Testimony on S.133

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Introduction

The expansion of youthful offender jurisdiction has by and large been a successful process that is well on its way to ensuring that a youthful indiscretion does not set an individual on an irrevocable path of lost opportunity and struggle in life.

Despite being labeled as a critic of youthful offender expansion, I am proud to note that Washington County has handled more than 68 youthful offender cases since expansion on July 1, 2018, with my office supporting a majority of the individuals seeking such status, either by direct filing charges in Family Division or not offering opposition to transfers by the youths or their counsel.

To add context, cases where my office has objected have involved offenses of: attempted murder, sexual assault, sale of heroin, violation of an abuse prevention order (with a prior conviction concerning the same victim), and the cases of one individual that, while otherwise eligible, were part of seven criminal dockets while the individual was already under Department of Corrections supervision. Conversely, my office has not objected to, and even directly filed in Family Division, cases involving serious offenses ranging from domestic assault, aggravated assault, to burglary.

The success of youthful offender in many cases has been overshadowed by a few notable cases, including two this committee is well aware of: *State v. Tyreke Morton* and *State v. Jack Sawyer*. Headlines this week also feature a 17 and an 18-year-old shooting a man in St. Johnsbury.

These cases have come on the heels of nationwide concern and discourse over the sentencing of Brock Turner, the Stanford University student convicted of raping an unconscious woman, and Nikolas Cruz, the Parkland, Florida shooter. Under the present law, if both acts were committed in Vermont under the existing youthful offender law, these cases could be transferred over a prosecutor's objection to Family Division for a youthful offender determination hearing. Such hearing is out of the view of the public, and if a youth is accepted as a youthful offender there is no further public information or open hearings concerning the matter.

Balancing the needs of public safety and the policy purposes underlying the expansion of youthful offender eligibility is necessary, as is recognizing the limits of youthful offender probation as this process is refined. While S.133 addresses several of the technical changes need to enhance functionality of the law, the debate

today likely centers on the heightened scrutiny of "Big 12" offenses in the context of youthful offender.

The ability to directly file "Big 12" offenses as youthful offender petitions for juveniles in Family Division is an important tool for prosecutors to have in appropriate cases. Likewise, requiring the filing of "Big 12" offenses for individuals over 18 in Criminal Division is likely consistent with existing practice and does not preclude the State from later supporting, or filing on its own accord, a petition to transfer the matter to Family Division. The new bar for 20 and 21-year-olds facing "Big 12" offenses is an accurate reflection that the time to complete rehabilitation is limited, but is a logical limitation that will forestall otherwise fruitless litigation.

Key Concerns

1. Distinctions between Juveniles and Youths

There are often significant differences between those over and those under age 18 during their involvement in the justice system. Presumptively, individuals under age 18 are either situated in a home with a parent, parents, or guardians able to assist in their supervision, and rehabilitation, or in State/DCF custody. Time is also a significant factor: a 16-year-old who has committed a sexual offense has more than five years to achieve rehabilitation, versus a 20-year-old college student who commits a sexual offense on a fellow student, who will have less than 2.

Moreover, experience tells us that many individuals in the 18-22 age group that have encounters with the criminal justice system have, unfortunately, already had involvement with the juvenile justice or family court system, and are often facing instability in housing, employment, or wellness. In my view, youthful offender probation does not presently have the tools, authorities, or resources to adequately address these challenges when coupled with individuals with a history of violent acts.

2. Socio-Economic Bias in YASI Pre-Screen

I believe the use of the YASI Pre-Screen as part of youthful offender determination process is problematic in cases that entail "Big 12" or serious violent felony offenses. Specifically:

- The Pre-Screen relies heavily on self-reported information, with limited time or ability of the Family Services Worker conducting the screen to verify or corroborate self-reporting. Some reports indicate underreporting or underscoring of issues and risk factors.

- Prior to a DCF policy change, my office received a YASI Pre-Screen that found a youth alleged to have committed a sexual assault on a fellow college

student to be "medium risk" to re-offend. Pursuant to 33 V.S.A. § 5280(e) and § 5282(b)(1), DCF was required to make a recommendation that the case be referred to diversion. YASI is not validated for sexual offenses, and is in my view, a poor tool for screening the violent offenses presently captured under the "Big 12" offenses.

