Alaska Criminal Justice Commission

Youth Justice Workgroup

Meeting Summary

Tuesday, June 30 2020, 10:00 a.m.

Via Zoom

Commissioners Present: Samantha Cherot, Alex Cleghorn

Participants: Tracy Dompeling, John Bernitz, Patrick McKay, Renee McFarland, Adam Barger, Angela Hall, Kelly Howell, Diane Boyd, Colette Cook, Chris Provost, Karl Clark, Taylor Winston

Staff: Barbara Dunham

Data

Barbara Dunham, project attorney for the Commission, explained that she had circulated a one-page document with data on youth in DOC custody. One chart showed the number of 16- and 17- year olds in DOC facilities at noon on the first day of every quarter since July 2014. The number ranged from 0 to 11 and the average was 4.3. The other chart showed the number of people in DOC facilities who were age 26 or younger and who had been admitted to DOC custody at age 16 or 17, using the same snapshot days and timeframe. The number ranged from 8 to 18 and the average was 12.5. Barbara said that there were relatively few people in the population this group was discussing.

Barbara noted that the Commission has a lot more data from DOC as well as the court system, and if the group is interested, she could ask the Commission's data analyst to pull more queries. CJ Bolger had also pulled some data from the court system for the previous iteration of the workgroup, which Barbara hadn't been able to find.

Tracy Dompeling of the Division of Juvenile Justice (DJJ) said that she still had that data and had compared it to DJJ's database; the data is a bit old at this point.

Patrick McKay of the Department of Law asked how long people in this population were staying in prison, and whether it was comparable to the length of stay for older people. Barbara said that staff could look into that.

Tracy suggested also looking into the some of the unintended consequences of the auto waiver, such as whether auto-waived youth would be more likely to be released on bail because a judge might deem it inappropriate for them to be in DOC custody, whereas if they would be in DJJ custody a judge might want them held. She was just thinking about numbers and how things might change.

Previous Proposals

Samantha Cherot, Public Defender, Commissioner, and workgroup chair, explained that Barbara had circulated the draft recommendation that was under discussion when the previous iteration of this group met in 2018. She had also circulated a chart explaining the auto-waiver statute, which had been updated to reflect the fact that sentencing laws have changed since 2018. She had also circulated a memo from assistant public defender Renee McFarland which explained the history of the auto-waiver statute, national trends in

youth justice, and recent research on the development of the young brain. The memo also summarized the previous proposals and included new proposals.

Samantha reviewed the three previous proposals, noting that each was drafted with the understanding that a) discretionary waiver would still apply in each case, and b) that youth placed in DJJ custody would have better outcomes than if housed with adults in DOC facilities. In short, the previous proposals were:

a) Removal of certain Class B felonies from autowaiver statute,

b) Removal of certain Class A and B felonies from autowaiver statute with extended juvenile jurisdiction, and

c) Enact a reverse waiver provision.

Samantha also explained that the Commission's process for recommendations was to discuss recommendations within a workgroup, which would then forward the workgroup-vetted recommendation to the full commission, which would then vote on whether to send the recommendation to the legislature. She encouraged discussion of the previous proposals.

Regarding the first proposal, Patrick said he had looked at the legislative history of the autowaiver statute, and had not found a lot of discussion, but the legislature seemed pretty clear that it wanted to include recidivist B felonies, referring to youth who fall under that category as "incorrigible offenders". He was not sure whether the Department of Law would support removing those offenses.

Samantha asked whether this proposal had unanimous support when the previous iteration of this workgroup was discussing it. Tracy said she didn't think so, and noted that this idea had also been proposed in other venues before, and had not gained traction.

Samantha said that she hoped that the information Renee included in her memo on the developing research on the adolescent brain was helpful, and noted that the autowaiver laws were passed before this new understanding came to light. She wondered if there was anyone who thought this recommendation should be forwarded to the Commission.

Assistant public defender John Bernitz said he would like the group to forward the recommendation. He believed the laws were outdated, and noted that there is no oversight of the autowaiver, i.e. no way for a judge to review whether a child should be legally treated as an adult. The worst part about the B felonies is that those are the cases that have the best possibility for rehabilitation. For truly bad actors, prosecutors could use the discretionary waiver. Autowaiver takes the kids who have the best chance of doing well and eliminates their day in court. This law dates to the 90s-era discussions of "superpredators"—theories that have now been disproven. He thought the country was moving away from treating children this way, and if Alaska does not change its laws, it could risk becoming an outlier.

