



Testimony

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HB 520

by

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I am Malcolm C. Young. I am an attorney and the Executive Director of The Sentencing Project, a Washington-based organization that has long been critical of our nation's unprecedented reliance on incarceration to achieve desired social objectives. The Sentencing Project is well known for research and reports analyzing the impact of incarceration and punitive sentencing policies for describing the racial and class disparity that occurs in the administration of these policies, and for promoting fairer, more effective, constructive and humane ways of reducing crime within and without the criminal justice system. We have also studied and recommended changes in court procedures and policies which help assure that the outcomes of cases -- that sentencing-- serve the interests of the defendant, the victim, and the community whenever and to the extent possible.

In 1998, in response to the dramatic increase in the number of children prosecuted in adult court, we undertook an initiative that focused on the unique problems of this defendant population. We were assisted by an Advisory Committee of experienced practitioners, including David Addison of the Maryland Public Defender office. We produced a set of recommendations for defender programs that represent juveniles charged in adult court, which was published and disseminated by the Department of Justice. And, we continued to observe and comment on the practice of prosecuting juvenile-aged children in adult court. I have this experience to offer as you consider H. B. 520 and the manner in which Maryland allows children to be prosecuted in adult criminal court.

A number of my colleagues in the juvenile justice community who are here today can well provide this committee a deep understanding of the research and of what information that is known about children in the juvenile and criminal justice system. We share many of the same views on issues such as the hazards adult corrections pose for children, about racial disparity that

shows up in the aggregate of decisions that send children to adult court, and about the developmental differences that distinguish children of different ages and leaves children ill-equipped to defend themselves in adult court.

Certainly this Committee does not need a reiteration of this information.

I also have another kind of experience that I offer the Committee.

About the time we undertook our initiative on juveniles in adult court, I was invited to join in the trial defense of a girl who was 13 at the time she was involved with an older male in a brutal homicide in Milwaukee, Wisconsin. I had not tried a case in nearly 20 years, but I agreed to do so after two meetings with the girl, which seemed to go well. Her name was Latasha Armstead.

Other cases followed. The case of a boy and his friend who simultaneously shot each other while playing a game together with the friend's father's guns. The boy took a bullet through his spinal cord just below his neck. During the first six hours of the paralysis which will be with him the rest of his life, he lay helplessly in blood on a bed next to his dying friend until the father came home and in horror called 911. The case of a boy called "J. P." in Missouri, who shot his favorite uncle in the back of the head with a 22-caliber rifle while the two of them were alone in the uncle's four-room frame house. "J.P." told so many different stories to the police that they charged him with murder. The sentencing of Nathaniel Brazill, who shot his favorite teacher in the front of his head and in front of a classroom of middle school students in West Palm Beach, Florida. And the case of a 15-year-old girl who allegedly hired a hit man to kill her boyfriend. After the hit man shot the boyfriend's brother from a car the girl was driving, she was charged with attempted murder. The case of a boy who in western Maryland stumbled stupidly into what ended up being charged as a car-jacking. Most recently, I played a small part in the

defense of one of the juveniles charged in the notorious beating death of a Milwaukee, Wisconsin man on a neighborhood porch one night last fall.

On all but one of these cases I served as second chair to Attorney Robin Shellow of Milwaukee, Wisconsin, an experienced and insightful lawyer-advocate for children charged with serious crimes. She handled most of these cases pro bono, covering costs; much of my time was pro bono as well and not part of my work at The Sentencing Project. I am deeply honored that her work and mine in four of these cases was recognized with the joint award to us of the 2001 Juvenile Defender Leadership Award.

Other attorneys have had more experience, but where I have been fortunate is in being given time to reflect upon what happened and what I saw in each of these cases. Thus, perhaps what I can offer this committee is the word of a person who has witnessed what it means for a child to be prosecuted in adult criminal court.

As a witness, I have drawn two conclusions about children in adult criminal court.

First, adult criminal court is no place for a child. What works for adults does not work for children. The child who finds himself or herself in adult court is penalized in comparison to the adult who has done something that is far worse. The irony is that transfer laws that put children into adult court were meant to punish them more severely than their peers who were left in juvenile court. Instead, children in adult court are penalized more severely than are adults in adult criminal court.

