Minutes
August 17, 2016 Committee Meeting

Committee members present: Adams, Buck, Bryd, Coleman, Holcombe, Huffman, Jordan, Kemp, McLaurin, Murray, Seigle, Smith (Reporter), Wagoner, Webb (Chair).

Indigent Defense Subcommittee members present (who do not also serve on the Committee): Maher, Melton, Rubin.

The minutes from the June 10, 2016 Committee meeting were approved with one typographical correction.

Reporter Smith provided an overview of the Subcommittee's draft report, Improving Indigent Defense in North Carolina.

Discussion turned to a section by section review of Version 4 of that report. Minor points of discussion will be captured in the revised draft report to be circulated to Committee and Subcommittee members by Smith. More significant points of discussion included the following:

- *Whether judges should be allowed to serve on the IDS Commission.* Although noting that the ABA standards suggest that judges should not serve on a statewide Commission, Melton indicated that she had no problem with judges so serving. She pointed out however that in other instances, such as with respect to Commission appointment of Chief Public Defenders (CPDs), the report follows the ABA standards. She questioned this inconsistency. The role of the ABA Standards was discussed and a consensus emerged that while they serve as a helpful guide, they should not be viewed as binding in any way on the Committee's assessment as to what will work best in North Carolina. Coleman added that it was not inherently contradictory to say that a judge can serve on the Commission but cannot appoint the CPD. He framed the issue as excessive judicial control and suggested that having one or two judges on the Commission gave judges only diluted authority, as compared to the concentrated authority if they are vested with sole authority to appoint the CPD. Maher added that at most two judges serve on the Commission and with only two votes have no ability to control Commission decisions. Rubin provided some history, noting that the original IDS Act provided for only one judge to serve, and that judge was generally a superior court judge. However it quickly became apparent that the Commission could benefit from having a District Court judge serve as well. Huffman asked whether it would be better to have judges serve in an advisory or ex officio capacity. Maher expressed the concern that it would be difficult to get the judges to participate if their role was limited to an advisory capacity only. Ultimately it was agreed that no changes would be made to this section of the report.
- *Budgetary authority.* Huffman asked whether the recent legislative change giving budgetary authority to the AOC could hinder IDS. Maher responded that if the AOC does not exercise its authority, no issues are created. However, leadership and leadership's position on this issue can change and the legislation gives the AOC authority over the IDS budget. In response to Huffman's question about how this authority would be exercised, Maher explained that the statutory provision does not say when or how budget modification could occur. He interprets

the provision as allowing the AOC to modify the IDS budget at any time. On this issue, no changes were proposed with respect to the report's language

- *Resource flexibility to create public defender offices.* A question was asked about how IDS would fund a new public defender office if it had authority to create one and in fact did so. Maher noted that funding currently being used to pay PAC would be used to create that office. Melton noted that a prior IDS director had stated at a 2008 Commission meeting that he would decline to create a new public defender office if IDS did not also have authority to appoint the CPD. Maher noted that that viewpoint has never been the case under his tenure.
    - *Authority to appoint CPDs.* The most significant discussion regarding the report pertain to whether the IDS Commission or the senior resident Superior Court judge should have authority to appoint CPDs. Wagoner asked whether there have been issues of judicial meddling in public defender offices. She suggested that because of rotation, the judge's ability to influence that office may be limited. Rubin noted that he could identify three instances in which the judge did not want to reappoint the CPD and it was difficult to say that in all instances the judges' reasons were based solely on issues of merit. Webb, who had served as a public defender in the federal system, indicated that he was appointed by a judge and he never experienced judicial interference. He added that while a judge would have authority to control reappointment, the removal statute for CPDs parallels that for prosecutors. Additionally, he stated that he favored judicial control in part because of the recent legislative decision to return appointing authority to the judges. Murray stated that the prosecutors supported the legislative decision to return appointing authority to the judges so that there would be local control. He noted that in his district things were working well and there was concern about someone "chosen by Raleigh" interfering with a well-functioning district. Maher noted that IDS never had unfettered discretion to appoint the CPD because it was required to choose from a list selected by the local bar. Thus, he asserted it remained a local choice. Reporter Smith noted that the President of the Superior Court judges conference had indicated that the senior residents wish to retain appointment authority. Melton stated that as a general matter it would not bother her for IDS to have appointment authority but currently she feels that IDS is under political pressure and she feels more confident that a judicial appointment is less subject to political influence. Kemp stated that in his opinion we have had little problem with the quality of CPDs. He added that we will never get away from political control but that he has never experienced judicial interference with his office. He continued, noting that he was offended by the notion that CPDs selected by a judge could not be trusted to implement uniform standards adopted by IDS. He concluded by noting that he favors judicial appointment authority, that such a system provides sufficient oversight, and that if a CPD "goes off the deep end" the removal statute is available to correct this. Reporter Smith noted that she had received yesterday a report from the National Center for State Courts (NCSC) on how this issue is handled nationally. Among other things that report shows that the vast majority of states vest appointment authority with a state oversight body and that only North Carolina allows for judicial appointment. She further noted that this research would be forwarded to Committee and Subcommittee members, along with all comments that she has received on this issue. Kevin Tully, CPD Mecklenburg and President PDs Association, offered his personal views on the issue. With respect to recent legislation, he noted that the judges were not

