

Interim Judiciary Presentation
September 13th, 2019
Kentucky Association of Criminal Defense Lawyers
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1. In a Democracy what matters most? Liberty or Safety?

There are those who address you who say what matters most in the criminal justice system is public safety. Others would speak of the *three legged* stool of prevention, punishment and rehabilitation. In a democracy we recognize the need to balance concerns for public safety and social control against fundamental liberty and privacy interests. Thus, for example, the debate at the state and national level about whether we can limit the fundamental rights recognized in the Second Amendment in the interest of public safety.

2. Protecting the fundamental right of the Presumption of Innocence

A) The Opportunity for Pretrial Release must exist in a society which desires to protect the individual in the face of accusations brought by the **power** of the state.

C) Recent reports from the Administrative Office of the Courts, the Bureau of Justice Statistics, the Herald Leader and the Kentucky Center for Economic Policy have set forth for you the problems with our pretrial release system. Too many of our people charged with crime are not getting out on pretrial release, spend months and years in our jails awaiting trial and they are prejudiced by a system where justice is delivered in an arbitrary fashion. It is really justice by geography and what is wrong with such a system is that Section 2 of the KY Constitution and the 14th Amendment of the U.S. Constitution do not tolerate the level of arbitrariness or disparate justice we currently have across the Commonwealth in the area of pretrial release. People are needlessly suffering in jail, whether innocent or guilty. Studies show that those we incarcerate pretrial are more likely to be found guilty because they are locked up, more likely to spend a longer

time in jail and will suffer more collateral consequences (such as the loss of jobs, loss of family, loss of their homes, loss of disability benefits including medicine that they need to survive) with no one to help them pick up the pieces when they are finally released.

D) Reaching consensus on how to improve the system can be difficult. We urge three reforms. Improve Pretrial Release by doing the following:

1. Place limits on the abuses of using a cash bond system to keep people who can safely be released, incarcerated instead;

2. Respect the heightened power of the prosecution function by imposing a **constitutionally required clear and convincing evidence** standard of proof for continued pretrial incarceration so that we can protect the fundamental right of the presumption of innocence while allowing everyone to be heard who has an interest in the question of release;

and

3. Ensure the right to a fast and speedy trial for those the system chooses to incarcerate pretrial.

B) Incarcerated People cannot be deemed guilty of crimes for which they were not convicted because that also violates the Presumption of Innocence:

1. Provide more direction to the Justice Cabinet, Probation and Parole, Department of Corrections, Department of Juvenile Justice and Parole Board so that Presentence Investigation Reports no longer **inaccurately** describe crimes and parole board members no longer **retry persons** who have already been convicted. Consider that the Board had a negative effective release rate in May, meaning they revoked more people than they released on parole. And a 38% rate of release for parole. The Bureau of Justice Statistics Report examining Kentucky tells us that only 58 % of the 21,239 new prison admissions in 2017 were because of a new conviction in court. The rest were due to probation or parole violations. The Chart reveals that offenders at a higher risk level

are in many cases being paroled more frequently than lower risk offenders with the same level of offense. Stranger still, high risk inmates at the highest level of offense are being paroled at three times the rate as those at lower level of offense, and at about the same rate as similar inmates in the lowest two tiers of risk. The Presentence Investigation Reports prepared by Probation and Parole and the Department of Juvenile Justice describes the crimes committed from the point of view of the original charges, not the convictions entered into. When people are not found guilty of the charges originally brought by the police, they must be presumed innocent of what they were NOT convicted of and only guilty of what they were convicted of.

3. District Courts Need Resources to Supervise Those on Probation: Increase district court judges' ability to supervise people on probation by increasing resources to our district courts. This will make misdemeanor offenses more effective and reduce the need of the courts to rely upon rocket dockets to catapult cases into circuit court and then enter pleas on felonies whether diverted or not. Such swift rocket docket action leads to people pleading guilty to offenses they did not commit so that they can resolve their cases with hope of release. It does not build a justice system, it builds a wrecked train of injustice. Consider Examples:

A) Spokane County (Washington) District Court Probation Office:

In partnership with government, law enforcement, and local community agencies, the District Court Probation department promotes community safety through the use of evidence-based practices and appropriate interventions while working with offenders to encourage changes in social behavior and to reduce recidivism.