Second, putting children in adult criminal court obscures or suppresses information that could be useful in preventing similar crimes or healing a community. In the interest of future safety, we should see that this information comes out, and the way to do that is to retain more of these cases in juvenile court jurisdiction

The adult criminal court is no place for a child

At age 15, Latasha Armstead testified in her defense at trial. I was the examining attorney. Question by question I took her through the events of the day of the murder of her grandmother's care nurse. I heard her speak clearly, with some force, and without much confusion. She sounded animated, she was on the stand for more than two hours, she did not collapse, she provided detail and sequence. She admitted to certain acts and denied others.

I was elated. It had taken many hours to prepare and I went home at the end of the day feeling it had been well worth it.

The next day's newspaper was a cold splash in the face. The reporter described Latasha speaking in a "flat monotone," and that she "showed no emotion as she recounted [the victim's] slaying. The report bode ill for the jury.

What the reporter or the jury didn't know was that Latasha spoke longer and in more detail, and with greater emphasis in court than she had ever spoken at any time about the homicide. Sometimes, in the juvenile lock-up, she would refuse to speak at all. Or, she would change the subject or put her head on the table. For many days she was as flat in affect as could be. Yet when the nice young lay pastor from a local church walked into the room, she became animated, open, laughing. Not so with us. I would talk with her for hours, plying out questions, and then come back, just to hear her tell her story once.

Because I had seen how she could close down, for me, her direct testimony in court was a major success. Latasha had come so far, tried so hard, and she did indeed feel pain. We felt it next to her at the counsel table. For the jury, though, she didn't work well. Shellow, the attorney experienced with children, told me this happens all the time.

Cross examination was another nightmare. Mark Williams, a seasoned prosecutor, didn't raise his voice or shout or yell. He was simply "nice" and "gentle" with Latasha. She wanted to please him, and wanted to believe that a man who was nice would not hurt her. But he led her into simply denying any memory of giving statements to the police. As a result, she could not explain to the jury as she had many times to us that the police had led her into saying that she had "planned" the crime with her boyfriend and that she "knew" there would be a crime of some sort. We believed that these were their words, not hears. Our belief was of little use. The prosecution would use those words in evidence in the police reports to make their case that this 13 year-old girl had the degree of intent required to convict her of murder.

And the fact was, the prosecutor had police reports with Latasha's statements plastered all over them. Children love to talk to police. They feel protected. After all, kids are told that if they get lost, the only person to talk to is a police officer, that a police officer will help them. But after they have answered questions, and the police have written down what they say, children quickly forget what they said. If the police talk to them a second time, there will be a second, different story. The police write that story down as well. Now with multiple statements in the police reports, there are "impeaching" statements that prosecutors will use to "prove" that the child was lying.

From "J. P." who shot his uncle, the police obtained at least seven different accounts of what he said happened in the small house. The boy had trouble telling the truth, but no hesitation in talking to the police. Did the changing stories mean that he was guilty and concealing the truth about how he came to shoot his uncle? We didn't think so because this boy, like so many others his age, couldn't seem to tell the same story about anything, whether it was important to him or not. He would deny taking a Coke out of the refrigerator if the evidence was right there in

front of him and his inquisitor. Ordinarily, this is a trait that one can grow out of in a criminal trial it usually means the defendant is disabled from testifying, or will be damaged terribly if he or she does.

In part of her testimony Latasha was to use a diagram representing the face and neck of the woman who was killed to demonstrate her actions. In hours of preparation, we were not able to get her to use this graphic aid for the jury. She lacked the adult experience in interpreting abstract or representative drawings. The judge denied our use of the diagrams, so we were spared the possibility that Latasha would simply freeze up when presented with them.

When adults testify, the witness stand is a fairly powerful revelation of character. When children testify, the witness stand is a place where truth is concealed or distorted. Nathaniel Brazill testified in his own defense at his trial; a month later when we arrived in West Palm Beach people who saw him on television were still talking about how cold and calculating he appeared. We heard time and again: "The boy has no feelings!"

