

Minutes

Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel

6 – 8 PM. Tuesday 30 April 2019

Aldrich Public Library, 6 Washington Street, Barre VT

Welcome – Introductions

Present: James Pepper, Ken Schatz, Rebecca Turner, Jessica Brown, David Scherr, Judge Brian Grearson, Geoffrey Jones, Chief Don Stevens, Monica Weeber, Garry Scott, Chair Etan Nasreddin-Longo.

Announcements

Minutes – Changes, addenda, and approval for the 26 February and 12 March meetings

2/26 minutes: Grearson, move to adopt, Scott Second, minutes accepted.

3/12 Minutes: Grearson, move to adopt, Scott second, minutes accepted.

Brief Discussion of *H 460: An act relating to sealing and expungement of criminal history records*. James Pepper gives an overview of bill. It is the product of cooperative effort between stakeholders. The bill will add to the list of expungement-eligible crimes felony drug possessions and other crimes related to substance use disorder. It eliminates fees to apply for expungements.

Discussion follows regarding processes for expungement, eligibility criteria (not in bill but found at 13 V.S.A. 7603), and the potential for petitionless expungements.

Pepper: application for expungements is not necessarily intuitive or easy, one needs some savvy to file a petition.

Etan: This speaks to the need for know-your-rights trainings, as previously noted by Rebecca, because these are complex processes—not easy to access the court.

Grearson: there are a lot pieces that have to be done in terms of the expungement process. As a new court management system gets put in place it will be easier to do more with expungements, including, potentially, petitionless expungements.

David: Vermont Legal Aid is a good resource for this: they provide an example of people who are providing a know-your-rights training, along with online resources. The main page can be found here: <https://vtlawhelp.org/expungement>.

Chief Stevens: What about expunging diversion cases?

David: yes, that happens now, and there is a lot of activity in this area. There is now a presumption that expungement-eligible cases will be referred to diversion, so we are making a

concerted effort to move cases out of the normal criminal justice track. Plus, the Tamarack Program is a new program for individuals with higher needs who require treatment-oriented services. If they successfully complete the program their cases will also be dismissed, as in regular diversion. These changes have been made only recently, since the current AG took office.

Geoffrey: hearing about cases of officers using small-time violations to get people in trouble for cannabis offenses. Essentially pretextual stops are being used.

Systemic Discussion:

Rebecca: I want to bring us back to Shela's point about how the underlying issue is white supremacy in the criminal justice system, and how do our proposals get at this issue?

Our problem is twofold: First, law enforcement at the outset has unbridled discretion, and implicit biases combined with this discretion leads to racial disparities in terms of who is entering the criminal justice system. Second: we apply a race-neutral set of standards once people are in the system. This prevents us from repairing the initial bias problems because we cannot address what is really happening if legal processes often obligate us to ignore race—despite the reality that race was a factor at the outset.

The Vermont Supreme Court case *Zullo v. State* does give Vermont defendants an avenue to repairing the bias through civil litigation. But we need to do more on this, perhaps proposals around more specifically recognizing the impact. What can we do to recognize the moments of discretion and how to repair disparate impact?

Chief Stevens: Is it enough to simply say that we need to repair it, or do we need to provide very specific examples and avenues toward solution?

Rebecca: there are experts who can talk about these issues and identify areas for changes and specific practices.

Chief Stevens: we need to find specific data and get at what's really happening. I do hear law enforcement saying things that are not especially sensitive to issues of bias.

Rebecca: we need to provide a remedy. A remedy that can be accessed during the criminal proceeding at issue—as opposed to a remedy that could only be brought in a later civil case (as in *Zullo*). Something similar to 1 V.S.A. 338 that provides a limitation on the use of confessions taken from someone who is deaf or hard of hearing: the state has to show there was sufficient understanding on the part of the ostensible confessor. Perhaps something similar where race may be concerned.

Grearson: discretion is unbridled by its nature. We know police/prosecutors have it. But what is to be done about it at the moment of discretion?

Rebecca: What about an example like when an officer identifies consciousness of guilt as supporting reasonable suspicion, when in fact the behaviors may be due to nervousness and the

factors are highly subjective? There are many facts an officer could cite that are really about racial animus.

Grearson: but how to provide a remedy at the moment, as it's happening?

Rebecca: I'm not suggesting a new procedural avenue, this would be a remedy that would happen during the court process—like a suppression hearing, for example.

Geoffrey: one aspect of discretion that could be an issue: an officer is allowed to lie to you during an investigation. But even when the suspect knows the officer is lying it is a crime to lie to the officer. That is one area where discretion is potentially problematic—an uneven playing field. It encourages behavior that in turn might encourage some disparate treatment.

Scott: cases where the officer is found to have lied get dumped quickly. James: Yes that's right, prosecutors have an obligation to disclose that type of information.

