

YOUTH IN THE CRIMINAL JUSTICE SYSTEM: AN ABA TASK FORCE REPORT¹

Introduction

In 1997, the ABA Criminal Justice Section Standards and Juvenile Justice Committees jointly authorized the creation of a Task Force to address the overall implications of the increasing number of juveniles being transferred to the adult criminal justice system for trial and incarceration there. The Task Force, chaired by Chief Judge Johanna Fitzpatrick of the Virginia Court of Appeals, began meeting in 1998 and has recently completed its work with the publication of a White Paper entitled *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners*.² The group consisted of representatives of all sectors of the criminal justice community and its work was made possible by grants from several major foundations.

Since 1991 almost every state has widened the scope of youth under 18 who, after being charged with a crime, are processed by adult criminal courts rather than by juvenile courts. It is estimated that at least two hundred thousand American youth under the age of 18 are tried as adults each year, and by 1997 the number of young people in adult prisons had reached at least 7,400—double the number in 1985. (Howard N. Snyder & Melissa Sickmund, *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT* 106 (1999); Kevin J. Strom, Bureau of Justice Statistics Special Report: Profile of State Prisoners Under Age 18, 1985-97 4 (U.S. Department of Justice, February 2000)) This growing population of youthful defendants and prisoners presents unique challenges to the entire criminal justice system. Lawyers, judges, probation officers, and corrections officials are encountering new problems and looking for guidance in how to deal with them. The purpose of the Task Force's White Paper is to provide such guidance to those involved with youth in the criminal justice system.

The Task Force intentionally did not revisit the ABA position on the transfer of juveniles to adult court for trial but focused instead on what should occur once a youth is involved in the adult system. The ABA transfer position is well-articulated in the IJA-ABA JUVENILE JUSTICE STANDARDS RELATING TO TRANSFER BETWEEN COURTS, where Standard 1.1 makes clear that only persons fifteen years of age or older should be eligible for transfer to adult court, and then only after an extensive hearing before a juvenile court judge.

This document summarizes the general recommendations made in the White Paper on the Pre-Trial, Trial, and Corrections stages of the criminal justice process.

¹ This summary of the White Paper's recommendations was prepared by Professor Robert E. Shepherd, Jr., of the University of Richmond, who served as Reporter to the Task Force, and is derived from columns he published in Criminal Justice magazine. It has not been approved by the Task Force, and the White Paper itself should be consulted for the full language.

² The White Paper consists of 92 pages of recommendations and Appendices, including an extensive Bibliography, a discussion of relevant youth development issues, and statutory references. The full White Paper may be obtained from the ABA Service Center at (312/988-5522) for the cost of postage and handling; cite Product Code 509-0082. It may also be secured off the ABA Criminal Justice Section website, www.aba/crimjust/pubs/reports/index.html.

General Principles

The Task Force spent much of its early deliberations gathering information and hearing from experts on child and youth development before deciding on seven general principles to inform its subsequent decision-making about the practices that should be followed in the various stages of the criminal justice process. These principles are as follows:

- Youth are developmentally different from adults, and these developmental differences need to be taken into account at all stages and in all aspects of the adult criminal justice system.
- Pretrial release or detention decisions regarding youth awaiting trial in adult criminal court should reflect their special characteristics.
- If detained or incarcerated, youth in the adult criminal justice system should be housed in institutions or facilities separate from adult facilities until at least their eighteenth birthday.
- Youth detained or incarcerated in the adult criminal justice system should be provided programs which address their educational, treatment, health, mental health, and vocational needs.
- The right to counsel in the adult criminal justice system should not be waived by a youth without consultation with a lawyer and without a full inquiry into the youth's comprehension of the right and capacity to make the choice intelligently, voluntarily and understandingly. If the right to counsel is voluntarily waived, stand-by counsel should always be appointed.
- Judges in the adult criminal justice system should consider the individual characteristics of the youth during sentencing.
- The collateral consequences normally attendant to the adult criminal justice process should not necessarily apply to all youth arrested for crimes committed before the age of eighteen.

