

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 3rd Meeting of the 2018 Interim

August 3, 2018

Call to Order and Roll Call

The 3rd meeting of the Interim Joint Committee on Judiciary was held on Friday, August 3, 2018, at 10:00 AM, at the Lake Barkley State Resort Park's Convention Center. Senator Whitney Westerfield, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Whitney Westerfield, Co-Chair; Representative Joseph M. Fischer, Co-Chair; Senators Danny Carroll, Alice Forgy Kerr, Dan "Malano" Seum, and Robin L. Webb; Representatives McKenzie Cantrell, Jeffery Donohue, Angie Hatton, Joni L. Jenkins, Chad McCoy, C. Wesley Morgan, Jason Nemes, Jason Petrie, and Brandon Reed.

Guests: John Tilley, Davis Paine, Damon Preston, and Rebecca DiLoreto.

LRC Staff: Katie Comstock, Alice Lyon, Dale Hardy, Breanna Miller, and Yvonne Beghtol.

Chairman Westerfield welcomed those in attendance. Due to not having a quorum, the July minutes will be presented at the September meeting for approval.

Update from the Justice and Public Safety Cabinet

Secretary John Tilley, of the Justice and Public Safety Cabinet, began by giving an update on the prison and jail population. Kentucky is experiencing record highs. Prior to 2018, the state inmate population had not yet met 25,000. However, the population is currently over 25,000. Secretary Tilley stated that without reform, the state inmate population is projected to be approximately 30,000-35,000 for this year. Four different sources were used in obtaining the estimated prison growth rate. With these estimates, we will officially be out of space by May of 2019. This puts Kentucky ninth, per capita, in terms of incarceration, and second for female incarceration. The female growth rate is five times that of the males. The Cabinet is working on finding solutions to reduce this number and to find alternatives for the women who are there largely due to substance abuse and mental health issues. Kentucky is unique in that we house half of our inmate population in county jails. We have 76 full service jails. Roughly 24 offer rehabilitation or treatment. Jails were never meant to house long-term, so some are not set up to offer treatment. Thirty-

four states have lowered their prison population and crime rates, and Secretary Tilley stated that is where we want to be.

In response to Representative Petrie, Secretary Tilley stated that revocation is the main driving force behind the growth in incarceration. Parolees miss a meeting, relapse, and then wait to be taken back to prison. The Cabinet is using administrative services to help bring down that number. If they can help them succeed, then there are less victims, less crimes, and fewer inmates. There is a report from an outside consulting group of the top 10 crimes that have been the driving force for incarceration. It shows an influx of Class D felonies, mostly possession and theft. Kentucky is still at a historic low for violent crimes. Mental illness and addiction are the greatest challenges for law enforcement and jailers.

In response to Representative Donahue, Secretary Tilley stated that the average yearly housing cost per inmate is roughly \$25,000.00. Medical costs are increasing dramatically. Moral Reconnection Therapy (MRT) is a program that correctional officers have seen as an effective treatment. As for jails, the cost is lower. Jails are paid \$31.40 per day per inmate, plus \$9.00 per day per inmate if involved in substance abuse treatment. A system currently in place in Kenton County using Medically Assisted Therapy and other efforts focuses on getting the inmate sober and clean, having a job while in jail, and employment when they get out. The money appropriated from SB 192 is used to help fund these programs. In response to the cost of how much is lost when an inmate is kept at a county jail, when there is no room in the prisons, in spite of the per diem paid for that inmate, there can still be a loss of funds. The cost will be different for each jail, but Secretary Tilley will get an estimated amount to the committee.

In response to Senator Carroll, Secretary Tilley highlighted that Kentucky began justice reinvestment reform in 2011. He suggested focusing prison beds on the most serious offenders, getting treatment for those with substance abuse, and identifying those that are mentally ill. He recommends using data from Texas, Georgia, and South Carolina as models to gauge the results of reform efforts. More recently Louisiana, New York, New Jersey, and North Carolina also enacted criminal justice reforms. Each state does one thing better than the others.