B) Pinellas County Sheriff's Department:

The Misdemeanor Probation Unit monitors and enforces compliance to court ordered conditions on offenders sentenced to probation for misdemeanor offenses. In addition to post-sentencing case management, the unit provides referrals to relative community resources which promotes higher success rates. This unit also administers:

- Collection of court-related fees for probation
- Community service requirements
- Human trafficking education

- Pre-Trial Intervention (PTI) Program for first time offenders accepted for participation by the State Attorney's Office
- Substance abuse and mental health evaluations
- Urine drug observed screening collection and on-site analysis
- Vehicle immobilizations
- Victim impact panel classes

4. Data from AOC and the Justice cabinet tells us that the majority of the jail and prison population are people charged/convicted of class D felonies. **YOU HAVE OPTIONS THAT WILL PROTECT PUBLIC SAFETY** to remedy this problem:

A) Create the Gross Misdemeanor level of offense that would permit jails to still be reimbursed for cost and thereby change the classifications of possession and theft/receiving stolen property to this new misdemeanor level. It is about the money and funding. We know that the Retailers' Lobby opposes such a change, but what if we beefed up enforcement while reducing the level of the offense so we could handle these cases more expediently and stop the thefts while punishing the offenders with sentences that can be imposed and supervised at the local level? We need to be honest that this would have the greatest impact on the jail overcrowding recorded first by the author of our current KY Penal Code, Robert Lawson and even more recently by journalist John Cheeves and now by our Federal Bureau of Justice. Raising the felony threshold does not mean that we support shoplifters. How many of us would ever want a misdemeanor conviction or to spend nights in jail or under probationary supervision?

B) Get rid of flagrant non-support as a felony and rewrite the current offense of misdemeanor non-support as a civil matter. Consider John's case. He had been a Sophomore at Lafayette High School. Consensually intimate with a nineteen year old adult female. She got pregnant. Because she needed state support for the baby, even though he was a minor, he was transferred to adult court and prosecuted for felony flagrant nonsupport. Five years later, married to another woman, supporting her two children and his one child, who had been born when John was himself, a child, he was in possession of an illegal substance and prosecuted for a felony drug offense and PFO 2nd. He was wrong to use an illegal substance but he was also working long hours, under economic strain and trying to be responsible for his family. The pressures placed on him at such a young age and the fact he had nowhere to turn, caused him to try to escape into stress

reducing illegal substances. Could Kentucky consider making failure to provide financial support for his non-custodial child a civil issue and not a crime? Contrary to popular belief, we have a substantial number of people in jail for flagrant non-support as well as contempt from family court cases.

C) Be Honest About the Ever Growing Size of our Imprisoned. Our prison population just under 24,000. Kentucky expects to spend \$628 million on its Department of Corrections in the fiscal year that begins July 1, up 17 percent from four years earlier in a state budget already struggling to pay for pension contributions and Medicaid. John Cheeves quoted from The Daily Independent, https://www.dailyindependent.com/kentucky-inmate-numbers-still-rising/article_60c16ae2-6c2f-11e9-8bbb-af4f0da5b617.html

D) The Bureau of Justice Statistics offered its own insights, including the fact that Kentucky ranked second in the nation (behind Oklahoma) for locking up women, with 133 female inmates per 100,000 female residents.

Kentucky also ranked second (behind Louisiana) in its reliance on local jails to house state inmates, sometimes for years. In 2016, a legislative report concluded that Kentucky state inmates held in local jails are more likely to commit new crimes than state inmates held in prisons after they are released.

Many local jails don't offer the rehabilitation programs that state prisons do, the legislative report observed. And state data shows that in August, more than two dozen Kentucky jails were spilling over at 150 percent of their maximum capacity or greater, with inmates sleeping on floors and jammed into open areas intended for recreation and other purposes. The 48-bed Rockcastle County jail, for example, was holding 109 inmates.

E) Being Locked Up For Long Periods of Time is Much More Harmful than We Often Realize.

5. Recognize as you are asked to create new Penal Code Violations that Criminal Justice and Health Care and Economic Policy are Intertwined.

A) Why are Kentucky’s children so vulnerable to Adverse Childhood Experiences that impact their ability to succeed and lead them into self-medicating with illegal substances such as huffing, drugs and alcohol?

B) What is the relationship between parental incarceration and instability of the family?

C) How does unemployment, lack of job training, and hopelessness about opportunity cause young people to be drawn into the allure of criminal activity with such deceptively easy “wins.”

6. Address the young adult offenders by revising statutes to favor more options in the sentencing of the young adult offender and directing the Executive Branch to revise regulations so that we ensure effective engagement for our young offenders who are most malleable, most open to rehabilitation, most likely to reoffend without proper guidance.