A week after we started working with Nathaniel, the reason for his cool appearance became quite clear. The boy suffered some kind of learning or communication disability (which was actually diagnosed for the first time in the jail). To compensate, it seems that he had learned to politely ask to have a question repeated while he "processed" what was asked of him the first time. His reply would be deliberate, slow. Teachers loved his demeanor. To them he seemed to be a learner, and respectful. Actually he was having a hard time grasping what was going on around him. In any case, the pattern of behavior that favorably impressed teachers looked absolutely terrible in a child who is on the witness stand.

The rules of evidence and taking testimony work against a child in adult court. At a trial, a lawyer usually cannot "lead" a witness he or she calls. You can't suggest the answer to the

witness with the question. For adults this is fair. For children, testifying without a bit of direction is difficult. Interestingly, most states carve out exceptions for the child victims of sexual offenses; they are allowed to be led and for that matter to use anatomical dolls or other visual aids to help them testify. Latasha was not allowed the use of a simple visual aid to help explain what happened during a violent, painful crime.

On the other hand, the opposing side can cross examine the witness with leading questions, those that do suggest answers or challenge the previous answer given by the witness. Children, as I observed, want to please and will follow the lead of a gentle cross-examiner all the way to the moon. It might be that children, even bright ones, lack the instinctive senses that guide some of the impaired older persons who are in the criminal court system. It may not be that children lack the ability to "understand" as much as they lack the sense of self-preservation or the alarms that go off in a person who is older when he or she is asked questions that clearly will "get them into trouble." My observation is that children lack the ability to preserve consistency in the story they tell. That is why, when a child is caught alone in the kitchen with the top off the empty cookie jar, the story goes quickly from "What cookie jar?" to "My sister ate them" to "I only had one." With each question the child looks to see if the new story worked. If not, then it is on to another. In a kitchen this is funny; in the trial of a serious crime, it is not.

Sitting next to a child on trial in an adult courtroom provides a score of reminders that, regardless of what the child was involved in, he or she is still just a child. Defendants are supposed to elect whether they want a jury or a judge trial, a serious decision that requires weighing many factors. A child will decide on the basis of the fiction that "the judge likes me," or doesn't, as the case may be.

A child will be more interested in whether a former boyfriend will say, if called to testify, that he still loves her, than if the boyfriend will claim he heard her threaten to kill him.

Although defendants are supposed to assist and advise their lawyers in the selection of a jury, a child will decide on the basis of the color of a dress or because a juror looks like Uncle Fred.

And in Latasha's case, the most important question in her mind was whether her mother had come to court. "No," her attorneys had to say, "the mother who abandoned you for the streets and never visited you in detention isn't going to be here, and now please listen to the police officer's testimony so you can help us ask questions." But the child isn't listening. She continues to mourn after her missing mother as the trial swirls on around her.

In adult court, the important questions are not asked or answered, and the lessons about how to reduce juvenile crime are lost

Nathaniel Brazill's trial was a year in preparation. The prosecutor interviewed all the students and staff at the school who saw anything. There were forensic tests and reviews of police reports. The trial itself took several weeks. All this was done to prove that a boy who was recorded on a school security video tape and standing in sight of more than 25 students when he pulled a gun that he later confessed to bringing to school, shot his teacher.

And yet at the end of the trial, no one could answer the question, "Why had he done it." Attorney Shellow and I tried to find the answer.

A middle school teacher provided the most convincing explanation and she testified in court at sentencing. When she did, I saw teachers from Nathaniel's school nodding their heads in recognition of the terrible way a child's confusion can turn to seemingly inexplicable violence.

We didn't really have enough time to reach a final conclusion, so we described the 'clues" we did find in our sentencing report to the court.

There was nothing unique about the fact that Nathaniel went through an adult court trial that produced no answer to the question that was most on the minds of school officials, the family of the man who was killed, and people concerned with violence among our youth. The criminal trial is not set up to reveal this kind of information. In fact the opposite is true.

Criminal law and court trials are rooted in the hypothesis that one can be presumed to be responsible for the logical consequences of his or her actions. The laws of accountability, the instructions given a jury that is to decide the level of intent or state of mind of the defendant, are all based on this premise. This hypothesis works, more or less, for adults. The task for the prosecutor at trial is to show where the defendant was and what the defendant did leading up to the crime. The task for the defense is to either show that the defendant wasn't there or didn't do it, or that what he did was different, from what the prosecutor attempts to show.