These over-arching principles governed those decisions made by the Task Force about policy throughout the remainder of the deliberative process.

Pretrial Stage

The Task Force determined that youth should receive, at a very minimum, the same safeguards available to adults during any police investigation. Statements made during the course of custodial interrogation in the absence of counsel and the youth's parent or parents should be carefully scrutinized, and such interrogation of a youth who has not reached his or her sixteenth birthday should not take place outside the presence of counsel. The Task Force also decided that the ABA CRIMINAL JUSTICE STANDARDS ON PRETRIAL RELEASE should apply generally as minimal standards for the pretrial detention and release of youth, considered together with the IJA-ABA JUVENILE JUSTICE STANDARDS RELATING TO INTERIM STATUS. The general policy favoring release of an individual taken into custody prior to trial should apply with even greater force to youth.

As with adults, youth should be released under the least restrictive conditions consistent with a jurisdiction's policies on pretrial release. When conditions for release are imposed, they should reflect the presumption that youth ordinarily should be released to their parents. In addition, the use of curfews, requirements for regular school attendance, restrictions on the use of driver's licenses, and other youth-specific conditions should be used as least restrictive conditions. Bail should be used only when no other conditions will ensure appearance since youth rarely have income or assets.

Pretrial services agencies should assist and supervise youth released prior to trial through staff specially designated and trained to handle youth and insure their compliance with the conditions of release. The agency should also be equipped to assist youth to secure educational and residential services, if necessary, in addition to aiding in accessing social, legal, medical, and mental health services. An inquiry by the pretrial services agency into the facts relevant to pretrial release should be held prior to the youth's first appearance before a judicial officer, and that inquiry should include, but not be limited to, those factors peculiarly relevant to youth.

When a youth is arrested and not released, he should appear promptly before a judicial officer. This appearance should not be delayed for police investigatory procedures. The requirement for a prompt appearance before a judicial officer should take into consideration the possible unavailability of a parent or custodian, but such unavailability should not unduly delay the appearance. At that appearance, the youth should be advised in simple, age appropriate language of the nature and possible penalty for the charge, of the privilege against self-incrimination, of the right to counsel, and the right to a trial by a judge and, where applicable, a jury. The youth should also be advised that his parents may be present for the appearance, and the parents should be there, if practicable. The advice given to the youth at the appearance should also be given to the parents, if practicable.

If the decision is made that a youth should be detained, there should be a procedure for an expeditious review of that initial decision based on new or additional relevant information. The use of pretrial incarceration for preventive detention reasons should be used sparingly, and in no event should it be more of a consideration than for adults.

Youth should be held in separate facilities from adults during any pretrial detention. Young people placed in a jail or other secure facility are more vulnerable to psychological and physical harm than adults, and they are at greater risk for suicide. In any jurisdiction where separate housing does not presently exist, a well thought out classification system is critical to the effective segregation of youth from adults, and of violent or threatening youth from other youth they may victimize. Youth in such a facility should not be mixed with adults in any common areas, and there should be sight and sound separation. Upon initial detention, whether in a juvenile or adult facility, youth should be evaluated for a risk of suicide and the need for a mental health assessment. If it is determined that a mental health assessment is needed, it should take place within twenty-four hours.

A youth's speedy trial rights should include a specific timetable tailored to meet the special characteristics of youth. The calendaring process should take into account the youth's sense of time while protecting the ability to prepare adequately for a defense at trial. (*See Anne*

Rankin Mahoney, "Time and Process in Juvenile Court," 10 *The Justice System Journal* 37, 39 (1985)) The statutory time for trial should commence running, without demand by the youth, from the time of arrest, from the juvenile court's decision to transfer the case to the adult court, or from the filing of charges for trial in the criminal court if the charge is initiated in the adult system, whichever occurs first.