A) Maine’s Criminal Justice Reform for the Young Adult Offender:

Sec. 11. 34-A MRSA §3816 is enacted to read:

§ 3816. Young adult offenders

The commissioner may confine adults sentenced and committed to the custody of the department who have not attained 26 years of age in the Long Creek Youth Development Center as long as the housing facilities for adult offenders are fully separated from the housing facilities for juvenile clients and the commissioner maintains at all times full compliance with mandatory sight and sound separation standards established by federal law. All provisions of this Title that are applicable to prisoners apply to adult offenders confined in the Long Creek Youth Development Center as if they were confined in a correctional facility housing only adults.

Sec. 12. 34-A MRSA §4117 is enacted to read:

§ 4117. Young adult offenders

The commissioner may confine adults sentenced and committed to the custody of the department who have not attained 26 years of age in the Mountain View Youth Development Center as long as the housing facilities for adult offenders are fully separated from the housing facilities for juvenile clients and the commissioner maintains at all times full compliance with mandatory sight and sound separation standards established by federal law. All provisions of this Title that are applicable to prisoners apply to adult offenders confined in the Mountain View Youth Development Center as if they were confined in a correctional facility housing only adults.

B) Her Majesty’s [Great Britain] Prison and Probation Service

What do our friends in Great Britain know?

Young people continue to mature both psychologically and socially up until their mid-twenties. We now know that the parts of the brain responsible for impulse control, regulation and interpreting emotions, continue to develop well into adulthood. In particular, young people continue to develop in their ability to:

- *temper themselves*
- *take into account wider perspectives and think about the future when making decisions*
- *know who they are and what they want to be, as well as their ability to resist peer influence*

Together, these factors are called 'psychosocial maturity'. Psychosocial immaturity is prevalent in young men in custody or under probation supervision. This affects how they engage with and respond to prison regimes, probation licenses and supervision.

Screening for maturity is an important part of making sure that services are available and offered to individuals who need them.

What Great Britain knows works well with young men

- *structured programmes to enhance thinking skills and regulate emotions - these include, cognitive skills and anger management interventions*
- *re-entry schemes that provide extra support and structure for the transition from prison to community*
- *interventions designed to strengthen family bonds*
- *stress management interventions such as relaxation or mindfulness training*
- *education*
- *employment training and help in finding employment*
- *activities that encourage people to take responsibility and build a positive identity. These include taking on peer support roles.*
- *Restorative Justice via victim-offender conferencing (for property-based crimes)*

In addition, we would expect that psychosocial maturity training could help staff develop and apply effective skills to relate, respond to and coach young men.

What they have found doesn't work?

- *military-style detention regimes*
- *more punitive or deterrence-based approaches, especially where the punitive elements do not fit with how we understand rewards and sanctions to work with immature or younger people.*
- *approaches that fail to help people build skills for the future (e.g., that focus purely on gaining insight or on the consequences of offending)*
- *interventions that reinforce a criminal identity*

7. The Time has come to regulate marijuana, not continue to criminalize it.

A) The National Cancer Institute, run by the federal government, has stated that cannabis kills cancer cells. The medical research and science behind marijuana as a more safe alternative to harsh chemicals is clear. We can significantly improve the lives of Kentucky citizens who battle serious illnesses. Liberty Interests Override Criminalization. Regulation permits for sufficient social controls.

B) An African American is almost 6x more likely to be arrested in Kentucky for Marijuana Possession than a White Person? This is because they are more likely to be stopped on the street, more likely to be searched, and thus more likely to be charged. It is not because they are more likely to be using marijuana. Criminalizing marijuana disproportionately affects Black people in Kentucky. This is an easy fix. Liberty Interests can be protected by reasonable social controls that do NOT criminalize the action.

C) Kentucky Shakers were known for their hemp. It is naïve to think we did not grow marijuana in Kentucky during those years. Similarly, we can return to a time when Marijuana and Hemp are prize crops for all kinds of uses. there are two varieties of the hemp plant, or *Cannabis sativa*. One variety, commonly called marijuana, is grown for the leaves, and has been bred to increase the properties that produce the relaxation and mitigate cancer treatment's side effects. The stem of the traditional hemp plant contains the fiber, so it is grown to produce more stem and fewer leaves. This is achieved through a combination of selective breeding and growing conditions — fiber hemp plants are grown much closer together, to produce taller, straighter plants.

Kentucky's Hemp History

On April 11, 1811 "We built a hemp mill it stood West of the East brick house on the same side of the street."

Valuable as a source for rope and bagging, hemp assumed importance as a crop in Kentucky in the 1790s. The cotton industry created great demand for hemp in the mid-19th century. If cotton was not wrapped in quality hemp bagging and bound with hemp rope, it was not fit for market. The cotton growers required \$150 worth of hemp bagging and rope for every 120 bales of cotton ginned.

