

Alaska Criminal Justice Commission
Youth Justice Workgroup

Meeting Summary

Tuesday, August 5, 2020, 10:00 a.m.

Via Zoom

Commissioners Present: Samantha Cherot, Scotty Barr

Participants: Adam Barger, Renee McFarland, John Bernitz, Patrick McKay, Kelly Goode, Angela Hall, Tracy Dompeling, Chris Provost, Kathy Hansen, Diane Boyd

Staff: Barbara Dunham

Introductions

Commissioner and workgroup chair Samantha Cherot said the plan for the meeting was to go through the proposed recommendations on the table and find out where there might be areas of consensus, then she would take this discussion to the full Commission and report what group members' positions are.

Reverse waiver provision

Automatic waiver: Children who are at least 16 years old will be charged, prosecuted, and sentenced as an adult if they are charged with:

- *an unclassified or A felony and the felony is a crime against a person;*
- *first-degree arson;*
- *a B felony that is a crime against a person where the child is alleged to have used a deadly weapon and the child was previously adjudicated of an offense involving the use of a deadly weapon in commission of a crime against a person; or*
- *first-degree weapons misconduct under AS 11.61.190(a)(1) or AS 11.61.190(a)(2) (when the firearm is discharged under circumstances manifesting a substantial and unjustifiable risk of physical injury to a person);¹*

This prompted a discussion on a proposal to enact a reverse waiver provision where a child could potentially be waived back to juvenile court despite his/her case falling into one of the above referenced auto waiver categories. There were varying positions on this proposal. In an attempt to build consensus, the working group also discussed a potential recommendation to amend the

¹ AS 47.12.030(a).

auto waiver statute to allow for prosecutorial discretion in charging children aged 16 or older in adult or juvenile court for the listed crimes.

Samantha said that there was some support for the reverse waiver as well as some opposition, and support for giving prosecutors discretion. She noted neither proposal would necessarily eliminate the automatic waiver. For the prosecutorial discretion option, prosecutors would have the option in some cases not to charge a juvenile as an adult in cases where the automatic waiver would otherwise require it.

Patrick McKay from the Department of Law said that the prosecutorial discretion option was at this point a general concept, and he was not sure whether Law was more interested in having that discretion at the initial charge or reducing the charge at a later point. He thought the idea would be that the youth would be charged with an autowaiver offense and auto-waived into adult court, but the prosecutor could move the case back into juvenile court.

John Bernitz from the Public Defender Agency said the key distinction between a reverse waiver and the prosecutorial discretion option was who makes the decision. If a reverse waiver is allowed, the judge makes that decision. The discretion proposal puts that decision in the hands of the prosecutor. He thought that prosecutors essentially have that discretion now.

Samantha said her intention was to explain to the full Commission that this proposal started with talking about reverse waiver and then ended up with a discussion on prosecutorial discretion, and wanted to be able to explain everyone's positions. She asked those present to said what their positions were on this proposal.

Adam Barger said he agreed on the reverse waiver proposal and did not support giving prosecutors more discretion.

Patrick reiterated that Law did not support the reverse waiver. Law was interested in discussing giving prosecutors more discretion to resolve cases as juvenile cases, wherein a child would automatically be charged as an adult but then the prosecutor would have discretion to bring the case back to juvenile court.

Kelly Goode from the Department of Corrections said that DOC's position aligned with Law's.

Angela Hall from Saving Our Loved Ones Group said she was concerned about increasing a prosecutor's discretion, because prosecutors are all different and it might lead to unequal outcomes, but if a prosecutor wanted to use it, she would support it.

Tracy Dompeling from the Division of Juvenile Justice said she supported the reverse waiver, noting that it allows parties to present arguments to a judge. Adding discretion was somewhat concerning because it can lead to intended or unintended bias. As a JPO, she saw discretion allowed for outcomes that varied widely. For that reason she was hesitant about the discretion proposal.

