

Alaska Criminal Justice Commission
Youth Justice Workgroup

Meeting Summary

Wednesday, July 15, 2020, 10:00 a.m.

Via Zoom

Commissioners present: Sam Cherot, Scotty Barr

Participants: Adam Barger, Angela Hall, Patrick McKay, Tracy Dompeling, Renee McFarland, Chris Provost, John Bernitz, Kathy Hansen, Kaci Schroeder

Staff: Barbara Dunham

Introductions

Samantha Cherot, Commissioner/workgroup chair and Public Defender, explained that at the last meeting, the group discussed proposals that had been previously discussed in 2018, and generally there was not enthusiasm for the proposals that would remove certain offenses from the auto-waiver statute. There was some support expressed for a reverse waiver provision, which was one of the previous proposals, and there was some support for the three new proposals, all of which were on the agenda for today.

Reverse waiver provision

Renee McFarland with the Public Defender Agency explained that a reverse waiver would apply in cases where a child was automatically charged as an adult (i.e. charged under the “autowaiver” statute). A reverse waiver statute would allow the child to petition the court to be returned to the juvenile system. She noted that the previous proposal was drafted so that it worked with the other previous proposals.

Patrick McKay with the Department of Law said that his recollection was that Taylor Winston from the Office of Victims’ Rights was not supportive of this concept at the last meeting. Since the last meeting he had spoken with others at Law and they also would not support this proposal. He and his colleagues were opposed to the proposal because it essentially turns the autowaiver into a discretionary waiver.

Kathy Hansen from the Office of Victims’ Rights agreed that Taylor would be opposed to this proposal. She agreed that it would render the autowaiver statute meaningless.

Renee observed that the proposal as written was very general and didn’t discuss any parameters. If a reverse waiver were to be proposed now, it could be written with a heightened standard. That would be one way to address Law’s concerns, because with a heightened standard the reverse waiver might not apply in every case.

John Bernitz with the Public Defender Agency said he believed that Taylor's comments were very broad, and he was not sure she knew specifically what the proposals were. There is an example in the current autowaiver statute of how the reverse waiver could be limited. If a minor is charged with an autowaiver offense (and therefore tried as an adult) but convicted of another offense, the minor may attempt to prove they are amenable to treatment in the juvenile system. The burden is on the minor to prove amenability to treatment. John thought it was possible to draft a carefully written statute that would limit its scope. There could be a limit as to the applicable crimes or age of the minor; the burden of proof could also be higher.

Samantha said the group could loop back to this discussion later in the meeting, or the group could also generally let the full Commission know where support for this proposal and where there is not.

Minimum age for discretionary waiver

Samantha explained that this proposal would set 14 as the minimum age at which a child could be subject to a discretionary waiver into adult court. She recalled that at the last meeting, Patrick had mentioned that he recalled only one case involving a child under 14 in this situation in recent memory (a 12-year-old), so there would not be a lot of impact. She reminded the group that this proposal came from the Human Rights for Kids legislative blueprint.

Patrick said that even in the case of the 12-year-old, a discretionary waiver wasn't sought, it just could have applied in that case. He also spoke with colleagues at Law on this, and Law was also not supportive. Their view was that there was no practical need for this provision, and it would preclude use of the waiver in outlier cases, such as if, for example, a 13-year-old committed a mass shooting—he was not saying that a waiver would necessarily be sought, but Law would want the option to consider it. He didn't think it should be precluded.

Samantha said she appreciated those concerns but did believe there was a practical need for a minimum age. She noted that setting a minimum age also meets international standards for the rights of children.

Attorney Chris Provost said that this proposal related to a bill that was discussed in the legislature last session but was not law yet; the bill was an extensive rewrite of the competency statute. During the legislative session, juvenile competency was also discussed. There was a draft bill that addresses competency for youth, which would render children 11 and under not competent, children ages 12-13 would be presumed not competent, and competency for children older than that would be determined according to the case. Chris said he supported the idea of a minimum age, and thought it related to the competency to proceed.

Patrick asked whether that was a bill before the Alaska legislature. Chris said it was, and could forward it to the group. Patrick said he would appreciate that; he hadn't seen it. John noted the idea was not new. The court system spent a lot of money to pay consultants from the University of Nevada to review Alaska's competency statutes, and their recommendations comport with what Chris had related; they also met a national standard.