Trial

For any youth fourteen years old or younger, and for any youth over the age of fourteen whose competency is put in issue, the court should order an evaluation of the youth's competency to stand trial or waive any rights. The evaluation should be conducted by a psychiatrist or clinical psychologist who is specifically qualified by training and experience in the evaluation of children and adolescents. This evaluation should assess the capacity of the youth 1) to understand the proceedings, 2) to assist defense counsel, and 3) to make a meaningful decision about the waiver of substantial rights.

Upon finding that a youth is incompetent to stand trial as an adult, the court should determine whether there is a reasonable likelihood that competency can be restored. If such a likelihood exists, the court should order restorative services in either a non-secure community setting or in a secure facility, if warranted. Because of the critical nature of a decision by the court on the issue of the competency of a child or youth to stand trial, an interlocutory appeal should be provided on an expedited basis after such a decision.

Youth should not be permitted to waive the right to counsel without consultation with a lawyer, and only after a full inquiry by a court into the youth's comprehension of that right and his or her capacity to make the choice intelligently and understandingly. Any waiver of counsel must be in writing and made of record. If the right to counsel is waived, stand-by counsel should always be appointed. The common law infancy defense should be available to youth in the criminal court who are below the age of fourteen to allow the issue of criminal responsibility to be addressed by the court. (See Robert E. Shepherd, Jr, "*Juvenile Justice: Rebirth of the Infancy Defense*," *Criminal Justice* 45 (Summer, 1997))

Counsel and the court should be permitted to address age considerations during the voir dire of prospective jurors for the trial of youth. Where practicable, specialized courts or judges should handle youth in the criminal justice system, and judges sitting in such cases should be specially trained to deal with issues involving youth. However, where such courts or judges are not available, judges handling youth cases should receive specialized training about the distinctive characteristics of youth and the appropriate way to handle them in the adult system.

Prosecutors, defense attorneys, and probation officers who handle cases of youth in the criminal courts also should receive specialized training in developmental psychology and the special characteristics of youth. Prosecutor's offices should develop written protocols and procedures for the handling of youth in the criminal system to encourage consistency in dealing with young offenders. Public defender offices should, whenever practicable, have separate units or attorneys who specialize in the handling of such cases, and there should also be staff to assist in collecting and developing social and psychological information helpful to the attorneys.

Effective multi-disciplinary training programs, curricula, and instructional materials should be developed to assist in the training of judges, prosecutors, defense counsel, probation officers, pretrial release personnel, correctional officers, and others, and they should be supplemented by regular in-service training to keep individuals informed about new research and developments.

Youth should have the same right and opportunity to plead guilty or nolo contendere as adult defendants, although such a decision should be subject to an individualized inquiry into whether the exercise of this right is voluntary, knowing and intelligent. The judge should separately advise the youth in open court of the conduct with which they are charged, the rights they are relinquishing, the possible sentence and other consequences of such a plea, including collateral consequences. As part of the guilty plea colloquy, the judge should determine that the plea was voluntarily, intelligently and knowingly entered, and that the youth was adequately represented by counsel.

When young children are involved as defendants in a criminal court, the judge should determine whether any special accommodations may be needed. Such accommodations may include the set-up of the courtroom, the accessibility of parents and social workers to the child defendant, the scheduling of the court day to match the shorter attention spans of children, increased frequency of recesses, and permission for youthful participants to spend time with their parents and social workers outside the courtroom, among other such accommodations. Generally, the press should have the same access to trials involving youth in the criminal justice system as to such trials involving adults. However, on a case-by-case basis, access to the pre-trial and sentencing phases may be limited where there is an individually determined compelling interest to limit access to certain reports and to portions of hearings where social and psychological evidence distinctive to youth is being presented.

Information about youth awaiting sentencing, such as the youth's school and juvenile court records, psychological evaluations or other assessments, should be available to the persons conducting a pre-sentence investigation and preparing a pre-sentence or similar report. Collateral consequences that normally apply to adults should be imposed on youth only on a case-by-case basis.