In 1840, 1,348,000 bales of cotton were produced. By 1860, almost 4 times that amount — 4,971,183 bales were produced, dramatically increasing the demand for hemp bagging and bale rope.

With the Civil War came the loss of Kentucky hemp's great cotton market in the South. Hemp growing never recovered. As the steam powered sea-going vessels replaced sailing ships, demand for hemp rope declined sharply. Cotton growers began to use iron bale ties instead of bagging, and imported fiber competed for the shrinking market.

D) Aim at Harm Reduction by Regulation: Since its decriminalization in the 1970s, weed use in the Netherlands has plateaued. The Dutch government has made frequent pointed attempts to quell the spread of the drug, banning its advertisement and, at one point,

restricting its sale to only Dutch citizens over 18 when the onset of "drug tourists" grew too annoying for Dutch citizens. This decriminalization doesn't differ much from the majority of European Union member state policies, most of which took the form of "harm reduction" after the AIDS outbreak in the 1980s. While the United States criminalized most forms of drugs, member states such as Switzerland led policy efforts aimed at harm reduction.

8. End Death Penalty or severely curtail it because it wastes resources and does not accomplish its aim.

Why abolish the death penalty in Kentucky?

- A. It's costly.
- B. It's out of step with modern thinking.
- C. It's risky. You may kill an innocent person, the execution may not work, you may kill someone even though there were serious denials of a fair trial
- D. It's unfair, broken, and arbitrary. Those who are poor, black, intellectually disabled and represented by highly overworked public defenders are more likely to have been sentenced to death.
- E. It's unnecessary. Justice can be achieved by sentences of Life Without Opportunity of Parole.
- F. If we remove the Death Penalty, we can focus the system more on serving Victims' families.

8. Protect the private property of citizens with Section 2 of the KY Constitution and 14th Amendment and ending Government power to unfairly seize private assets.

Seized: Few Kentucky Police Agencies Report What They Take Through Asset Forfeiture

By Jacob Ryan (November 29, 2018) "Of 323 law enforcement agencies listed in statewide data, only 11 percent reported the details of their seizures each year, as required by law."

"Transparency is vital," said Robert Frommer, senior attorney with the Institute for Justice, a Washington, D.C.-based libertarian advocacy group. "Without knowing what's going on, you can't make sure police are pursuing justice, rather than profit." In Kentucky, Frommer said law enforcement need only a "slight evidence of traceability" that property is tied to illicit activity in order for it to be subject to forfeiture. "That's an incredibly low standard," he said. "The deck is stacked against property owners."

The Injustice of Civil Asset Forfeiture:

An Article in the Atlantic:

A DEA agent boarded the train at the Albuquerque Amtrak station and began asking various passengers, including Rivers, where they were going and why. When Rivers replied that he was headed to LA to make a music video, the agent asked to search his bags. Rivers complied. He was the only passenger singled out for a search by DEA agents – and the only black person on his portion of the train, Pancer said. In one of the bags, the agent found the cash, still in the Michigan bank envelope. “I even allowed him to call my mother, a military veteran and (hospital) coordinator, to corroborate my story,” Rivers said. “Even with all of this, the officers decided to take my money because he stated that he believed that the money was involved in some type of narcotic activity.”

Rivers was left penniless, his dream deferred.

“These officers took everything that I had worked so hard to save and even money that was given to me by family that believed in me,” Rivers said in his email. “I told (the DEA agents) I had no money and no means to survive in Los Angeles if they took my money. They informed me that it was my responsibility to figure out how I was going to do that.”

<https://www.theatlantic.com/politics/archive/2015/05/the-glaring-injustice-of-civil-asset-forfeiture/392999/>

A. What work must we do to Ensure Kentucky Practices are Constitutional in Light of Timbs v. Indiana, 586 U.S. ____ (2019). In this case, the United States Supreme Court dealt with the applicability of the excessive fines clause of the Constitution's Eighth Amendment to state and local governments in the context of asset forfeiture. In February 2019, the Court unanimously ruled that the Eighth Amendment's prohibition of excessive fines is an incorporated protection applicable to the states under the Fourteenth Amendment. Thus, we have a fundamental right for the government NOT to impose excessive fines or to use incarceration to extract such penalties.

9. As you work to fix the Ignition Interlock bill address the gap between entry of a plea and the securing of Ignition Interlock on a vehicle. Young adults are losing their jobs or their ability to attend college when they are strapped with no ability to drive during this time in limbo. Address the out of state driver, provide for a way for these drivers who attend school and go to work in Kentucky to secure ignition interlock devices as well. Fixing this gap will make our highways safer.