John said he would also like to push back on Law's position on this. The outlier case in his view was the exact argument for not having discretionary waiver in these cases. There have been 11-

and 12-year-olds charged with murder. He didn't want this decision subject to the emotional response at the time, and wanted to limit the discretion in those cases. He thought there had to be some age where a child is young enough that society will not hold that child responsible. He thought that at some point, everyone could agree there should be a limit, and it might just be a question of just what age everyone could agree on.

Adam Barger said that he thought his views on this were made clear from his previous statements on other proposals. He wanted to just note that no one was saying that the child will not be held accountable, but the idea was just to determine the age at which a child will not be sent to jail for life. At a young enough age, they are just not competent enough to have the rest of their life thrown away. Kids at this age aren't even competent to tell us what will happen 10 minutes from now. There should be an age the group can find a consensus on. A 14-year-old can't really understand what's going on, or what will happen to them in 6 months. If the crime is exceedingly horrific, perhaps there could be an exception.

Scotty Barr, Commissioner, explained he was new to the Commission and that this was his first meeting. He agreed with what Adam said. This decision should involve considering a child's personal history, mental health history, and what's going on with the child's parents. Kids change their moods and attitudes frequently, and can be happy one minute, and sad the next. He thought the authorities should look at the child's situation. The child could be influenced by peers, or video games. He thought setting a minimum age would be tough, but would probably be somewhere in the range of 10 to 14.

Samantha wondered whether there was an age or range that Law would support. Patrick wasn't sure. The proposal he discussed with his colleagues was age 14, which they weren't supportive of. He could go back to see if they had any thoughts on a different age. Samantha thought that would help.

Eliminate felony-murder rule for children

Samantha noted that the proposed change would not fully eliminate the felony murder rule for children; it could still apply in situations where the child shared the requisite intent.

Patrick said that Law would also not support this change because it was too broad.

Chris said that this is where a reverse waiver would really come in handy. Accomplice liability can be really tragic; often juveniles are charged under this rule when they were present for the homicide but didn't participate.

Patrick thought that situation could be addressed by a provision that would allow a prosecutor to refer those cases to the juvenile court. The statute now requires that a juvenile in that situation be charged as an adult. He would be more open to discussing provision that would add that discretion for juveniles who have less culpability.

Scotty wondered whether there was any data from other states on children who have been convicted of these crimes. Samantha thought that was a great question. Information on how other states have changed their law was included in the materials that had been provided by Human Rights for Kids. She was not sure whether there was any hard data but it does cover what other states have done. Barbara noted that data on this specific situation was not part of the data that the Commission had.

Adam asked whether, if the felony murder rule for these kinds of cases was taken off the autowaiver list, prosecutors would still be able to use the discretionary waiver. Patrick said they would. Adam wondered whether in that instance removing this offense would really affect things. Patrick said there was a big difference in process between the autowaiver and the discretionary waiver. Discretionary waivers can take years to litigate; it is a process that is significantly longer than just filing a petition. It takes years of litigation regarding whether the juvenile is amenable to treatment.

Samantha said that as drafted, a child could still be tried for murder if they were the actual killer or had that intention. It would not be a wholesale elimination of the felony murder rule for children, it just would prohibit certain children from being tried for murder if they were not the killer and did not have that intention.

Scotty wondered whether the proposed rule would be for any age. Samantha said that as written, it would cover any age but welcomed further thoughts on that.

John said that regarding Patrick's remarks on the lengthy process for discretionary waivers, it was much easier to obtain before the autowaiver statute was enacted. Since the statute was passed, there has only been one discretionary waiver case. Before that, there were many cases in which 16- and 17-year-olds were subject to discretionary waiver. Also regarding having the discretion to opt out of the autowaiver, Law is currently settling cases by not charging autowaiver offenses, so essentially Law has that discretion right now.

Patrick said that his point was that there would be a safety valve that would allow charging those offenses but would not require going through the autowaiver process. The problem is that for the offenses in the autowaiver statute, the statute says they "shall" be subject to autowaiver.

John wondered whether law could agree to a minimum age for discretionary waiver if it was coupled with that safety valve provision. Samantha suggested just removing the word "shall" from the statute. Patrick said that would also essentially render the autowaiver meaningless because the waiver would no longer be automatic.

Renee noted that the statute is written such that if child is charged with one of the listed crimes, that child must be charged as an adult. Other states have statutes that give authorities the discretion to charge juveniles in these cases in either the juvenile or adult system; perhaps 10 states did so. She was not sure whether that would be the best approach, but if there was a group consensus on that, she could research those other states.