worried about going to the Gen. Assembly for a change in appointment authority shortly after the IDS Commission had been vested with authority; he suggested that deference to the recent legislative change should not deter the Committee from recommending that the IDS Commission have appointing authority. He also noted that when the Gen. Assembly vacillates on an issue, as it has done with respect to CPD appointment authority, that invites stakeholders to suggest better approaches. Tully articulated the view that lack of independence from the judiciary is the greatest threat to effective representation. This point has been nationally recognized and it is a core principle in the ABA recommendations; he also noted that the NCSC research suggests that North Carolina stands alone on this issue. Tully went on to describe an example from Mecklenburg which illustrates the dangers of vesting appointment authority with the judge. He recounted that when his former boss came up for reappointment, the senior resident Superior Court judge, who had authority over her reappointment, "sat her down and told her how things would be to keep her job." After she refused to bow to these conditions, the judge recruited an assistant district attorney to run for her position and "all but promised" that individual would be appointed. When a vote was called by the local bar the sitting CPD won by a ratio of 14:1. The senior resident Superior Court judge still refused to appoint her for six months, "hoping that she would buckle." When she did not, the judge sought technical assistance from an outside group to evaluate her performance. Only when that group came back with a report stating that she was doing an excellent job did the judge agreed to reappoint her. In addition to this situation, Tully recounted that he has heard from Assistant Public Defenders that their bosses have instructed them to stop engaging in some form of advocacy for their clients because the senior resident Superior Court judge did not approve. He expressed the opinion that judicial interference does happen and that it is "very real." Tully noted that if defenders have an issue with the performance of the IDS director, they can seek removal through the IDS Commission. The only way to obtain relief from a judge who is interfering in the indigent defense system however is through election. He further noted that all of the senior resident Superior Court judges that he has worked with in his district have said that they do not want appointment authority. Finally he conveyed the opinions of two CPDs who had communicated with him about this issue. The CPD from Fayetteville indicated that he was completely in agreement that the indigent defense system should be independent from the judiciary but that he supported judicial appointment authority of the CPD. Chief Public Defender James Williams however supported IDS Commission appointing authority. Lawrence Campbell, CPD Durham, spoke in favor of judicial appointment authority. He stated that IDS was "fighting for their very existence" and as long as that was the case IDS was "not interested in doing anything other than living" and that "they will do anything that they feel they need to do to continue to exist." He stated that while his senior resident Superior Court judge does not interfere in his office with respect to who he hires, how he pays them or when he can give them raises, IDS does. He stated that "they do that because they have to justify their existence." Tully offered one more example of judicial interference. He noted that at one time he was contacted by the Lawyers Assistance Program (LAP) about a lawyer with a substance abuse problem who was doing a substantial amount of indigent work. As it typically does in this scenario, LAP went to the senior resident judge and asked that the lawyer be removed from his indigent cases and that a new lawyer be appointed.

The judge refused to act, noting that the individual in question shows up and pleads his clients on time. Campbell objected to considerations of "episodic recitations" with respect to this issue. Susan Brooks noted that the success of a judicial appointment model relies on the concept of a benevolent dictatorship; she supported the report's aspirational recommendations. Responding to Tully's historical example of what happened in Mecklenburg, Kemp noted that in that scenario the right result ultimately was obtained. He reiterated his desire to keep "politics local." Holcombe stated that up until today he had not heard a single example of a judge interfering in the public defender's office. Today he has heard contrary viewpoints but believes it is important to consider the big picture and how a recommendation in this respect bleeds over into other issues that the Committee is working on. He stated that one of the things that doomed the work of prior court commissions was the fact that recommendations were put forward over the objections of public officials. He stated that "we need to be very cognizant about what stakeholders think. We need to think about reality." He further expressed the view that he wanted the Committee to achieve results with respect to juvenile age and was concerned that a recommendation that the legislature reverse course on this issue could have negative repercussions on that other Committee project. Some discussion occurred over the alternative of electing the CPD with strong opposition of this from Coleman, who suggested it was the worst possible selection alternative. He reiterated the view that we should "eliminate interference by people who have an interest other than the best interest of the client." He also questioned why judges want appointment authority, suggesting that the reason must be that they would benefit from it. He articulated the view that judges should not benefit from this authority. He also indicated that if the Committee goes in the direction of supporting judicial appointment authority the report should not remove the aspirational language. Ultimately it was resolved that Smith would distribute to Committee and Subcommittee members the NCSC research and all comments that she had received to date and that the issue would be taken up again at the Committee's September meeting.