That outcome reflects the structure of the YASI Pre-Screen, which looks at legal and social history factors, that will result in lower risk scores where, for example, a youth grew up in a stable household, graduated high school, attends college, and is substance free, versus a peer who spent time in DCF custody, has used illegal substances, and has no family contact. Sex assaults, especially those on college campuses, demonstrate that the risk for this behavior is not concentrated on one socio-economic segment of the population.

3. Impact of Serious Felony Cases on the Juvenile Justice System

In Washington County, the drastic increase in youthful offender caseload has strained the judiciary staff, court time, and DCF resources. Many cases are resolved by agreement of the parties and without contested determination, merits, or disposition hearings. However, some cases have consumed a disproportionate amount of time, namely those involving serious violent felony offenses. The increase in cases has forced the delay of other critical Family Division proceedings, especially CHINS and termination of parental rights hearings.

Likewise, we are asking an incredible amount from DCF Family Services Workers, who are on any given day responding to an emergency custody order situation involving toddlers and then shifting to interviewing a 20-year-old held without bail for an aggravated assault. DCF may be best situation to describe the impact on their organization, but from my perspective the Barre office has been adversely impacted by the increased caseload and scope of responsibility that has accompanied youthful offender expansion. The dedication of these professionals has ensured that the mission has been met, but the sustainability of workers covering the situations involving infants, toddlers, juveniles, and young adults untethered from their families must be questioned, independent of any changes in the law.

<u>Considerations & Recommendations</u>

1. Revising the "Big 12" Offenses and the "Big 12 Plus"

Ensuring the scope of the offenses defined under 33 V.S.A. § 5204(a) is sufficiently inclusive to cover the types of offenses where treatment as a youthful offender requires greater scrutiny, or where there are more substantial public safety considerations.

Appendix A sets forth recommended revisions to the present "Big 12" to add attempts of such crimes, as well as some other serious violent felonies (e.g. aggravated sexual assault, human trafficking, etc.). The proposal also differentiates some offenses from traditional juvenile jurisdiction and youthful offender jurisdiction by capturing listed felony offenses punishable by more than 5 years of incarceration – giving rise to a "Big 12 Plus" for youthful offender purposes.

2. Heightened Scrutiny for "Big 12 Plus" or all Listed Offenses

Two primary options exist for further addressing public safety concerns with respect to the youthful offender determination process:

- Requiring the public safety determination portion of the determination hearing to be held in Criminal Division for listed offenses; and/or

- Requiring a clear and convincing evidentiary standard in listed offenses with respect to whether public safety may be assured, where cases are not directly filed in Family Division by the prosecutor, or where transfer to Family Division is opposed by the prosecutor.

Listed offenses often carry collateral consequences that serve to protect the public – with certain violent offenses and all felony offenses resulting in the disqualification to purchase or possess firearms, and sexual offender registry in sexual offenses. These collateral consequences are not presently required to be considered by a court in determining eligibility for treatment as a youthful offender. Appendix B sets forth recommended revisions to effectuate such changes.

3. Considering an Admission as part of Amenability to Treatment

Presently, the standard for "amenability to treatment" is ill defined and is not required to take into account whether a youth intends to enter an admission or demand a merits hearing in a proceeding. Most, if not all, domestic violence accountability programs, sex offender treatment programs, and restorative justice programs require some form of an admission as to wrongdoing or causing harm. Presently, reports often reflect "

Fundamentally, if acceptance of responsibility, measured through an admission or agreed resolution to some offense, is not an outright predicate to treatment as a youthful offender, such acceptance or denial should be part of the court's decision-making process. Any provisional admission should be offered the protections of V.R.Cr.P. 11 and V.R.E. 410, in that both limit or preclude the use statements or admissions made in furtherance of negotiating or resolving a case.

Further, the term "all required programing" should be replaced with the term "rehabilitation" in 33 V.S.A. § 5284(b)(2)(C).

Conclusion

I encourage the House Judiciary Committee to explore ways in which the proposal in S.133 may be further refined to add transparency to the public safety considerations and determination process in youthful offender proceedings. Ultimately, my hope is that increased scrutiny by the court, and discretion by prosecutors where appropriate, can ensure enduring confidence in the youthful offender system and provide a stable/predictable structure in which to adjudicate these cases for the long term.