Taylor Winston of the Office of Victims' Rights (OVR) said that OVR would be opposed to these changes. There has been new research, but there is also a lot of inconsistency in social policy when comes to youth. A lot of juveniles are much more sophisticated now. In order to qualify for the autowaiver statute, kids charged with B felonies have to have been previously charged, which doesn't mean they necessarily have the best chance of being rehabilitated. A lot of these are serious offenses. All children can understand that they're not supposed to kill. She understood the research on the juvenile brain, but didn't want to go in the direction of not being able to convict anyone under 26. By the same rationale, people should not be able to smoke, drink, or drive until age 26. Taylor also noted that there have not been any discretionary cases in the last 20 years, which to her put the issue of having a judicial discretion into question.

John said that there was only one discretionary waiver case since the autowaiver statute was enacted in 1996. Before that, there were a lot. Regarding rehabilitation, John noted that a person's ability to be rehabilitated has more to do with the person than crime. He wanted to be clear that he was not saying that all murderers should be let off. He was saying that someone other than a prosecutor should make the decision, that the decision to try a child as an adult should go through judge. John also noted that there has been varying policy from the DA's office on this; for example, recently the policy has been that if there is probable cause, an autowaiver case is always started.

Patrick said that as he had explained at the last meeting, he was not aware of any policy set up in Department of Law. He observed that it almost sounded like John was advocating for more prosecutorial discretion. Autowaiver actually takes discretion away from the prosecutor in terms of charging someone as an adult. He understood that prosecutors have discretion as to the offense charged. But sometimes their hands are tied as to charges. If there was increased use of the discretionary waiver, there would be more discretion for prosecutors.

John said he had noticed practice change from the Department of Law recently. Previously, a prosecutor would come to the PDs and use the autowaiver as bargaining chip. In recent months, if there is probable cause for an autowaiver crime, the DA will automatically file the case in adult court. He added that his larger point was that whatever happens, this decision should go before a judge.

Adam Barger asked whether, when it comes to autowaiver, it was the case that there is no due process protection. He understood that in case of discretionary waivers, the waiver decision goes in front of the court, and there is due process involving a hearing with briefs filed. He wondered if he was understanding correctly that that didn't happen for autowaiver cases.

Patrick said that juveniles charged as adults have the same due process rights as adults. He said he would disagree that juveniles subject to autowaiver have no due process.

John said it was true that there is no hearing before a case is charged in adult court under the autowaiver statute. There can be a hearing if the adult case is dismissed. There is a hearing if the case involves a discretionary waiver. It's true that when they are in adult court, kids are given same due process rights as adults.

Adam asked whether a child waived into adult court faced a sentence that was more substantial than the child would face in juvenile court. John said definitely. Adam asked whether there wasn't a liberty issue in being treated as an adult that requires due process. John said he would agree with that notion, but the Alaska Court of Appeals has held that there is no constitutional right to be treated as a juvenile, and that that decision is up to legislature. He also thought that case law could change based on the recent US Supreme Court cases.

Chris Provost said that in response to Patrick's statement, attorneys, himself included, keep hearing on the defense side that the Department of Law's position is that the statute says "shall" which ties their hands. But in practice they see a wide variety in the application of autowaiver by different prosecutors around the state, and he had seen a lot of discretion used depending on the venue. It was inconsistent. He has represented kids who have been "reverse waived" even though there is no reverse waiver statute. He would like to see individualized assessment based on who the kid is, not based on the offense. Before a kid is charged as an adult he would like to see a 30-day period to do an assessment, and social history so that there could be an individualized determination as to whether charging the persona as an adult would be appropriate.

In response to Taylor's comments, Chris also agreed that no one was saying that kids should not be charged or held accountable. Ultimately 18 is 18. These cases can take 4-5 years to resolve. If a child is charged at 16 and convicted 4-5 years later, that child has likely spent much of that time in solitary confinement. The research just says that the human brain is just not fully developed in adolescents and young adults, but is not saying that they should not be held accountable for their actions. It was saying there is a spectrum of maturity; people who are 18 are more mature than people who are 16.

Chris added that it was also clear that people who are charged at age 16 as adults and released 10 years later at age 26 will have higher recidivism than if adjudicated in the juvenile system. It is counterproductive to public safety to charge all kids in this situation as an adult. One reason is that the adut facility is inappropriate for an adolescent. If a child is pretrial, they should not be kept in adult prison for 3-4 years. These are people who will likely be released at some point, so do we want them to be more of a threat? He would therefore would support a reverse waiver. It would be a relief valve especially for younger kids. At this point half or more of the states have enacted something like a reverse waiver.

Tracy noted that regarding the class B felonies with one prior, she didn't think there were a lot of those cases. From DJJ's perspective, they had no opinion on removing offenses from the autowaiver, but would note that the reverse waiver process might prolong getting kids into services. DJJ is preparing legislation to hold autowaived youth pre- and post-conviction at DJJ until age 18. The federal law that was updated in 2018 gave the state three years to make this change. DJJ has been working with DOC to get a sense of the numbers involved. Right now, the numbers are manageable. The youth in this population would not all go to one facility so they will be spread out.