Samantha noted that discussing a provision like that might be a reason for having an additional meeting.

Second look parole provision

This proposal would create a parole provision making children who are tried as adults eligible to apply for parole after serving 15 years of incarceration.

Patrick said that Law was not prepared to take a position on this proposal, but didn't oppose its consideration by the full Commission. Law might want more information before taking a position.

Samantha noted that there were already some comments on this proposal from the last meeting which had been noted. It was her intent to take the proposal to the full Commission.

Chris noted that providing evidence of rehabilitation to the parole board depends to some extent on the offerings of the Department of Corrections. He wondered what would happen with someone who was incarcerated since they were teenager but never had programming available.

Samantha noted that this group had also discussed and voiced support for more robust programming for this population. There was also consensus that children under 18 should not be held in adult facilities. The federal law would soon prohibit this and DJJ was submitting legislation to comply with it.

Tracy Dompeling from DJJ said that was correct. The only thing she was concerned about with the federal law is that a judge can override the placement provision and place a juvenile in an adult facility. She thought it would have to be included in Alaska's conforming statutory change, but thought it could have the adverse consequence of having only one such child held in an adult facility. But the general philosophy is to keep them out of adult jails until age 18.

Angela Hall from Saving Our Loved Ones Group asked what the measure of rehabilitation would be. Recently she has seen people go before the parole board, and the focus seems to be on the seriousness of the person's crime, rather than on anything they've done since. Samantha said that was a good question. The blueprint from Human Rights for Kids outlines standards that states could set for provision like this. Chris was also right evidence of rehabilitation might be limited by what DOC has to offer in terms of programming.

Patrick said he recalled that DOC did not have position on this at the last hearing, as with Law; Law would wait and see what other agencies thought, but the proposal was worth looking at. Samantha said that there should be a DOC representative at the next full commission meeting. Chris said that if you look at the legislative history of the juvenile justice laws, DOC has taken the position that it does not want kids in its facilities.

Tracy recalled that Kelly Howell was stepping in for DC Kelly Goode at the last minute for the last meeting, so she just wasn't able to take a position at the time. Tracy has been in discussions with DOC about DJJs proposed legislation and she had a meeting scheduled with them this afternoon. She noted she had also talked with Deputy AG John Skidmore who brought DJJ's proposal up, and said Law was supportive of DJJ's work.

Patrick said he was hopeful that Law will be able to offer a position at the next full Commission meeting.

Barbara noted that the issue with programming in DOC facilities relates to what another Commission workgroup is doing. The Rehabilitation, Reentry, and Recidivism Reduction Workgroup is looking at, among other things, behind the walls treatment. The issue of having too much time left to serve to be eligible for programming has come up in that group. She noted that Adam had also explained in the comments that in order to be eligible for parole, a person needs to have completed their Offender Management Plan (OMP). Completing an OMP in many cases is also dependent on whether the person is able to engage in programming.

Public Comment

There was an opportunity for public comment but none was offered.

Future Meetings and Tasks

Samantha encouraged the group to look at Barbara's meeting summaries, and to make sure to read them thoroughly to determine whether each person's position was well-represented. She would summarize these discussions at the Commission meeting in August. She also encouraged the group to let her know whether anyone had thoughts on a possible range of minimum ages for a discretionary waiver, and whether any parameters for a reverse waiver might be acceptable.

Patrick said he didn't know whether there were parameters within which Law would favor reverse waiver, but did think there would be support for the prosecutorial discretion to reduce an autowaiver offense to a juvenile offense, or to opt out of the autowaiver process. Something similar to what Renee was talking about from other jurisdictions.

Samantha said she and Renee might take a look at the other states' laws to see what they find. Chris noted that there has been a lot of research in this area, and about 24 states have reverse waivers. Samantha wondered whether the group should meet again to discuss research about what other states have done.

Adam said he thought it was worth doing to see if there were any areas of consensus. He would like to see consensus around any proposals coming from the group.

Tracy said she also thought it would be helpful to have one more meeting. She wanted to have a more concrete idea of what the proposals are, and maybe look at written recommendations in the next meeting to refer to.

Samantha said she could pull out specific language from the memo that had been previously circulated about what exactly was proposed. She also thought there was more work to do on the possibility of a reverse waiver provision.

The next meeting was set for Wednesday August 5 at 10:00am.