

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 4th Meeting of the 2020 Interim

September 17, 2020

Call to Order and Roll Call

The 4th meeting of the Interim Joint Committee on Judiciary was held on Thursday, September 17, 2020, at 10:30 AM, in Room 171 of the Capitol Annex. Representative Jason Petrie, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Whitney Westerfield, Co-Chair; Representative Jason Petrie, Co-Chair; Senators Danny Carroll, Alice Forgy Kerr, Gerald A. Neal, Michael J. Nemes, John Schickel, Wil Schroder, Robert Stivers II, Robin L. Webb, Stephen West, and Phillip Wheeler; Representatives Kim Banta, John Blanton, Charles Booker, McKenzie Cantrell, Joseph M. Fischer, Chris Harris, Angie Hatton, Samara Heavrin, Nima Kulkarni, Stan Lee, Derek Lewis, Savannah Maddox, C. Ed Massey, Chad McCoy, Patti Minter, Kimberly Poore Moser, Jason Nemes, Brandon Reed, and Rob Wiederstein.

Guests: Rob Sanders, Commonwealth's Attorney for the 16th Judicial Circuit; Martin Hatfield, Pulaski County Attorney; Damon Preston, Public Advocate; Rebecca Ballard DiLoreto, Legislative Agent.

LRC Staff: Katie Comstock and Yvonne Beghtol.

Approval of Minutes

A motion to approve the minutes of the August 20, 2020 meeting was made by Representative Reed, seconded by Representative Fischer, and approved by voice vote.

Prosecutorial Issues and Concerns – COVID's Impact on the Criminal Justice System

Rob Sanders, Commonwealth's Attorney for the 16th Judicial Circuit, stated that case backlog is a major issue across all 57 circuits. Circuit courts were shut down for three months, then opened for two months with no jury trials. Due to maintaining added precautions for Covid-19, cases now take almost twice as long. Social distancing requires some spectators to be in a separate courtroom, which limits the amount of cases that can be heard due to lack of available space. The technology in courtrooms is being updated to meet requirements. Mr. Sanders stressed the importance of Rocket Docket, which moves lower level cases through the system more quickly.

Mr. Sanders stated that 18 counties do not have a victim advocate on staff at the felony level. If Marsy's Law passes this November, it may require that every county have a victim advocate, and more than one may be necessary in the busier circuits.

Mr. Sanders stated that crimes against children have gone down due to children not being in schools and daycares or going to doctors, which are the prime reporting sources. The Commonwealth's Attorneys are working on suggestions to improve the protection of children.

Mr. Sanders stated that the Governor's commutations are becoming an issue. Some were done to deal with the corona virus, but there are ongoing commutations happening. The majority were for people who have other pending felony charges which becomes a cost dump to the county, because the state no longer pays for the inmate when the sentence is commuted.

Martin Hatfield, Pulaski County Attorney, stated that case backlogs are also an issue for district courts. Individuals are not showing up for court or paying their court costs, which leaves no restitution for victims. The Covid-19 social distancing requirements turn a two hour trial into a two day trial. Mr. Hatfield agrees that Rocket Docket numbers have gone down due to Covid-19, which keeps individuals from getting the help they need. The drop in attending programs such as the Traffic Safety Program, the Delinquent Tax Program, and the Cold Check Program has lowered the revenue for county attorney offices, county school systems, and sheriff departments.

Mr. Hatfield stated that Administrative Release has had a negative effect on Rocket Docket by allowing individuals to be given a court date and released without the county attorney being able to meet and discuss the benefits of Rocket Docket. Administrative Releases are also keeping mental health evaluations from being completed, because the individuals are not staying in jail long enough for the process to be complete.

Mr. Hatfield addressed issues for the upcoming 2021 Session. Federal funding of the child support program may be cut or lost if the guidelines are not updated. Shared parenting is another issue that needs to be addressed. Mr. Hatfield emphasized that the child support pay scale has not been updated since the early 1990s. In addition, if passed, Marsy's Law will be costly by requiring additional personnel. 2020 SB 64, regarding indemnification of prosecutors, may be prefiled for the 2021 Session.

In response to Senator Carroll, Mr. Sanders stated that, while pardons do have a time, place, and case, Governor Beshear is not following the guidelines set by himself. The first batch of commutations were low-level, non-violent offenses, but the list is no longer limited to those offenses.