Tracy added that DJJ would not necessarily support holding people in DJJ facilities until age 26. It is challenging to provide youth programming after graduation, like vocational programming. DJJ wants to meet their criminogenic needs. She felt that the programming was a reason that DJJ's recidivism rates were low. An alternative idea is whether a person is held at DJJ or DOC, up to a certain age they should get that same programming.

Patrick said he would personally be supportive of that. He did not support having 16 and 17 years olds held in ad-seg (administrative segregation) at the Anchorage Correctional Center (ACC). He couldn't bind the Department of Law on that, but would hope they would be supportive of those kids spending that time at DJJ.

John said he thought the change in the federal law was indicative of a national change in thinking about these cases. He didn't want to be an outlier. He has seen kids held in ad-seg, and it is just cruel to deprive them of socialization. DJJ does really well in terms of programming. They say they don't provide treatment but it is a treatment-like setting. Putting any young people in that setting would give them tools to survive.

Adam said that ad-seg is one of the worst places to put a kid. And if ad-seg is overflowed, they can be put into punitive segregation, and vice versa, so that puts kids in the company of people who are a high security risk, which can wind up giving kids an education on how to be a criminal. It is dangerous to keep kids there. It does mental damage. He himself did 9 months there.

Kelly Howell from DOC said she appreciated this conversation, and was taking in a lot. She didn't have the department's position on this, but would discuss this meeting with DC Goode, and thought it was a really great conversation.

Samantha said she was not hearing any consensus on removing offenses from the autowaiver statute. She wanted to get the group's thoughts on a reverse waiver.

Chris said that regarding conditions of confinement, the ad-seg issue has been litigated. Cases in 2005 tried to get kids transferred out of solitary. The Court of Appeals said the practice was not good but that it needed a legislative fix. He thought there would need to be more than an memorandum of understanding to get kids out of ad-seg. He has had two clients arrested at age 16 for homicides. They were placed in ad-seg and became incompetent to stand trial within a couple of months. They couldn't even be restored to competency. He thought there could be fixes for that. There is a high school program in ACC but there is a waiting list, and most of his clients have been on that waiting list. He would propose expanding that program.

New Proposals

Samantha said that Renee's memo had also outlined three new proposals:

a) Enact a minimum age for discretionary waiver

b) Eliminate the felony-murder rule for children

c) Enact a second-look parole provision

She explained that these proposals were pulled from the Human Rights for Kids blueprint legislation. The proposed minimum age for discretionary waiver would be age 14. For the felony murder rule proposal, it would only apply where the child is not the actual killer. The second-look proposal involved having the parole board consider parole for a child given a lengthy sentence after 15 years of custody; the board must consider any change in the individual.

Chris said that regarding the felony murder rule, he would note that the spectrum for liability is very broad, and the law doesn't make any exceptions. Some teenagers can be convicted of first degree murder without having an intent to kill, and they just happen to be there. He thought that proposal was warranted. He also thought the second look proposal was warranted, and thought a lot of states were going down that road.

Regarding the minimum age for discretionary waiver, Patrick noted that it was exceedingly rare that kids under that age would be charged under that statute; he knew of one kid age who was so charged at age 12, and was not aware of others. See the point of having such a law but was not sure it would have any practical effect. Regarding felony murder, Patrick note that it was very different from first degree murder. For accomplice liability to apply to a first-degree murder conviction, the person would have to have intent to kill. He didn't think a change in the felony murder statute would have an effect on first-degree murder.

Renee said that was correct, the proposal was not intended to affect first-degree murder.

Patrick said he would like to discuss these proposals with others in his office. He would also propose another change to discretionary waiver. He thought the process was backwards. He didn't see why the system was determining whether a child should be tried as an adult before it determines whether the child committed a crime. Why not find out if the child is guilty at all before determining whether to try them as an adult. Determine guilt first, then decide how the child will be treated. This could provide the privacy protections that all juvenile cases receive during the adjudication process.

John noted that he and Patrick had already talked about this, and he continued to think that Patrick had not really gotten his head around the ramifications of his proposal. Discretionary waiver requires proving a child not amenable to rehabilitation by the age of 20. So if a child comes in at 14 -15, and it takes 2-4 years to convict them, there is no way to prove that amenability to rehabilitation. He thought they also

might have a disagreement as to the goals of the juvenile system. A trial itself is not a therapeutic process; it's actually traumatic. It's better for children to come to terms with their crime in a therapeutic setting. He thought there could be ways to mitigate some of these concerns, and would be interested in seeing something in writing. Samantha agreed, and suggested that Patrick send something in writing for the next meeting.

Adam said that regarding a minimum age, he would hate to see anything less than age 14. The human brain can barely can understand what the person has done if they are younger. If there is no set minimum age, there could theoretically be a 4- or 5-year-old waived into adult court.