- *Approval of fee applications.* Holcombe expressed the view that he would love to be able to give up judicial approval of fee applications but did not understand the procedure that would be used in lieu of judicial approval. Smith noted that it had been discussed in Subcommittee that one potential model was a uniform recoupment schedule to be used in court by the judge in the presence of the defendant, but that fee applications could be approved by indigent defense staff. Maher confirmed that this model is used by at least one other jurisdiction and it can work if you divorce recoupment from the hours paid to the lawyer. Melton asked how a supervisor, who was not in court for the trial, will know whether the hours submitted were reasonable. Jordan noted, as he had in Subcommittee meeting, that the federal system has an excellent technology system in place that speeds fee application approval. Rubin noted that he works closely with public defenders and they tell him that judges refuse to pay for certain functions and that as a result we get underperformance. Maher noted that as a practical matter if hourly pay is used, this would be quite challenging for IDS to take on.
- *Workload formulas.* Tully expressed the view that the best way to develop workload formulas was not to require the public defender offices to engage in timekeeping but rather to get a group of people together to determine how much time *should* be spent on each type of case. He expressed the concern that we are not currently spending the time we need on each case.

- *Access to counsel.* Kemp and Murray expressed support for expanding indigent defense services to petitions for removal from the sex offender registry.
- *Time of appointment.* Some discussion focused on the report's recommendation that the first appearance statute be amended to require a first appearance for all in-custody defendants within 24 hours. Murray and others expressed the opinion that a 24-hour timeframe may be very difficult to implement and that 48 hours might be more appropriate. Murray noted the costs to the system when bail decisions are not timely reviewed. Final decision on this issue was deferred until the Committee considers issues related to its work on Pretrial Justice. Buck noted that if the timeframe was going to be shortened for the first appearance, the Committee should make a recommendation for statewide use of technology for remote first appearances. Tully noted that current system creates real issues with respect to the ability of the lawyer to have confidential communications with the client. He stated that the system currently being used in Mecklenburg does not afford such confidentiality.
- *Ability to communicate with counsel.* The issue of using technology for communications between counsel and in-custody defendants was discussed but rejected primarily for two reasons. First, concerns about the ability to preserve the confidentiality of the lawyer-client communication. Second, the importance of a first face-to-face communication between lawyer and client to establish trust and rapport.
- *Part-time defenders.* Kemp supported the use of part-time defenders, noting that IDS should be given all of the tools necessary to implement the most effective indigent defense system. In response to a question by Webb about whether this authority was in fact needed, Maher indicated that he thought it would be used rarely but there may be situations where caseloads are such that a part-time public defender makes sense. For example, a district may have a particularly heavy load of parent representation or delinquency cases that require indigent defense representation but do not require an additional full-time defender.
- *Reasonable compensation of all counsel providing indigent defense services.* In response to a question by Adams about what constituted reasonable compensation, Smith noted that the Subcommittee intentionally declined to state a number because what is reasonable will change over time and the report was designed to serve as a long-term blueprint for indigent defense. For that reason, the Subcommittee deferred to IDS to develop a formula for reasonable compensation. Melton requested and it was agreed that the chart of PAC rates included in footnote 265 be expanded to include the entire history of PAC rates. Murray requested and it was agreed that the chart in footnote 269 comparing public defender and district attorney salaries be removed.
- *Voucher system*. Kemp questioned whether the Committee should recommend against a true voucher system. Maher said that the Committee should do so because all of the controls that the report identifies as necessary to an effective indigent defense system are lacking in a true voucher system. Coleman agreed, noting that the state is still on the hook for ineffective assistance of counsel in a voucher system. No changes were adopted to this section of the report.

Reporter Smith updated the Committee on its criminal case management and pretrial justice projects, indicating that reports from the outside consultants would be distributed in the coming months.