In response to staffing, Secretary Tilley noted that the turnover rate for probation officers is increasing. Applicants are either not qualified or they cannot hire them. Salaries need to be increased. He has met with Governor Bevin who has approved additional funds to help with the hiring. They are working on reducing caseloads for those that do not require supervision. Kentucky is currently at 90 to 1 on caseloads, whereas Texas is 45 to 1.

In response to Senator Webb, Secretary Tilley agrees that the \$9.00 a day does not buy the treatment needed. It may come down to court intervention, where it is mandated from a federal court that treatment has to be offered. This would double their budget. He

believes in performance based funding; paying more to the facilities that offer more and the minimum to those who offer less. There is no answer right now as to where the funding for this would come from.

In regards to tracking the utilization of preferred sentencing or treatment prior to sentencing, Secretary Tilley assured the committee that the Cabinet is tracking as much as possible. They are seeing good numbers in probation and parole where there is a 10% reduction in admissions.

If an officer determines that somebody needs to go to a shelter, either because homeless or mentally ill, they can go that route instead of to a jail cell. They are tracking the use of diversion, and the Administrative Office of the Courts could help get some numbers. Some areas of the state are using the diversion where others are not using it at all.

In response to Representative Jenkins, Secretary Tilley stated that Kentucky is still experiencing a shortage of correction officers across the state. Some of those vacancies are being filled by probation and parole officers on their time off, to maintain safety and security at the prisons. Parts of the Oldham County facility have been shut down due to staffing shortages and the condition of the buildings, and moved into a private prison facility. The contract with the private prison is fair and efficient. Inmates are receiving services there that they would not receive in the jails.

In response to tracking HB 169, the Cabinet will be working closely with Lexington, Louisville, and others to see if the bill has the desired effect of curbing gang violence and where some changes may be necessary.

In response to Senator Kerr, Secretary Tilley would like to see the qualifications for a parole officer expanded to include military, law enforcement, or some other related background as a substitution for a four-year degree. Cyndi Heddleston, Legislative Liaison with the Department of Corrections, commented that about half of states require a degree while the other half allow related background substitutions. Her concern is that we emphasize the desire to hire the right person, with the right training, so that they are effective. It is something the Department of Corrections will continue to review.

In response to Representative Nemes, Secretary Tilley stated that one reason they cannot move inmates into Dismas Charities' facilities is due to classification issues. He agrees that Kentucky has a lot more treatment capacity than most are aware. There is a hotline treatment locator and other sources to link those in need of treatment to the facilities. The Cabinet is working with judges and other officials to make them aware of these facilities, to possibly send people to treatment instead of jail. In regards to the Oldham County prison facility, he agrees that it needs to be closed and moved elsewhere. But this requires funding. Selling the Oldham County property is an option they are considering.

Secretary Tilley closed by thanking the General Assembly for the funds for more new vehicles and firearms for Kentucky State Police. He also noted that the Department of Juvenile Justice's detention center population has been cut in half, with no increase in crime, and the closing of five facilities. In addition, the Department of Corrections reentry program is doing a great job. Sarah Johnson is the new Substance Abuse Program (SAP) Director. Parole board chairs, and probation and parole officers are working with SAP to make it more effective; through employment, treatment, housing, and transportation. A lot of the operations from the Medical Examiner's Office have been transferred to medical schools, which has enabled them to stay within budget. There are only 500 forensic pathologists in the country. The Cabinet has been able to raise salaries to keep the ones we have. The Cabinet is working on school safety. There are some implementation concerns with SB 133, which he is working with the sponsor to resolve. The Department of Criminal Justice Training backlog has been eliminated and they are pushing training throughout the state so that they are not required to come to Frankfort. Kentucky Law Enforcement Foundation Program (KLEFP) funds are no longer being diverted and are used for their intended purpose. Previously, over \$56,000,000.00 was being diverted.

In response to Senator Carroll, Secretary Tilley stated that one of the issues with SB 133 is the language indicating who should be released. They do not want to release someone who is dangerous, but is clearly pregnant. On the issue of mother and child visits, they are working with other agencies to increase these visits.

In response to Chairman Westerfield, Secretary Tilley will get a report listing the top five issues the Cabinet would like the committee to consider.

