

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 4th Meeting of the 2018 Interim

September 7, 2018

Call to Order and Roll Call

The 4th meeting of the Interim Joint Committee on Judiciary was held on Friday, September 7, 2018, at 10:00 AM, in Room 171 of the Capitol Annex. Representative Joseph M. Fischer, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Representative Joseph M. Fischer, Co-Chair; Senators Danny Carroll, Perry B. Clark, Alice Forgy Kerr, Dan "Malano" Seum, and Robin L. Webb; Representatives McKenzie Cantrell, Jeffery Donohue, Daniel Elliott, Angie Hatton, Stan Lee, Chad McCoy, Reginald Meeks, C. Wesley Morgan, Kimberly Poore Moser, Jason Nemes, Jason Petrie, Brandon Reed, and Kevin Sinnette.

Guests: Laura Sudkamp, Brandon Standifer, B. Scott West, Matthew Henderson, Matthew Cole, David Atha, Jason Siwula, Kelly Stephens, Judge Jerry Crosby, Steve Gold, Jenny Oldham, Martin Hatfield, Lois Linhold, Representative Mark Hart, Representative Diane St. Onge, Cassie Everett, and Taylor Everett.

LRC Staff: Dale Hardy, Alice Lyon, Chandani Kemper, Matt Trebelhorn, Breanna Miller, and Yvonne Beghtol.

Chairman Fischer welcomed those in attendance, and requested a moment of silence on behalf of Corbin Harris, the son of Representative Chris Harris, who is currently in a coma. Having reached a quorum later in the meeting, Chairman Fischer asked for a motion to approve minutes from the July 6, and August 3, 2018 meetings. Representative Reed made a motion, seconded by Representative McCoy, and approved by voice vote.

Drugged Driving

Laura Sudkamp, Laboratory Manager of the Kentucky State Police Forensic Lab, noted that the Lab is the state's only forensic laboratory, and it is more cost efficient than outsourcing. Fortunately, in 2017 and 2018 the Lab has processed more cases than received, which has lowered the case backlog. Of the cases received, those being tested for drugs jumped from 30-40 percent to 72 percent, which was the cause for some of the backlog. There are 1,900 cases awaiting analysis, which is down from 4,800 cases in 2015. New drugs have been added, so the Lab is looking at a wider range of drugs. Kentucky has a class type drug law that lists the controlled drugs. As soon as users find a new drug that

is not “classified,” they start using it. This keeps the Lab busy. The Lab uses a new line of processes called Pinpoint, which allows it to analyze samples more accurately and quickly.

Brandon Standifer, Toxicology Supervisor for the Kentucky State Police Forensic Lab, stated that seven testing procedures are required for drug confirmation testing and screening. New methods will cut the testing procedures to four. The new process will also cut the time needed to extract drugs from a blood sample in half, allowing more time for the required peer review process, as well as the time needed to analyze additional drugs added to the list. The first new screening process is anticipated to be online before the end of 2018.

Ms. Sudkamp said that the budget increase has helped retain employees. She hopes does not lose employees to Virginia, which is offering \$55,000 for chemists directly out of college and over \$70,000 if already trained. Starting over with new employees and training causes set-backs. In addition, instrument breakdown is the number one area that can cause backlog. Back-up equipment enables the Lab to keep working while the other machine is being repaired.

In outsourcing the testing of synthetics, 18 percent of the cases tested positive. Adding synthetics into the screening process adds to the time and cost of the screening. When considering whether to add a drug to the drug screening list, the cost and the percentage of those that will test positive should be considered. Ms. Sudkamp is working with the toxicology department to see if it has ideas as to how this can be done more efficiently. While outsourcing only costs \$113 per sample, the larger cost is incurred when technicians from outside laboratories are required to testify.

In response to Senator Webb, Ms. Sudkamp stated that the Lab will run a sample to see what drugs (or alcohol levels) appear, regardless of what the officer may think is there. Positive drug screenings that carry the highest charges may be the only ones reported. Now that the lab is catching up, it hopes to increase those tested and reported. Mr. Standifer reported that the percentage of cases that included marijuana is approximately 60 percent, the highest of all the drug findings. Chairman Fischer indicated that 60 percent of the \$3,000,000 cost of screening would be roughly \$2,000,000 for marijuana screenings.

In response to Representative Moser, Ms. Sudkamp verified the cost for outsourcing a blood sample is \$113.00 per sample. The cost can be as much as \$10,000 once the expert testimony costs are added to the testing costs.

In response to Representative Meeks, Ms. Sudkamp stated that when a piece of equipment such as the CMS/MS machine goes down, the Lab must diagnose the issue, get a cost quote, and start the process to finance the repair. This is why back-up equipment is so beneficial. The lab has done this with some of the bigger instruments, but need to also

do it for the smaller units. In regards to requests from outside of the state that may generate revenue, Ms. Sudkamp believes that Kentucky receives toxicology requests.