Discussion turned to an update on the juvenile age project. It was reported that the Police Benevolent Association, North Carolina's largest law enforcement association, had formally voted to support raise the age and that a press release to that effect would soon be released. Murray informed the Committee that the prosecutor's Executive Committee had voted on the issue and that while they support raise the age, they want sole discretion (without judicial approval) to transfer 13 through 17-year-old juveniles to adult court when those individuals are charged with Class A through E felonies. Smith redistributed to Committee members the briefing paper previously prepared on transfer issues (and attached to these minutes as Appendix A). Murray took issue with some of the data in the briefing paper, noting that the statistics are under-representative because many prosecutors simply do not make transfer motions. He also took issue with the recidivism data presented in that paper, noting the small sample size. Buck suggested that the district attorney, with the input from law enforcement, is better positioned to make the decision about transfer than a judge. Coleman stated that he was not persuaded on the merits that this change was necessary, noting the strong support for raise the age that was expressed at the Jamestown public hearing. He added that the best interest of the child should be considered with respect to the transfer issue and that he would be opposed to giving this authority to the prosecutors without some level of judicial review. Webb wondered about judicial review of a denial of a transfer motion as a vehicle to address the prosecutor's concern. He further suggested that the issue may be one on which a solution can be developed. He expressed a concern about unfettered prosecutor discretion and wondered whether there could be some way to cabin that discretion. Coleman objected to certain statements suggesting that those who want to protect juveniles don't care about victims. Responding to Murray's statement that District Court judges were not well suited to decide transfer motions for serious crimes because they do not typically try cases involving serious crimes, Jordan asked about another alternative: Vesting the Superior Court with original jurisdiction to hear transfer motions. Jordan expressed the concern that vesting the prosecutor with sole discretion would create issues of "plea bargain bait." Murray indicated that this may be more palatable. Coleman asked for more information about the total number of 13 through 15-year-olds who are charged with Class A-E felonies. Tom Murray suggested that the Committee needed to look into the issue of whether the prison system could accommodate 13-year-olds under federal law. The issue was not resolved at the meeting.

Appendix A

Juvenile Age: Issue Briefing

Transfer of 14- and 15-year Olds

June 2016

The issue: At a recent Committee meeting, Prosecutor member Andrew Murray stated that some prosecutors want 13- to 15-year olds to be subject to the report's automatic transfer provision for Class A-E felonies. After discussion, however, he conceded that subjecting 13-year olds to mandatory transfer would be out of line with other U.S. jurisdictions and indicated that the issue was focused on 14- and 15-year olds. The rationale asserted for this change was that under current procedures, prosecutors are unable to successfully transfer juveniles charged with Class A-E felonies to adult court. It was asserted that some district court judges simply refuse to transfer these cases.

What's the current law on transfer? Under the existing transfer provision, G.S. 7B-2000, the district court may transfer jurisdiction over a juvenile who is at least 13 years of age and is alleged to have committed a felony to superior court. G.S. 7B-2200. A motion to transfer may be made by the prosecutor, the juvenile's attorney, or the court. *Id.* If the juvenile is alleged to have committed a Class A felony at age 13 or older, jurisdiction *must* be transferred to superior court if probable cause is found in juvenile court. *Id.*

What does the Committee's draft proposal say about transfer? The draft proposal recommends (1) maintaining the existing procedure in G.S. 7B-2200; and (2) providing that Class A-E felony charges against 16- and 17-year olds will be automatically transferred to superior court after a finding of probable cause or by indictment.

How would the prosecutor's request change this? The prosecutors would have (2) above provide that Class A-E felony charges against 14-, 15-, 16- and 17-year olds will be automatically transferred to superior court after a finding of probable cause or by indictment.

What does the data show about the prosecutor's ability to obtain transfers of 13-, 14-, and 15-year-olds charged with Class A-E felonies? Data from the Division of Juvenile Justice shows that from 2004-2016:

- Transfer was sought for 487 13-, 14-, and 15-year-olds charged with Class A-E felonies. Of those, 66% were transferred to adult court; 34% were retained in juvenile court. Ninety-one of the juveniles transferred were subject to mandatory transfer for Class A felonies. Removing this number from the data set reveals that 232 discretionary transfer motions were granted, a 58% prosecution success rate.
- Focusing on 14-year olds, transfer was sought for 101 juveniles charged with Class A-E felonies. Of those, 57% were transferred to adult court; 43% were retained in juvenile court. Twenty-four of the juveniles transferred were subject to mandatory transfer for Class A felonies. Removing this number from the data set reveals that 34 discretionary transfer motions were granted, a 44% prosecution success rate.
- Focusing on 15-year-olds, transfer was sought for 341 juveniles charged with Class A-E felonies. Of those, 71% were transferred to adult court; 29% were retained in juvenile court. Sixty-one of the juveniles transferred were subject to the existing mandatory transfer for Class A felonies. Removing this number from the data set reveals that 182 discretionary transfer motions were granted, a 65% prosecution success rate.