Separation From Adults

The task force urges that youth who are detained or incarcerated before, during, or pursuant to, proceedings in the criminal justice system should be held in separate detention or correctional facilities from adults. (*See American Correctional Association Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction*, ¶ B (Jan. 20, 1999)) Whether or not jurisdictions have been successful in achieving complete separation of youth from adults, compliance with all the other recommendations in the paper is essential.

Corrections Administration

Administrative staff, people in policy making positions, and others hired to supervise youth in the adult system should all have education, training, and experience regarding the distinctive characteristics of children and adolescents, and they should have an understanding of

treatment and rehabilitation. There should also be training on the special needs of female offenders, minority offenders, offenders with gender identity issues, and youth who are sex offenders or the victims of sexual assault or other abuse.

There should also be a definitive classification and screening system in facilities housing youthful offenders to assist in the placement and handling of children and adolescents, including those with special needs. There must be available a range of placements and facilities for youth, including juvenile facilities, youth correctional programs, intermediate institutions for youth alone, community based programs, and intensive probation.

Because the safety of youth in the adult system is an overriding concern, institutions that house either detained and/or sentenced offenders must take special steps to protect this population. Appropriate individual classification instruments must be designed that recognize and take into account a variety of issues, including age, social history, institutional history, previous record, physical and mental development, and the charged offense.

Initial classification must take into account suicide risk, medical needs (including a determination of the existence of communicable or chronic illness) and medication needs (including mental health and substance abuse screening) and consideration of special education requirements. The classification process should provide for regular, consistent, periodic and meaningful reclassification, in light of the changing development of children and adolescents.

Since appropriate classification decisions can only be made when staff have complete information about a youth and the ability to thoroughly assess it, procedures should be in place to allow intake staff to promptly secure all relevant medical, psychological, educational, treatment and correctional records concerning the youth as part of the classification process. The design of both pre-trial and post-conviction correctional facilities for youth must take into account the special needs of children and adolescents. Small community based facilities for youth are preferable to larger facilities located far from the families and support base for incarcerated youth.

Any disciplinary system established for youth in correctional facilities should take into account the fact that adolescence is a period in which youths typically challenge authority. This knowledge is relevant to determining whether verbal conflicts with staff actually threaten institutional security. The disciplinary system should reflect the basic fundamentals of due process and should be tailored to take into account appropriate sanctions for children and adolescents, including recognition that youth perceive time differently than do adults. Discipline should: (1) be proportionate to disciplinary infractions; (2) only be imposed consistent with clearly defined standards that are clearly known to both youth and correctional staff; and (3) be enforced consistently. Solitary confinement should be prohibited, although room or cell confinement should be permitted for the time needed for an agitated youth to regain calm or as a disciplinary sanction for a major infraction, and for no more than ten days for a single incident. Chemical agents and physical restraints should be used only as a last resort, and only under strictly monitored circumstances.

Every institution should have in place a clear, easily understandable grievance procedure that allows youths to raise complaints about institutional programs, care, policies, conditions, personnel, and procedures. The use of private for-profit facilities for detained and convicted youth should be approached with caution, as has been urged by the American Bar Association in a Resolution approved in February of 1990 by the ABA House of Delegates.

Services

Studies show that youth tried in the adult system recidivate at higher rates and with more serious offenses than those who have committed similar offenses but are retained in the juvenile justice system. Therefore, notwithstanding the dominant punishment goal for incarceration in the adult system, public safety requires that youth in that system be provided certain services essential to reducing recidivism. Many youths in adult correctional facilities--including some convicted of violent crimes--will be released while they are still in the peak years for offending, and a growing number are released unconditionally at the end of their prison term. Consequently, a major focus in developing programs must be on equipping these youths to be productive, self-sufficient, and law-abiding citizens after their release from incarceration, and enabling them to resist re-offending. There should be equity in developing programs and facilities for male and female youth.