In response to President Stivers, Mr. Hatfield stated he would gather information regarding the increase in incarceration costs to counties and report back to the committee. Mr. Hatfield stated that the incarceration rate in Pulaski County is down from the pre-Covid rate due to the administrative releases.

In response to Senator West, Mr. Sanders stated that discussions of budget costs have been on a local level, rather than with the Administrative Office of the Courts. The Commonwealth's Attorneys have submitted a request to receive Covid funds in order to add additional prosecutors to help lessen the backlog, but the Governor's Office did not see the request as being in relation to the coronavirus. Mr. Sanders agrees that bringing on additional judges, prosecutors, and public defenders would help. However, some of the smaller circuits do not have enough courthouse space to bring on another judge.

In response to Chairman Petrie, Mr. Sanders stated that most circuits are being more generous about what they can do to resolve cases, without putting public safety at risk, to keep the backlog from growing. Mr. Hatfield added that county attorneys have more flexibility to dispose of cases and are looking at ways to be proactive in thinning out the docket.

In response to Senator Wheeler, Mr. Sanders stated that he is not aware of any cases where the Governor's Office has contacted a Commonwealth's Attorney for their input in the decision of who is deserving of or needs to have a commutation. The Governor has not released anyone that Mr. Sanders has asked not to be released. Some that have had their sentences commuted have committed additional crimes, sometimes bigger crimes.

In response to Senator Webb, Mr. Sanders stated that a federal judge or federal court of appeals could override the Supreme Court's rules and overturn a conviction. An accused's right to a speedy trial could also be impacted by the backlog. Another concern is perspective jurors keeping their masks on during voir dire, making it hard to read their faces. In fact, some jurisdictions require witnesses to remove their face masks.

In response to Representative Moser, Mr. Hatfield stated that one positive change due to the Covid-19 pandemic that he can see continuing is the use of virtual arraignments. Mr. Sanders stated that technology is the only thing that has saved the criminal justice system from imploding. Almost all hearings are being done virtually, which has generated thousands of dollars in cost savings by not having to transport prisoners, expert witnesses, or witnesses.

Criminal Defense Issues and Concerns – COVID's Impact on the Criminal Justice System

Rebecca Ballard DiLoreto, Kentucky Association of Criminal Defense Attorneys (KACDL), emphasized that jails and prisons are still overcrowded. The Criminal Justice Forum reported that in February one-third of jails were operating at 170 percent above

capacity, and another third were operating at an average of 128 percent over capacity. After Covid commutations, there are still 8,750 inmates serving state felony sentences in county jails. Current jail count sheets show that 39 of 76 jails are over capacity as of August 2020.

Ms. DiLoreto stated that Covid has presented many changes to consider. One is an opportunity to disassociate ourselves from our attachment to incarceration as the default choice for those who commit crimes. She urged the committee to raise the felony threshold for theft, to end our reliance on incarceration for drug offenses, and to address parental non-support in the civil arena rather than the criminal.

Regarding law enforcement integrity and accountability, Ms. DiLoreto stated that body cameras must be considered. Legislation must include mandatory standards that address when to turn the camera on and off, who has access to the footage, and under what conditions footage is to be shared or distributed. According to Ms. DiLoreto, this will protect law enforcement and the integrity of the process, as well as streamlining our ability to know what happened, requiring less litigation to get at the truth.

Under the category of law enforcement integrity and accountability, KACDL urges the termination of no-knock warrants. The U.S. Supreme Court recognizes that police have a right to enter a residence if exigent circumstances exist. Police can enter a residence if there is evidence of death or serious physical injury or the eminent destruction of evidence related to a crime.

Ms. DiLoreto stated that it is critical to amend state statutes to clarify the rights of all communities to establish civilian review boards. These review boards should confer with national standards and meet local needs. Board members need to have access to critical pieces of information, develop rapport between law enforcement and the community, and have the authority to look at police policies, training, and other systemic issues to secure change. Ms. DiLoreto further stated that the Second Amendment of the U.S. Constitution provides that local communities are entitled to have input and oversight regarding how they are policed.

Ms. DiLoreto stressed that the biggest challenge with respect to Covid is client communication. Virtual communication is being used and works well for hearings predominantly about scheduling. However, not being able to go to the jails or prisons to talk with clients, whisper in their ear during hearings, or take a break and go into a separate room to have a conversation with them, increases the risk of clients being harmed due to not understanding what is happening. Covid has also increased the difficulty of completing an investigation due to the inability to enter a residence or workplace to gather information or have interviews. This will be further complicated if Marsy's Law passes, because the rights of defense attorneys to investigate will be compromised if victims can prohibit them from conducting investigations.