Attorney Chris Provost said he thought a reverse waiver was essential to reform and supported that idea

Commissioner Scotty Barr said he supported the proposals and wondered whether the reverse waiver process would allow a judge to consider mental health issues. Samantha said it would.

Kathy Hansen from the Office of Victims' Rights wanted to echo Patrick's comments from a previous meeting that a reverse waiver would essentially nullify the automatic waiver statute. She was also concerned about the discretion proposal and thought that it would need to include a victim's right to notice.

Minimum age for discretionary waiver

The proposal is for a minimum age for discretionary waiver requests. Currently, prosecutors may request a discretionary waiver to charge, prosecute and sentence a child as an adult with no limit as to age. Based on international guidelines regarding children's development and culpability, the bipartisan organization Human Rights for Kids recommends prohibiting transfer of children younger than 14 years old to adult court, and Alaska's discretionary waiver statute could be amended to include this minimum age.

The group discussed the possibility of an age between 10-14. Is there a minimum age the group can agree on?

Samantha said that prior to the meeting, she had circulated a report from the University of Las Vegas Nevada (UNLV) which was commissioned to perform a comprehensive review of Alaska's mental health statutes in 2016. Part of the report included of this specific recommendations about the age at which a child may have competency to stand trial, including a proposed a specific statute. The report recommended a statute stating that juveniles ages 10 and below were not competent to stand trial; juveniles ages 11-13 had a rebuttable presumption of incompetence, and at age 14 and older, had rebuttable presumption of competence. This related to the group's discussion about a minimum age below which children cannot be waived into adult court. At the previous meeting, the Department of Law would not support a minimum age of 14, and Scotty had suggested something in the range of 10-14. She asked everyone to state their positions.

Patrick said he didn't have the Department of Law's position on a younger age, thought they still didn't support a minimum of 14. Samantha asked if he had any thoughts on the age of competency that the UNLV study proposed. Patrick said it would depend on the wording, but he really couldn't say. Samantha noted that the Commission could get Law's position at the August meeting.

Kelly said that DOC's position was the same as Law's.

Angela said she supported a minimum age of 14.

Tracy said she supported Law's position on this side and hoped that in the waiver process there would also be some consideration for what the group has been talking about at these meetings.

Chris said he supported a minimum age of 14. He hadn't personally seen Law pursue a discretionary waiver for anyone under age 15. He wondered what role DJJ would play in this process. He has experienced DJJ opposing discretionary waivers as well as supporting them. He thought a minimum of 14 would align Alaska with best practices, and said he would forward a publication on each state's position on this.

John said he wanted to be clear that this proposal was talking about discretionary waiver cases, since the autowaiver already only applied to youth ages 16 and up. He has had many contested discretionary waiver hearings for 15-year-olds, and for younger children, the discretionary waiver has been part of negotiations—used as leverage to get the child to go into treatment, for example. He was in favor of a minimum age of 14.

Adam said he was in favor of a minimum of 14; he thought kids any younger than that can't really understand what they've done. Treating them as adults will mean they will be in jail for the rest of their lives, in an environment that won't let them grow into a reasonable logical adult. He also agreed with the UNLV report's suggested statute as written.

Scotty said he agreed with a minimum of 14, but also agreed with the Department of Law—he was new to all this, and might need more information. He thought that having a mental evaluation would be the biggest thing for this topic as well. Samantha noted that a mental evaluation is what the UNLV study contemplated, and suggested group members refer to page 64 of that study.

Kathy said she had concerns about a minimum age. She has seen juvenile cases where there are presumptions to rebut, and the evidentiary hearings can cause delays. In cases involving children there was a need to move quickly. She understood the reasoning behind this, but thought that Alaska needed an adequate mental health infrastructure. From victim advocacy perspective, she was thinking about safety. In Alaska if adults are deemed not competent, they are sometimes just released. It's a problem, and she just didn't think Alaska was ready.