Many incarcerated youth are functioning below grade level, and there are a disproportionate number of offending youth in need of special education. Education should be compulsory for all incarcerated youth under the age of 18 who have not received a regular high school diploma or a GED. Education must be available for youth in disciplinary segregation as well. Basic education services should be delivered to students at an appropriate grade level, for the number of hours equivalent to those required by state law for the public schools, and in accordance with public school standards. All youth who qualify for special education and related services pursuant to the Individuals with Disabilities Education Act (IDEA) must be provided an appropriate education.

Vocational education and job training relevant and designed to meet the realistic demands of the economy should also be provided for all youth. Independent living skills should be provided for youth likely to be on their own after release. GED programs should be offered in addition to the high school and college level programs, but these programs should not be encouraged for youths with the ability to meet the requirements for a regular high school diploma.

Youth in the adult system should have access to religious services and advisors but participation shall never be mandatory. Physical activities should be available to maintain good health and physical development. These activities are necessary to reduce the incidence of violent behavior and to assist in maintaining good order and discipline. The ability to participate in group activities is particularly important for youthful offenders who need to learn to interact appropriately with others.

Each detained or incarcerated youth should be provided a health assessment to detect problems needing immediate attention as well as to meet ongoing health needs. This assessment

should screen for sexually transmitted and communicable diseases and other diseases, and should be done in connection with the classification process. When a youth taking prescription medication is initially admitted to a facility, all such medications should be continued in accordance with directions until a youth's medical needs have been fully assessed by a physician.

Appropriate confidentiality should be provided for youth who are screened for HIV or sexually transmitted diseases and who are determined to be HIV-positive or otherwise suffering from a sexually transmitted disease. Gender appropriate medical care should be provided for female offenders including pregnancy screening and appropriate prenatal care where needed.

There should be general mental health screening and assessment for all youth upon admission to a facility. Other mental health programs should be in place to deal with the disproportionate incidence of mental health and emotional problems among incarcerated youth. Programs also should have in place substance abuse treatment programs that are appropriate for children and adolescents. They should provide specialized treatment for youth who are the victims of abuse or neglect, especially the victims of sexual abuse, and for youth who are sex offenders. Institutional medical professionals who deal with youth should be trained in adolescent health care, and nutritional planning should be specific to the dietetic needs of children and adolescents.

Frequent visitation with family members, including parents, siblings, step-parents, children, and friends should be encouraged. This should include assisting with transportation for family members if practicable. Telephone contact at reasonable cost should also be available, and contact visits are to be encouraged. The use of volunteers to visit and work with youth is to be promoted and encouraged. Volunteer mentors are particularly important for youth who have little contact with family or who have few or no visitors.

Correctional agencies should have policies in place to allow for reasonable access to counsel and inmate advocates. Confidentiality of communications between attorney and client is essential and should be assured whether communication is by mail, by telephone or in person. Correctional agencies also should have transitional services for youth to assist them in returning to their communities. A youth committed to the adult system is likely to have few independent living skills. They may never have looked for a job, contacted an employment service, had a job interview, held a job, gotten a driver's license, arranged transportation, had a bank account, rented a room or an apartment, managed a budget, or paid bills. These "adult" experiences will pose challenges that may predispose them to failure unless good transition services are in place. Educational transition services are of particular importance for youth who are paroled or released while still eligible for public education services. Planning for services should begin sufficiently in advance of release to assure that release into the community is not unduly delayed.

Conclusion

The task force acknowledged that youth are committed to the adult system as punishment for anti-social behavior, but it recognized that youth are not yet adults, either developmentally, emotionally, or physically. Thus, it recommended policies, procedures, and treatment designed to promote greater safety and security for the youth and for the staff who work with them.

Similarly, the service and program recommendations are designed to make facilities operate more smoothly by keeping youth appropriately occupied in ways likely to facilitate better community adjustment upon release. Thus the protection of the community is fostered at the same time that youth are being sanctioned.

Respectfully submitted by
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