For adults, this is often enough.

But children cannot be said to understand as well the consequences of their acts. That is why we have signs that warn drivers against "children playing." A child will dart into the street; an adult is expected not to do so.

When children do dramatic or surprising things, we know we have to plumb their background and experience to understand why. We thought that Latasha Armstead's background, which included being raped multiple times at a very young age, being abandoned by her mother, and then taking care of an elderly and bed-ridden grandmother, might have had something to do with her attachment to the older boy who actually took the life of the victim and Latasha's ability to make a decision about what she should have done. Under the trial judge's application of rules

of evidence, very little of that background information came before the jury. The trial focused on the immediate actions, not the background of the girl.

In Nathaniel Brazill's case, the prosecution seems to have built its case around the presumption that a person who goes into a school, points a gun at someone and pulls the trigger intends to kill that person. This is logical for an adult. The trial defense attempted to counter this with an image of Nathaniel Brazil as a model student from a good family home. The jury convicted Nathaniel of a lesser included offense to First Degree Murder, so the defense strategy was partly successful.

However, the trial defense unintentionally obscured the fact that Nathaniel Brazill's academic performance was dropping dramatically, and that he came from a home where he had witnessed violence and domestic discord, lived in fear of his mother's death from cancer, and where alcohol was a family weakness. All these things were contrary to the image of the defendant that the attorneys were trying to project, so they avoided them.

Similarly, the girl who was charged with hiring a hit man to kill her boyfriend went to trial portrayed as a "good" girl who got in with the wrong crowd. The opposite was true: she had been involved in sex and drugs without her parents knowledge for several years, was highly dependent, capable of a high degree of fantasy and drama which she could put in motion without any apparent sense of what might transpire as a result. Typically she was more interested in preserving her parents' image of her as "good" than in raising a strong defense to a serious criminal charge.

Should anyone care that criminal trials seem to be such poor vehicles for revealing the backgrounds and histories that might help explain serious, violent acts by juveniles? In my opinion, our best hope for curbing violence and serious crime, and probably a lot of the less

serious crime among children, lies in learning more about why children do bad things in the first place. I suppose, if another person believes that tough adult sentences to decades in prison will do more to reduce crime, the nuances of a criminal court trial are of little interest, and it matters not if we continue to bury or conceal the information that explains what goes on in the lives of children involved in serious crime.

But one can have doubts about the utility of tough adult sentences alone.

As I mentioned, I'm involved in the periphery of the defense of a child who got caught up in that terrible group beating murder in Milwaukee last fall. He's only 15. When I was on trial and then facing sentencing with Latasha, he was 10. Not surprisingly, the life sentence imposed on Latasha failed to make an impression. Some might surmise that the fact that he was abandoned by his parents, that he was placed in a foster care home that proved to be violent and abusive so that he had to be removed from it, and that he has very little to do on any given evening has some relevance to the fact that he came to be with the group that beat an older man to death. If he is put to trial, the evidence will focus on his whereabouts and what he did the night of the murder. The court will severely limit any evidence about his background. If convicted, he will face 30 years, we won't have more answers about what led to the violence in which he participated, and other children will repeat the cycle again. We can do better than that, and with House Bill 520, this legislature has the chance to do so.

What should be done?

In my opinion, House Bill 520 goes very much in the right direction. There are cases in which the child defendant should be tried in adult criminal court. A judge should make that decision, however, not a prosecutor. Unless there is a judicial determination, children's cases

should stay in juvenile court. It is the right place for a child to be. It is the court that is better suited to answer the questions we really need to know if we are to reduce or prevent serious juvenile crime.

Where there is a concern that the maximum length of supervision for a juvenile is too short in juvenile court jurisdiction, then the answer might be to consider some form of "blended" sentencing, or to otherwise allow extended jurisdiction in some serious cases.

And, because we need more information about why serious juvenile crimes occur, it is appropriate to open up juvenile proceedings to public scrutiny. It would not make sense to argue that juveniles should not be tried in adult court because the information we need fails to come out there, and then not permit public access to juvenile court, which is better equipped to develop information about why kids act as they do.

Thank you for the opportunity to appear today.