Ms. DiLoreto stated that she was encouraged by last session's pretrial release proposal. Many of the problems with pretrial release have been exasperated by Covid-19. Because Kentucky does not have a statutory speedy trial right, the interpretation of what it means generally cuts strongly against the accused.

Ms. DiLoreto agrees that requiring jurors and witnesses to wear face masks increases the difficulty of voir dire. Attorneys are generally not able to visit clients in jail, but can make phone calls and have Zoom meetings. Ms. DiLoreto stated that the greatest damage is to pretrial cases.

Damon Preston, Public Advocate, stated that during this pandemic there is a need for more public defenders, prosecutors, and court staff, though the DPA is looking at significant cuts. While case numbers will be down due to the pandemic, Mr. Preston believes the numbers will escalate as the backlog cases are brought to court.

Mr. Preston provided that DPA's top legislative priorities include jury empowerment, amendments to DPA organizational statutes, an adequate DPA budget to ensure the right to counsel, criminal justice improvements, and improving Casey's Law. Mr. Preston emphasized that jury empowerment gives jurors the option of showing mercy at the sentencing phase but does not reduce the penalty on any offense.

Regarding the impacts of Covid-19, Mr. Preston began by addressing constrained client communications. It is difficult to maintain adequate attorney-client communication during this time. Many jails prohibit in-person visits. Even for clients out of custody a safe, confidential in-person meeting is difficult to arrange, as many clients have health or transportation issues. Communications with clients in custody are particularly constrained as they are subject to recording. It is also difficult to share and review evidence, such as video, with clients. Due to very few hearings allowing an attorney and client to both be in the courtroom, the attorney cannot communicate in real time with the client during the hearing.

Mr. Preston reviewed the difficulty and inefficiency of preparing cases outside of court. Conducting effective investigations, obtaining records from institutions that have limited hours and staffing, and interviewing witnesses is nearly impossible. The workflow of defenders has changed as dockets are longer and less efficient and more frequent, leaving less time each day for in depth preparation of cases. Most public defenders in Kentucky are between the age of 25 and 45. During this pandemic, they have the additional stress of childcare and health concerns. The practice of law requires time to contemplate, strategize, research, and develop arguments.

Mr. Preston stated that state inmates are unable to participate in programs if transportation is not provided. The completion of some programs are required for release. After speaking with the Justice Cabinet, Mr. Preston believes transfers within corrections

will be resuming soon. The more pressing problem at the moment is inmates not being transported from county to county. A Pretrial Services survey indicates that there are hundreds of inmates who are housed in a county jail on a warrant or holder from another county who have no court date and no ability to access court. The Kentucky Jailers Association recently adopted a policy recommending that all jails participate in virtual hearings when an inmate cannot be transferred. However, not all jails, including Jefferson and Fayette County, are following the policy. Fayette County has over 70 inmates who are being held on out-of-county holders and have no access to court.

Chairman Westerfield commented that additional resources are needed to provide victims' advocates in every county. In regards to Marsy's Law, Chairman Westerfield stated that the victim has a right to be heard and should have more input. He noted that the 12 victims' rights listed in Marsy's Law do not impede the investigative authority, power, or opportunity for the defense bar to thoroughly investigate a case.

Chairman Petrie commented that he had hoped to hear of cost savings with the potential passing of Marsy's Law, as it would provide constitutional rights that the victims could enforce rather than the prosecutors.

Representative Blanton commented that he took comments made by Ms. DiLoreto during the meeting as an attack on the integrity of law enforcement. While inmates are sons, daughters, and fathers, so are law enforcement personnel. Officers put themselves at risk to ensure citizens have a safe environment and society. Representative Blanton opposes having a Civilian Review Board to investigate an officer who had to make a split second decision.

Senator Wheeler commented that he was taught in law school of the importance of the jury. If an officer violates someone's rights or commits a crime, they can be charged just like everyone else. A Civilian Review Board is just an extra committee that may or may not have certain prejudices, or be driven by the media rather than facts. The easiest way to avoid a confrontation with an officer is to comply and be respectful. Law enforcement officers should not have to be judged twice but should be allowed to go through the criminal justice system like any others.

There being no further business, the meeting adjourned at 12:10 PM.