Thus, long-term statewide data does not support the suggestion that the prosecution is unable to obtain transfer of 13-, 14-, and 15-year olds juveniles charged with A-E felonies to adult court.

Even if statewide data shows that prosecutors enjoy success on transfer, might there be isolated, judge-specific issues? That doesn't seem to be the case. Data from the DJJ's NC-JOIN database reveals that for the period 2004-20016, five judges denied all transfers brought to them. None of those judges, however, had more than 8 juveniles presented (the number of juveniles presented to these five judges were respectively: 8; 7; 7; 6; 6). At the other end of the spectrum (and for the same 2004-2016 period) four judges granted all transfers brought to them for a much larger population of juveniles (the number of juveniles presented to these four judges (and transferred to adult court) were respectively: 50, 42, 29, 24). All other judges had mixed results on transfers for the 2004-2016 period. Thus, if this data is read to suggest an issue with some judges always denying transfer motions it also must be read to suggest an even more significant issue with some judges always granting them.

What remedy currently exists when a party is unsatisfied with a district court judge's ruling on a transfer motion? Under existing law the juvenile has the right to appeal a decision to transfer the case to criminal court. G.S. 7B-2603. However, the law does not give the State a right to appeal a denial of a transfer motion.

Could that remedy be expanded to give the prosecutor a right of appeal? Yes. The Committee could recommend amending the statute to allow the prosecution a parallel right to appeal a district court judge's denial of a transfer motion. This would give the State an avenue for review when the prosecutor disagrees with the district court judge's action or thinks it was made without due consideration of the statutory factors.

What would such an appeal provision look like? Current law allows a juvenile to appeal an adverse transfer ruling to the superior court for a "hearing on the record." G.S. 7B-2603(a). The standard is abuse of discretion. *Id.* One option would be to give the prosecution a parallel right to appeal: a hearing on the record to evaluate abuse of discretion. Although abuse of discretion is a permissive standard, it is unlikely that a ruling by judge who refuses to consider the relevant factors, *see* G.S. 7B-2203(b) (setting out factors that the judge "shall" consider when ruling on a transfer motion), and simply denies the motion out of hand would survive this standard.

At the Committee meeting it was suggested that perhaps the more robust de novo review standard might apply to the prosecution's right of review. While that is possible, principles of equity suggest that juveniles must enjoy a similar standard. However, if a de novo standard applies to all appeals from adverse transfer rulings, the parties likely will have an incentive to appeal all such decisions for the simple reason that doing so offers a free "do over." The Committee may wish to consider whether this alternative more robust standard of review is appropriate given the scope of the issue.

Is there any other data that should inform our thinking about where 14- and 15-year olds "belong"? Yes. The Committee's draft report cites studies suggesting that recidivism is lower when juveniles are handled in the juvenile justice system versus adult criminal court. A recent analysis by the research staff of the NC Sentencing and Policy Advisory Commission finds that this result holds true even with respect to juveniles involved with violent crimes. That analysis reveals that juveniles aged 14 to 15 years adjudicated of Class B1 through E offenses with community-based dispositions (Levels 1 and 2) appear to have better outcomes (i.e., recidivism rates) when compared to adults aged 16 to 17 years convicted in Classes B1 through E and sentenced to probation. Specifically, Table 1 below shows that 27% of a cohort of juveniles adjudicated in Classes B1 through E and aged 14-15 years at the time of offense had a subsequent complaint or recidivist arrest during a two-year follow-up period. Individuals convicted in Classes B1 through E and aged 16 to 17 years at the time of offense had a notably higher 44% recidivist arrest rate during a two-year follow-up. The Commission staff advises that this finding should be interpreted with caution due the small sample size and because limited data did not allow for an exact comparison between the juvenile justice and adult criminal justice systems.[1] Nevertheless it is based on best available data that can be used to compare recidivism rates for juveniles processed in the juvenile versus adult system for violent crimes.

[1] For the full analysis and explanations of all caveats to the research, see NC Sentencing and Policy Advisory Commission Request (June 2016) (on file with Reporter Smith).