In response to Representative Lee, Ms. Sudkamp stated that, although the Lab has the same equipment, outsourcing is beneficial because companies may have more staff to dedicate to a more thorough research of the samples, which keeps her agency from becoming further behind in cases. About 116 cases were outsourced over the past two years, and 21 tested positive. The cost for an outside technician to testify includes 50 percent of the fee, plus travel expenses, which is paid through the courts. Five percent to six percent of the 116 would have required testimony. Sixty percent of the cases test positive for THC levels, but it may not be required to be reported. It is only reported when the level is high enough to be confident that it is THC. The screening for THC is part of a series of testing, and the lab goes forward from there with its findings.

Ignition Interlock Issues

Scott West, Deputy Public Advocate with the Department of Public Advocacy (DPA), spoke in favor of the Ignition Interlock system as a means for offenders to continue with a less disruptive way of life, while training them not to drive while drinking, not just when intoxicated. A low average for the cost of installation, calibration, maintenance, and repair would be \$300 to \$350. Mr. West does not believe it should be mandatory since many offenders do not own a vehicle, or, if they do, cannot afford the cost of the device. If made mandatory, it should be exempted for the truly indigent. “May” should be changed to “shall” in KRS 189A.420(7), in which courts are to use the sliding scale established by the Supreme Court of Kentucky for indigent defendants. Another request is to create a process by which a client is protected from unreasonable practices by interlock providers, such as charging for the resetting of a machine when the client states it read a false positive, which is possible. The old regulation had a 90 day recalibration period, whereas the new proposed regulation has a 60 day period. If the machine will work efficiently for 90 days, the client should not have to pay every two months, instead of every three months for the recalibration. The Flege case recently stated that Circuit Courts lack jurisdiction over the issuance of ignition inlock. Mr. West would like to have the statute changed from “The District Court shall have exclusive jurisdiction” to “The Sentencing Court shall have exclusive jurisdiction.”

Matthew Henderson, Commissioner of the Department of Vehicle Regulation, stated that the Ignition Interlock program went into effect in 2015. The process begins when a driver is cited for a DUI, or is driving while suspended on a DUI. The driver can ask for the Ignition Interlock Device (IID) or it can be ordered by a judge. The court will send the order to the Kentucky Transportation Cabinet (KYTC). The driver can then apply for an IID and if approved, will receive a Letter of Approval. The driver then takes the letter to a vendor, certified by the Office of Highway Safety, to have the IID installed. The driver will receive a Certificate of Installation, which he or she can present to the Circuit Clerk to receive a restricted license. Fourteen days prior to the end of the suspended period,

the KYTC will send a Letter of Removal to the driver, which he or she will take to the vendor to have the device removed. The vendor will provide the driver with a Certificate of Removal which the driver presents to the Circuit Clerk to update their driving record and to reinstate a non-restricted driver's license.

Commissioner Henderson stated that the program is not effective in its goal of increasing public safety on our highways. In 2016, there were 20,749 DUI convictions, with 1,403 IIDs ordered, and only 786 (3.8 percent of convicted cases) installed. In 2017, the usage rate increased slightly. There were 20,619 DUI convictions, with 1,585 IIDs ordered, and only 948 (4.6 percent of convicted cases) installed. The KYTC is in favor of any means of increasing the usage rate.

Monitoring of the devices is also a concern. In 2016, 10,396 violations were reported, resulting in 3 convictions. In 2017, 13,424 violations were reported, resulting in 9 convictions. The KYTC is in favor of a more robust monitoring system. One option is for the KYTC to oversee the monitoring. For that to happen, KYTC would require additional funding through fees or some other source. Another area of concern is the confusion in terms of the penalty length. The forms the courts use to report to the KYTC are often confusing. The KYTC would support making the statute simpler and more understandable.

In response to Senator Webb, Matthew Cole, Director of the Division of Driver Licensing, stated that the review process could be written in regulation to keep it from being subjective, because that leads to inequity.

In response to Representative Lee, Commissioner Henderson clarified that one of the reasons for court ordered IIDs not always being installed is that the offender has the option to "sit out" and not drive during that period. Director Cole informed the committee that the cost to install the IID averages from \$85 to \$130, plus a monthly fee (\$85 maximum) for monitoring. Commissioner Henderson explained that the reported violations account for each time the vehicle shut down due to the driver entering the vehicle with an alcohol content level above the allowed amount, as well as possible tampering with the system; however, the violations are not necessarily violations of the law. Convictions stemming from violations may vary on how they are reported, but are often reported by the County Attorney. Commissioner Henderson stated that one of the main goals of the IID is to keep intoxicated drivers off the road. Director Cole stated that an offender's number of offenses usually trends down as the time continues with the IID because he or she realizes that the equipment will not allow drinking and driving.