Secretary Tilley closed by saying that while overdose deaths rose by 11%, other states had more. The efforts of the "Don't Let Them Die" campaign, along with all of the agencies in contact with the inmates, is working. Heroin has been replaced with fentanyl, and Kentucky is leading the way in policy at keeping on the forefront of the drug epidemic.

Criminal Defense Issues and Concerns

Damon Preston, Public Advocate with the Department of Public Advocacy (DPA), began by thanking the committee for inviting him to speak, for their support of his position as Public Advocate, and for the additional funding provided this year.

One of the challenges DPA faces is salaries. Attorneys start at \$42,000.00. Their maximum salary averages \$62,000.00. This makes it hard to obtain employees. The number of law school graduates has also declined. Therefore, the choice is to hire applicants who are not qualified, or try to keep with the standard of low pay with high caseloads and risk losing them to higher paying positions.

Case load is another concern. The additional funding has allowed DPA to reduce case load to around 450 cases per attorney. However, the annual report estimates around a

3% caseload increase. That would equal 160,000 cases (almost 5,000 additional) per year which would require 12 additional attorneys just to keep up with the additional case load.

Aging technology is another concern, as is with all state facilities. A growing amount of work comes in digitally. Not just the usual paperwork, but also digital downloads. Outdated computers, storage capacity, processors, and network speed affects their ability to do their job.

Conflicts are another concern. DPA often has one attorney representing two or more clients because they cannot afford another attorney to handle a preliminary hearing. This is not just a budget issue, but an ethical issue.

Mr. Preston also believes that DPA should do better than offering “legal service for poor people”. He wants to provide clients with the best legal service in the state. While the general population has grown 37.5% over the last 48 years, the inmate population has increased 695.3%. This means that, more than ever before, you are more likely to be around people or have family members who have been in prison. DPA’s clients are people, worthy of respect and dignity, even when they have made mistakes. The response to criminal behavior has to be humane, even while holding people accountable.

As far as recommendations for criminal justice reforms, felony expungement has been a great success. He would like to see it expanded to almost everyone. When hiring, many who see a criminal record on the applicants background check, would no longer consider that applicant, regardless of their other credentials. He would like to suggest expanded expungement that would include staggered eligibility for convictions: 5 years for Class D felonies (with exceptions), 10 years for the remaining Class D felonies and some Class C felonies, 15 years for the remaining Class C felonies, and 20 years for Class A and B felonies. The wait time would begin at the end of their sentence. Instead of listing the felonies by statute number, he feels it would be better to list by class. Even Class A felonies should be considered, because they will have served their sentence. He would also like to expand expungement of dismissals and acquittals, including dismissals without prejudice. He also suggests having automatic expungement of dismissals and acquittals for adults, as was done for juveniles in Chairman Westerfield’s SB 200. Particularly, dismissals of misdemeanors, after the 12 month statute of limitations is run.

Mr. Preston also stated that every offense should be discussed. Nothing should be “untouchable”. These topics (Persistent Felony Offenders (PFOs), Violent Offenders, Sex Offenders, and Trafficking) have to be addressed, if we want to make a dent in the prison population. His suggestions for each is:

- PFO – leave it up to the jury;
- Violent Offenders – return to 50% as it was prior to 1994 federal incentive;
- Sex Offenders – incentives for compliance for non-predatory offenders; and
- Trafficking – distinguish transfers between addicts from commercial sales.

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Criminal justice reform needs to be bold. Mr. Preston recommended the 3 Days Count movement that Chief Justice Minton recently announced, recognizing that a few days in jail can make a negative impact on a person's life, by possibly losing a job, creating instability, and in turn making them more of a risk to society. He would like to see gross misdemeanors classified higher than a Class A misdemeanor, but lower than a Class D felony, and on the side of a misdemeanor. He also suggests reexamining prison terms for elderly inmates, having maximum sentences for probated terms, life or decades sentences for Class B offenses, and mandatory consecutive sentences. Mr. Preston stated that one of the biggest ways to lower the inmate population is to stop raising penalties. These recommendations could improve the justice system, help families, improve outcome for offenders and improve public safety, and save money.