David: I think what Geoffrey is getting at here is more about the allowable investigative technique of deception.

Geoffrey: Yes, that seems like a real problem. Untruths garner untruths.

Etan: Let's turn now to an overview of H518. What the history of the bill is. What the policy is, what is going on with the bill.

David gives overview of bill and disagreement with VSP: The bill is a follow-up to Act 54 of 2017 that mandated a model fair and impartial policing policy that had to be adopted with essentially the same components by every police agency. H518 proposes to allow individual agencies to be more protective of certain information related to undocumented individuals, but not less protective. This is to further protect our undocumented communities. The VSP has concerns about uniform expectations of police behavior, as well as losing access to federal dollars. The AGO doesn't share those same concerns.

A brief discussion ensues regarding reporting of the police statistics, who keeps them, and the need for easy access and consistency. Crime Research Group is the present repository for much of this data.

Chief Stevens: shouldn't this cultural competency and implicit bias training required by law (and referenced in H518) be applied to people other than law enforcement? Does this apply only to law enforcement?

Jessica: it is not a requirement of any type of training for public defenders. We do have CLE obligations but the topics are not mandated. Perhaps this should be a requirement.

Notes that UVM Professor Stephanie Seguino gave testimony regarding a case and stated that implicit bias should be called out as close in time to the occurrence as possible

Ken: DCF staff notes that training has limited utility, but coaching has a lot of value—the contemporaneous approach is the best way. Both identify the issues and support people. Of course, coaching is time-consuming and resource-intensive.

James: are you suggesting implicit bias or cultural competence or both?

Chief Stevens: Everything. I'm suggesting that we put it on the radar for the other systems more generally, not just the police.

Monica: we do a lot of training around culture but on different topics: women's pathway to violence, LGBTQ training, etc. where do we take the work around cultural competency

David: it is the case now that implicit bias training requirements of the law only apply to police, not to other government entities. This could be an important recommendation that would change the law and requirements.

Discussion of bullet points leading to Panel's final report. The plan is to hear from those members who were unable to attend the 12 March meeting.

Etan: Let's now give Monica, Ken, and Grearson, a chance to weigh in on the bullet points to complete last month's discussion.

Ken: my world has similarities and differences from the regular CJ system. The issues with youths are accused of delinquent acts are basically the same. Interactions with LEOs and societal issues are very similar. Woodside is a clear example of this: disconcerting to walk into Woodside and see the high rates of people of color. A recent change: the only person who can put someone in Woodside is now the judge. And the judge can only do it if DCF recommends Woodside. But the law gives DCF commissioner discretion to remove youth from Woodside even after such a placement. Minority confinement is a big problem around the country, we are developing tools to address the issue here as well.

We are also working on developing approaches that will help avoid detention. Need to do more work still. The biggest issue is really a detention issue.

The disposition phase in delinquency cases is similar to sentencing. We are seeing a reduction of the youths who are in state custody due to delinquency hearings which is a positive step.

Monica: one thing to keep in mind: the various categories of incarceration, including probation and parole, are all under the auspices of DOC—different than other states.

One of the topics of discussion are legal statuses of people who are under the custody of DOC. Parole and furlough system could be the cause of some disparity—and are more directly attributable to the actions of DOC staff. Other categories (like who is initially incarcerated) is not up to DOC.

If we really care about data collection, we have to recommend that adequate resources, people, are in place to actually collect the data. Otherwise it cannot be done.

Some things that are in place that are in line with the report: DOC does already use graduated sanction system, does have resources in place for treatment.

More training is important—we agree that more training is important. Will likely require resources.

We also need to look at staff recruitment. We need to do a better job of diverse recruitment. Our current focus is on female recruitment but we need to do more in that area.

Greerson: the biggest areas of the exercise of discretion are at the beginning of the process (charges, arraignment, bail)—and the end of the process (sentencing). The impact of out-of-state criminal records can make a big impact. Detainee population remains fairly constant—350-400 everyday. Hard to move this population. Very low number of misdemeanors that are being held pretrial. Sometimes they are being held on bail in order to get sentencing credit for the time they are serving because they would be held anyway on a furlough violation for a prior offense—and the time wouldn't necessarily count toward the new offense without bail in place.

When we talk about data we need to keep in mind source of data. Court data about characteristics are often coming from police, not separately gathered by court system.

Once we get to the end of a case there is almost always a plea (95% or so) and judges often accept them so even the sentencing phase is not highly controlled by a judge.

Out of state convictions can have a big effect on sentencing decisions and those convictions could be reflecting racist policies like stop and frisk.

Jessica notes that Del Pozo did a bail study in Chittenden County that appears to show racial disparities.

Brief Discussion of steps forward: Etan will draft and distribute for comment. We will skip the May meeting to allow time for this process, then meet again in June.

Public Commentary – None.

New Business—None.

Next Meeting – 4 June 2019.

Adjournment