In response to Representative Petrie, Director Cole noted that the time period can be from 6 to 12 months. Commissioner Henderson stated that the monthly cost is paid directly to the vendor, and can usually be paid month-by-month. Director Cole said that a violation does not result in additional fees.

In response to Representative Reed, Commissioner Henderson stated that many court systems use a continuing alcohol monitoring device bracelet but KYTC does not.

In response to Representative Nemes, Director Cole explained that the reason for the high number of breath tests required by the IID per month is because more than one test can be required in a single trip. The initial test allows the vehicle to start, and the continued testing allows it to keep running. If they are not driving, they are still required to submit 50 breath tests per 30 days. Documentation of an illness during the testing period may be required, which is something an administratively run program would oversee.

In response to Representative Meeks, Director Cole responded that he has not heard of the device discussed on NPR News that the state of Indiana now has to detect alcohol content in containers, but he will look into it. Commissioner Henderson stated that Kentucky does not currently meet the standards for federal grants, which could assist in paying for the monitoring program. One requirement is that IIDs be mandatory.

In response to Representative McCoy, Commissioner Henderson stated that the 10,396 violations indicate how many times the IID kept someone who was drinking from getting on the road. States with mandatory IIDs have seen a 16 percent decrease in road fatalities.

Kelly Stephens, Government Affairs Liaison with the Administrative Office of the Courts (AOC), stated she has completed a survey of circuit clerks and judges who take particular interest in these issues. The majority of feedback indicates that the process is too confusing and complicated. A statutory revision making it more of an administrative process would improve the usage. There are inconsistencies in interpretations by KYTC regarding the mandatory period. A clearer statutory period about revocations and suspensions, finite periods, and making it possible for judges to refer someone over to the KYTC for the IID would be preferable. AOC is also concerned with the financial challenges for those who cannot afford it, and in how the violations are reported. Ms. Stephens believes improvements through a stakeholder driven bill are possible, and AOC looks forward to working with legislators during the 2019 Session.

In response to Chairman Fischer, Judge Jerry Crosby, District Court Judge in Oldham, Henry, and Trimble Counties, responded that when having the option to not drive for 30 days versus the cost of having the IID installed for 60 days, most first time offenders will opt for the 30 days, resulting in not having the IID installed at all. The cost for the IID is a large part of why it is not being used. Judge Crosby grants the IID when requested. The violation report shows how often it has kept the vehicle from being on the road due to a positive (.02) test, which has led Judge Crosby to favor granting the devices.

Steve Gold, President of the Kentucky County Attorney's Association and Henderson County Attorney, referred to the current IID law, and stated that an alcohol-related DUI, if not a first offense with an aggravating circumstance, does not require the IID to be mandated. Therefore, the number of offenses subjected to the IID is a small percentage. There is a concern as to whether or not the finding of alcohol is accurate, resulting in not having the IID as an option.

Jenny Oldham, Hardin County Attorney, stated that a first offense runs approximately \$630.00 minimum, which includes installation, maintenance, and the \$200.00 fee for the KYTC ignition license. For a second offense, the minimum is \$990.00. A third offense is \$710.00. While Ms. Oldham does not have an issue with making DUIs costly, the reality is that there is no one to pay those fees. Vendors are private companies that will not make the IIDs available without a profit. Staffing issues are also a concern, if each county is required to monitor the system. Ms. Oldham believes administrative monitoring makes the most sense in regulating the program.

Martin Hatfield, Pulaski County Attorney, clarified that the term "violation" is not a violation of the law, but of the IID terms of use. Knowing what to do when a violation is reported is another concern. Pulaski County does not have an IID installer, so he is not sure who to send the offender to when granted the IID device. One offender reported that a vendor offered to install a bypass breathalyzer for an additional charge, which in turn would be reported to law enforcement. Mr. Gold reiterated the concern of access when a county does not have an installer and the offender, who is not supposed to be driving, has to go to another county to get the device installed.

In response to Representative Petrie, Mr. Gold stated that every life saved by not having an intoxicated driver on the road is of great value. Ms. Oldham agrees that the funding and cost for the system requires us to be resourceful in where we place the money for this program to have the most impact.