Regarding the felony murder rule, Adam noted that in order to be an accomplice, a person has to have taken substantial steps toward completing the crime. He understood that rule for an adult. But a juvenile can be in the wrong place at the wrong time and all of a sudden someone is shot. Kids don't think about that; they may be running scared, and think they will also be shot if they don't go along with something. He knew of kids who shot into a dead body but were charged with first-degree murder. They didn't go into the situation with the intent to kill anybody.

Regarding the second look provision, Adam observed that just because someone might be eligible for parole doesn't mean they are going to get it. The proposal was just saying that if they are convicted at an early age, they will get another look. If they went in at age 15, they will have served half their life in prison after 15 years. If they have an opportunity for a second chance, it's not a guarantee they will get parole, but they will be able to say if have done enough. He himself "fell" at age 18 and was rehabilitated by age 33. This provision would have allowed him to petition the parole board 10 years earlier. They could have said no, but it would have been an opportunity to tell them he was ready. A good friend entered the system at age 17, and will be eligible for parole at 70. That is throwing our children away. He thought people like him should have an opportunity to go before the parole board.

Alex Cleghorn, Commissioner and attorney at the Alaska Native Justice Center, said he thought these three new proposals all made sense. He was also curious as to how often an autowaiver was used to coerce a plea deal.

John noted that he was the only public defender who does juvenile cases full time. He estimated the agency sees autowaiver cases once every 3 to 6 months. He doesn't get waived cases, as those go to PDs who represent adults. Most cases where there could be an autowaiver offense but one is not charged are sex cases, where the facts don't really support charging the child as an adult, as well as robbery cases. Using the autowaiver to bargain was not common, but not rare.

Chris noted that plea bargaining just how this business is done. He has had cases where a prosecutor has come up with a deal, i.e.m, agree to this treatment at DJJ within 10 days or we will go to grand jury. It's not great but better than treating the child as an adult right away. The problem with sex cases is that the attorney has to use experts to assess risk, which takes time. If the defense is presented with only one choice it can eliminate other possibilities that an expert might recommend.

Patrick said he didn't have numbers as how often the autowaiver might be used as a bargaining tactic; by the time a case comes to him, the decision has already been made. Practices were probably different in different jurisdictions, and he would like to see some more uniformity across offices to ensure things are being done the same across the state, although of course every case is different. If there is not parity in how things are being charged, he personally would like to see that change, and would be surprised if his superiors at Law would not agree.

Alex said he would be very concerned if there were disproportionate treatment in these cases. He wondered if anyone was tracking whether Alaska Native youth are disproportionately reflected in autowaiver cases. The numbers are striking in other areas of the criminal justice system. He realized the numbers were small, but would like to know who's being charged and who's not.

Samantha asked whether this was something that was tracked. Tracy said that Alaska Native youth were generally overrepresented in juvenile cases. Barbara said that the Commission would have the race/ethnicity data for have for youth who are in DOC custody- but since those numbers are so small they might not accurately represent rates.

Public Comment

Angela Hall from the Saving Our Loved Ones Group said that she had been participating in discussions like this since 2015. With regard to the second look proposal, she wondered whether that would apply to all juveniles sentenced as adults, not just those admitted under an autowaiver; there are people who were incarcerated under the discretionary waiver and she wanted to make sure those individuals are not lost in this discussion. Samantha said yes, the proposed recommendation was that the second look would apply in that situation.

Adam said he was in full support of the reverse waiver. He was not a fan of anybody being auto waived. He still thought there was a liberty interest in being adjudicated as a child rather than tried as an adult, and thought there should be a finding of fact in support of that. He agreed with Chris and John that the autowaiver statute is outdated. It doesn't make sense to leave someone in prison for so long that when they are released they are old enough to be a burden on society. He thought enacting a reverse waiver was a good first step to taking another look at autowaiver as a whole. Putting kids in custody with career criminals will mean they learn things they never should learn. The outcomes are worse when kids are in ad-seg. Prison is the wrong environment for children.

Barbara noted that there had been two other public comments provided via email, one from Cordell Boyd and one from Collette Cook.

Future Meetings and Tasks

Samantha said she was not hearing support from the group for removing offenses from the autowaiver statute. She was hearing some support for the reverse waiver, and said the group would further consider that for the next meeting along with the three new proposals, as well as any proposal sent by Patrick and perhaps Tracy's data.

Barbara asked whether DJJ would need the Commission's support for DJJ's proposed legislation to bring Alaska into compliance with federal law. Tracy said that DJJ didn't necessarily need support and it would be up to the group. She could share what DJJ and DOC are currently working on with the group but would want to run it by DOC first.

The next meeting was set for July 15 from 10 to noon. Samantha asked participants to let her know their positions on the proposals.