAN). Out of the 600 members of ICAN who have been released from prison, many are active in the same way he has been, and none have committed new crimes. Over the course of the last 16 years he has been investing himself in his community. He made a promise to the victim in his case that he would spend rest of life trying to prevent other children from going down his path.

Eric said it was possible to bring incarcerated children home who will be able to transform their communities. However, some who are coming home now have spent decades in prison and are now senior citizens—they will need additional help, and they are now not able to serve in perhaps the way they want to. Eric observed that he had so much to offer society coming home as a 28-year-old, much more so than a 58-year-old. Spending 10 years in prison was enough time for him to make a change. He has been able to prove to Tennessee that they made the right choice in letting him come home.

Angela Hall said she was part of the Alaska-based Supporting Our Loved Ones (SOLO) group for family members of people sentenced as youth to de facto life sentences. Right now there is no mechanism in Alaska for youth given long sentences to go before the parole board until they reach mandatory parole. Of those who do receive discretionary parole, their parole is deferred for 7 years or 10 years, or they are told to reapply in that time. These determinations are based on the crime the person committed, not on the person they have become.

Angela also said that for people handed lengthy sentences at a young age, there is little for them to do in prison, because if they have so much time left to serve, they are not eligible for a lot of the prison programming. Her husband was able to participate in a dog training program which has been very beneficial for him, but he is not eligible for other classes. He will be eligible for mandatory parole in his 70s. SOLO was not advocating to automatically let people out, but just a way to give people a second look.

Presentation Wrap-Up

Adam Barger said that he was convicted with a group of four teenagers at age 18. He and his co-defendants had killed someone who became a police informant. It was not something he was proud of. He spent 25 years in prison, and while in prison he read *The Deepest Well* and learned about the impact of early childhood trauma. He discovered he had an ACEs of seven (out of ten). He realized through his own experience that it was so easy for kids with high ACEs scores to turn left instead of right. Estimating the scores for everyone convicted with him, he didn't think any of them would score less than a 6. He wondered what Eric's score was. Eric said he scored a seven.

Adam said that when he was caught he gave a 3.5-hour confession as a way to brag about what he had done. He was sentenced by Judge Elaine Andrews who said that she had read the transcript of his confession, and that while she had read many such confessions before, his made her blood run cold. Adam said that that was person he was when he was locked up at 18, but then he spent 25 years trying to become a better person. Programs were often not available to him because of the length of his sentence but tried to find what programming he could. Educational opportunities were very narrow. He got his barber's license, which was a great opportunity for him once he was out of prison. People now care about how well he can cut hair, not about what crime he committed.

Adam believed he was blessed to get parole the first time he went before the parole board. Many people who are similar to him are going to die in prison. But the changes they have made in their lives make them no less worthy than he was. The changes he has seen in people incarcerated as youth are so stark, it is amazing. He watched Angela's husband become a totally different person while in prison, and he's not the only one. He wondered what the Department of Law would be able to do on this issue, and what the sticking points would be for reform.

Assistant DA Patrick McKay said that while he was asked to participate in this group on behalf of the Department of Law he couldn't commit to anything on behalf of the Department at the moment. He imagined that there would be a number of sticking points to changing the law. He thought one concern about the reverse waiver proposal was that it would turn every case into a discretionary waiver case. He personally agreed that there are issues relating to juvenile justice that should be addressed. He understood the reasons for wanting reform. He said he would like to do more research on this topic, for example looking at the legislative history of the automatic waiver—why did the legislature want to put that in place? He did think that Law recognizes that change is needed, although they might not agree with other participants on what exactly that would be. But Law is still willing to look at the juvenile justice system.

Samantha thanked everyone for sharing their expertise and perspectives. The agenda for today's meeting reflected where the previous iteration of this workgroup left off, but these presentations and the accompanying materials have given the group a lot more to work with. She thought the participants needed a chance to read and digest the materials and think about the ideas raised today. It might make sense for each agency to think about its priorities. She wondered whether the group had received the old draft recommendation. Barbara said they had not but she could send it out. Samantha said that would help as a starting point.

Adam wondered whether there was a way to return children to juvenile jurisdiction after serving time as an adult—it could be one of most beneficial things to do for youth. *JRN v. State* was the case that instigated the autowaiver statute; JRN was actually a close friend of his, and he sat with him during sentencing. He didn't know anyone who is the same person they were 20 years ago. Right now that kind of change can't be taken into account at sentencing. You can count the number of seeds in an apple but not the number of apples in a seed. But that's what we ask judges to do when sentencing children. When he was sentenced, he had no concept of what 75 years was and what 25 years was. At that point he could only remember maybe 12 years of his own life. People will start to reform when that time becomes real to them.

John Bernitz with the Public Defender Agency agreed the group should take time to think about these things. Alaska's auto-waiver law is a brutal law. There is no way back from it. He thought it was created by one legislator, whose brother was killed. John has been collecting information on every case of waiver since 1996. Adam added that that legislator was now on the clemency board.

Kelly Goode, Deputy Commissioner with the Department of Corrections, said she wanted to clarify—there was someone whose son was killed on the parole board but it was not the person who Adam referred to. Adam said he was not referring to the person on the parole board but rather the person on the Executive Clemency Advisory Committee.

Chris Provost, an attorney in private practice, said he has spent a lot of time with auto-waiver cases. He noted that Edie Grunwald was the head of the parole board whose son was killed. The Grunwald case was prosecuted on a theory of accomplice liability. All four people were charged as accomplices. Chris thought the auto-waiver and felony murder rule were together very problematic. He was also a big supporter of a reverse waiver, and thought a judge should be able to make the decision. He believed Alaska has a strong bench, and it is a good venue for judges to be able to make these decisions. He added that since this group last met he has seen more kids involved in “#metoo” cases, reflecting a better understanding of consent among teens. He now has more clients waived into adult court for sex offenses.

John said that he recalled that in the ‘90s Law had a policy that prosecutors had discretion regarding internal decisions about charging auto-waiver offenses. It seemed to him that Law had recently decided to automatically always charge auto-waiver offenses. He was also seeing a lot of sex offense cases.

Patrick said there was no specific Department of Law policy on that. Former Anchorage DA John Novak, who just left his position, did have a policy for the Anchorage office interpreting that the statute did not allow for discretion. But there was no statewide policy; he was also not aware of any policy in the ‘90s. Nor was he aware of an increase in sex cases but those would not typically be in his unit.

Chris said he was seeing a lot of cases out of Palmer, as well as Kenai. He has had cases that started in the juvenile justice system that were seemingly arbitrarily charged as adult cases.

Future Meetings and Tasks

Samantha said she was hearing some specific topics for a potential recommendation. Barbara will send out the previous proposal, and they will reach out to everyone about their ideas for the group.

Renee McFarland with the Public Defender Agency wondered whether there is data on the number of auto-waived cases. Barbara said that would be difficult to get at precisely but she recalled that Justice Bolger had come up with an approximation for the previous workgroup. Staff had also looked at the number of people in prison who entered as 16- or 17-year-olds. She said she would circulate that information.

The next meeting was set for June 15, from 10:00-12:00.

Public Comment

Angela said that on behalf of the family members in SOLO, she just wanted to say thank you, and hoped that this would lead to a positive outcome. Adam agreed, and said he appreciated the group’s willingness to listen.