In response to Senator Carroll, Mr. Preston believes there is more common ground between them than what may appear. He believes that victims' opinions matter and are considered. Many victims do not want harsh penalties because the offender is often a family member or friend. He would appreciate a discussion with Senator Carroll to address his concerns in depth.

Rebecca DiLoreto, Legislative Agent with the Kentucky Association of Criminal Defense Lawyers (KACDL), emphasized that her organization's main concern is the protection of the Bill of Rights and just, fair, and workable justice reform. While many come to legislators asking them to use their power to pass particular legislation, Ms. DiLoreto stated that it is difficult to gather all of the necessary information to insure that legislators are making the right decision. Some key areas of concern for KACDL are protection against misidentification leading to wrongful convictions, protection against mistakes in statements to police by witnesses and the accused, ensuring access to accurate data by requiring the right data be collected about cases in the criminal justice system, restoring the proper role of corrections as rehabilitation, and removing unnecessary and harmful collateral consequences.

Ms. DiLoreto stated that mistaken eyewitness identification is the leading factor in wrongful convictions. Facial recognition software does not test accurately those who are not caucasian and technology is not always the best solution. Easy reforms she feels necessary are the "double-blind" procedure (using an administrator who does not have a targeted offender), giving uniform instructions to the witness, establishing standards for composing a line-up, confidence statements given by the witness, and documentation.

Electronic recording of interrogations can benefit both law enforcement from allegations of coercion, and the innocent from being wrongfully convicted.

Ms. DiLoreto stated that having updated and accurate data when mandating legislation is crucial. Data shows that the justice system remains racially imbalanced. A

person of color does not have a fair chance. It is important to hear from leadership in African American and Hispanic communities, as well as victims, women, and children. If they are not there, Ms. DiLoreto stated that the General Assembly needs to invite them to get their opinions. Collecting the data on racial demographics is necessary. She quoted John 8:30, "Then you will know the truth and the truth will set you free."

The Criminal Justice Policy Assessment Council reported that prison admissions have increased by 32% over the last five years. Class D felonies have increased by 38%. 56% charged as Class D felons were convicted as Class D. Of those serving for a Class D felony, 82% do not have a more serious offense, and are serving in jails without services.

Ms. DiLoreto would like to see the committee focus on programs targeting the young adult population. Data indicates that maturing is complete around 25 years of age. Therefore, it is the prime time to rehabilitate and intervene. This is when they need to be building an economic future and the General Assembly needs to examine how we can alter their sentencing.

Drug treatment is crucial for those in prison, jails, and in our communities.

Ms. DiLoreto noted that opportunities need to be provided for those incarcerated. The problem with the job training and other programs is that you have to be close to release in order to qualify. She also stated that HB 169 provides that an offender must serve 85% of their sentence, which increases the length of time before they are eligible for these services. Making these services available for the younger inmates is crucial in reaching them before they reach the maturity age of 25 years.

The National Association of Criminal Defense Lawyers is pushing for an end to unnecessary collateral consequences. Once an inmate has served their time, Ms. DiLoreto stated that we need to stop punishing them by making it difficult to find a job, get a loan, find housing, or voting. KACDL is asking legislators to set the bar in this coming legislation. Listen to your constituents, but consider the real issues. What are the intended and unintended consequences and their costs? Victims often have the same outlook on these issues. They want to see the violence ended, rather than just putting someone away in prison.

Senator Webb commented that she appreciates everyone's thorough efforts to seek truth, justice, and effectiveness in representing defendants. While it is not perfect, it is a good system.

In response to Chairman Fischer, Mr. Preston's opinion as to what qualifies as a non-predatory sex offense could include things that happen in a dating context, possession of child pornography, and indecent exposure.

In response to Chairman Westerfield, Mr. Preston does not believe Kentucky has hit the 10% penalty for not being compliant with the Adam Walsh Act. Ms. DiLoreto commented that we need to educate instead of criminalizing as there are mental health and maturation levels related to sexual behavior.

Chairman Westerfield reminded members of the September 7th meeting to be held at 10:00 am at the Capitol Annex in Room 171.

There being no further business, the meeting adjourned at 2:10 pm.