Appendix A – Proposed Revision of "Big 12" Offenses & "Big 12 Plus":

33 V.S.A. § 5204(a) is amended as follows: "…and if the delinquent act set forth in the petition was any of the following, or attempts thereof:

(1) arson causing death as defined in 13 V.S.A. § 501;

(2) assault and robbery with a dangerous weapon as defined in 13 V.S.A. § 608(b);

(3) assault and robbery causing bodily injury as defined in 13 V.S.A. § 608(c);

(4) aggravated assault or aggravated domestic assault as defined in 13 V.S.A. § 1024 or § 1043;

(5) murder or aggravated murder as defined in 13 V.S.A. § 2301 or § 2311;

(6) manslaughter as defined in 13 V.S.A. § 2304;

(7) kidnapping as defined in 13 V.S.A. § 2405;

(8) unlawful restraint as defined in 13 V.S.A. § 2406 or 2407;

(9) maiming as defined in 13 V.S.A. § 2701;

(10) sexual assault as defined in 13 V.S.A. § 3252(a)~~(1)~~ or (b)~~(a)(2)~~;

(11) aggravated sexual assault or aggravated sexual assault of a child as defined in 13 V.S.A. § 3253 or § 3253a; or

(12) burglary into an occupied dwelling as defined in 13 V.S.A. § 1201(c)~~.~~; and

(13) for purposes of § 5281 of this Title, other listed offenses set forth in 13 V.S.A. § 5301(7) punishable by more than 5 years of incarceration."

The addition of subparagraph 13 would presently include the following additional offenses, not otherwise added above:

- Sexual assault as defined in 13 V.S.A. § 3252(c);

- Sexual assault – parental or guardian role as defined in 13 V.S.A. § 3252(d) and (e);

- Lewd or lascivious conduct with a child as defined in 13 V.S.A. § 2602;

- Operating vehicle under the influence of alcohol or other substance with either death or serious bodily injury resulting as defined in 23 V.S.A. § 1210(f) and (g);

- Careless or negligent operation resulting in serious bodily injury or death as defined in 23 V.S.A. § 1091(b);

- Leaving the scene of an accident with death as defined in 23 V.S.A. § 1128(c);

- Severe abuse of vulnerable adult cases as defined in 13 V.S.A. § 1376 et. Seq.;

- Human trafficking in violation of 13 V.S.A. § 2652; and

- Aggravated human trafficking in violation 13 V.S.A. § 2653.

Appendix B – Modification of Public Safety Procedures

33 V.S.A. § 5283 is amended as follows:

(d) Burden of Proof. The burden of proof shall be on the moving party to prove by a preponderance of the evidence that a ~~child~~ juvenile or youth should be granted youthful offender status, except for offenses listed under subsection 5284 (a) of this title [*alternatively, except for offenses listed under subsection 5301(7) of Title 13*] where the burden of proof shall be by clear and convincing evidence. If the court makes the motion, the burden shall be on the youth.

33 V.S.A. § 5284 is amended as follows:

(a) In a hearing on a motion for youthful offender status, the court shall first consider whether public safety will be protected by treating the youth as a youthful offender. For offenses listed under subsection 5284 (a) of this title [*alternatively, except for offenses listed under subsection 5301(7) of Title 13*], upon request of the prosecuting attorney, the public safety portion of the hearing shall be held in the Criminal Division. If the court finds that public safety will not be protected by treating the youth as a youthful offender, the court shall deny the motion and transfer the case to the Criminal Division of the Superior Court pursuant to subsection 5281(d) of this title. If the court finds that public safety will be protected by treating the youth as a youthful offender, the court shall proceed to make a determination under subsection (b) of this section.

(b)(1) The court shall deny the motion if the court finds that:

(A) the youth is not amenable to treatment or rehabilitation as a youthful offender. In making such determination for offenses listed under subsection 5284 (a) of this title [*alternatively, for offenses listed under subsection 5301(7) of Title 13*],the court shall consider whether the youth will make admissions sufficient to enable completion of recommended programing; or

(B) there are insufficient services in the juvenile court system and the Department for Children and Families and the Department of Corrections to meet the youth's treatment and rehabilitation needs.

(2) The court shall grant the motion if the court finds that:

(A) the youth is amenable to treatment or rehabilitation as a youthful offender, and in making such determination for offenses listed under subsection 5284 (a) of this title [*alternatively, for offenses listed under subsection 5301(7) of Title 13*], the court shall consider whether the youth will make admissions sufficient to enable completion of recommended programing; and

(B) there are sufficient services in the juvenile court system and the Department for Children and Families and the Department of Corrections to meet the youth's treatment and rehabilitation needs.