Modify the felony-murder rule for children

The proposal is to amend the felony murder statute as it applies to children. The felony murder rule allows an accomplice to a felony to be held legally responsible for murder if someone dies as a result of the crime, even if the accomplice did not cause the death or intend for it to happen.

The Legislative Blueprint by Human Rights for Kids provides a roadmap for eliminating the felony-murder rule for children. The felony murder statute as applied to children could be amended to allow a child to only be found guilty of felony murder if the child was the actual killer or if the child, although not the actual killer, intended to kill or aided, commanded, requested, or assisted

the actual killer in the commission of the killing. Eliminating felony murder for children who do not actually kill or take an active role in the killing of another reflects the brain science research establishing children's reduced ability to foresee the consequences, both intended and unintended, of their actions; it would not, however, reduce the state's ability to prosecute the child for the underlying felony, either as a principal or an accomplice.

There was some support for and opposition to this proposal.

Patrick said that as he stated at the last meeting, Law didn't support this proposal.

Kelly said that DOC agreed with the Department of Law; discretion was important in cases of this nature.

Angela said she supported this proposal.

Tracy said she supported the proposal, though she wasn't sure if the rule had ever been used to charge a child in recent memory.

Chris said he supported the proposal. Kids tend to commit serious crimes in a group. Many cases he has handled involved multiple kids. The felony murder rule involved a nuanced and difficult analysis for lawyers, which made him think about jurors and whether they are getting those nuances.

John supported the proposal.

Adam said he supported the proposal. He noted the proposal was not talking about getting rid of felony murder altogether, just in cases where the child didn't pull trigger or take steps to cause the death to happen. He thought the bar should be set higher in order to jail a child for life.

Scotty supported this proposal.

Kathy said she didn't support the proposal; she didn't see a need to treat kids differently from adults, and also didn't see this provision used that often.

Second look parole provision

The addition of a retroactive "second look" or "safety valve" provision that grants juveniles sentenced in adult court expanded parole eligibility as recommended by the bipartisan organization Human Rights for Kids. Expanded eligibility allows those juveniles who have demonstrated maturity and rehabilitation a meaningful opportunity for release. Consider recommending a statutory change providing eligibility for parole release no later than the individual's fifteenth year of incarceration with mandatory consideration of the individual's maturity and rehabilitation since being incarcerated.

There seemed to be support for this proposal and a lack of any opposition to bringing it to the full Commission for discussion.

Samantha noted that this proposal also came from the Human Rights for Kids blueprint. As the group discussed at the last meeting, the viability of this proposal does depend on what programming is available in DOC facilities. She didn't think she heard any opposition to this proposal, and recalled that Law was okay with taking this to the full Commission.

Kelly asked whether this would mean this population would be eligible for parole or if parole would be mandatory. Samantha said they would be eligible, and would not automatically get parole, but it would be mandatory for the parole board to consider certain factors. The idea was to ensure it would be a meaningful hearing. Kelly said she was fine with this proposal going forward for discussion.

Patrick clarified that he personally thought this proposal was a good idea but was not aware of Law's position. He suggested asking John Skidmore.

Next steps

Samantha asked the group to review the summary for this meeting, and said she would take it and turn it into a memo for consideration by the full Commission.

Tracy asked if she wanted to note that the group discussed DJJ's proposal for legislation on housing youth in DJJ facilities— she didn't recall a lot of discussion or opposition. Samantha said yes, that there had been discussion about legislation to come into compliance with federal law in terms of housing justice-involved youth. She thought the group had supported that and asked if there were any additional comments. There were none.

Patrick asked if the group would set another meeting date. Barbara said that the full Commission would consider these proposals and may want the group to come back to this, it would be best to wait to see what they say before setting a meeting.

Public Comment

Adam said he appreciated being allowed to participate in this group and share his experiences. After 25 years of incarceration he still felt institutionalized, and the transition has been difficult, but he hoped his perspective helps. He was happy to keep participating if the group met again.