Lois Linhold, Founder of MADD Kentucky, believes the IID is the only tool we have that will save lives. If one person's life is saved as a result of the IID, it was worth the cost. Ms. Linhold told the story of Detective Schweitzer, who was on the sidewalk talking to an individual, and was struck by a vehicle driven by an impaired repeat offender, killing both pedestrians in 2016. The MADD Kentucky members are in support of the IID program and ask that it be mandated for all offenders. In 2017, West Virginia mandated the program for all offenders. That year West Virginia reported 69 lives lost, whereas Kentucky had 175. Ms. Linhold stated that Jefferson County uses the real-time SCRAM monitoring system, but it does not prevent that person from getting in a vehicle and driving. MADD Kentucky would like to see the KYTC handle the administrative license revocation.

Representative Reed was reminded of when he was 7 years old, and experienced the horrific bus crash with a drunk driver in 1988 that took the lives of 27 people. In response

to Representative Reed, Ms. Linhold believes that using both the IID and Alcohol Monitoring Bracelet would be very valuable, so that an intoxicated offender who chooses to drive another vehicle without the IID would still be reported, in real time, as intoxicated. It would then be left to the authorities as to how they would handle the situation.

In response to Representative Petrie, Ms. Linhold agrees that the resources and tools need to be used for the maximum effect.

In response to Representative Donahue, Ms. Linhold stated that there is a protocol for a vehicle that reads your breath before it will start.

Medical Marijuana

Representative Hart began with saying medical marijuana can have positive effects on disorders such as epilepsy and other seizure disorders. He reiterated that marijuana allowed under this bill would not be for recreational purposes, but solely for medical use. The goal is to set the guidelines for the medical community to be able to recommend it for treatment. This is an effort to bring a resource to Kentucky that Kentuckians are currently going out of state to purchase. As a paramedic for 30 years, Representative Hart states he has never taken someone to the hospital for overdosing on marijuana.

Representative St. Onge stated that this bill is not the same as what was presented last year. This is not for recreational purposes nor is it meant to be a revenue generator for the state. It addresses the concerns of Kentuckians who have been seen by a doctor, for whom traditional therapy has not been effective, and whose quality of life has been reduced by medications. Authorities would be aware of who is allowed to have home-grown marijuana. Representatives St. Onge and Nemes feel the best place to house these regulations is the Justice Cabinet. The number of allowed home-grown plants has been reduced from 12 to 6. The reason to allow home-grown plants is cost, distance, and quality. Those in rural areas may not have the means to travel into cities for purchasing, and the quality of what they would buy off the streets would not be monitored.

This bill does not contain a list of qualifying medical conditions. That is to be left up to the discretion of the doctors. Not having a list will also keep conditions not listed from having approval sought each year. Cities and counties will have the opportunity to opt out of the provision, allowing them to remove themselves from the businesses associated with medical marijuana, but does not remove the ability of a resident to use medical marijuana.

Representative Nemes stated that this bill builds off of HB 166. Changes were made to hold the line between recreational and medicinal marijuana, such as reducing the number of plants allowed, allowing the doctor to determine the qualifying conditions, allowing the landlord to prohibit growth on the property, and misuse through sharing or selling resulting in potential prosecution and the loss of your card forever. The prohibition in HB 166 against

cooperation between state and federal law enforcement has been removed. The “no smoking” provisions were strengthened to include no smoking in public places. When a doctor certifies that the patient may benefit from the product, he or she will tell the Kentucky Board of Medical Licensure, and put it into a system to be monitored immediately. If a doctor thinks he or she may begin to certify patients, the doctor has to inform the Kentucky Board of Medical Licensure so that the doctor can be monitored. If a patient is able to home-grow, the Kentucky State Police, the Sheriff, and local law enforcement will be informed. These changes are being made in an effort to keep it from becoming recreational.

Mrs. Cassie Everett shared her testimony. She was diagnosed with juvenile epilepsy at the age of eleven, with a 70 percent chance of outgrowing it and 30 percent chance of it becoming worse. At the age of 17, she experienced her first grand mal seizure. When she became pregnant her medicine dosage was increased, causing her to not be able to drive, trouble sleeping, and difficulty with walking and balance. She showed the amount of her daily medications. Mrs. Everett said she would like the option to be taken off of some of the medications that medical marijuana could replace.

Mr. Taylor Everett, Cassie’s husband, explained the frustrations of not having the option to use medical marijuana to replace the medications that cause his wife to be in pain or to not be able to function properly. Mr. Everett pointed out that their daughter, Lexi, was born with one femur shorter than the other. Testing showed that the medication Mrs. Everett had to take while pregnant was the main possible cause. Mrs. Everett has epilepsy throughout her brain, so surgery is not an option. They have tried Vagus Nerve Stimulation (VNS) but it did not help. The only current option is to continue to increase her medication as it progresses.

Representative Nemes said he was contacted by the Everetts. Mrs. Everett was a third grade teacher and is now a kindergarten classroom assistant. Her neurologist told her medical marijuana is an option he would like her to have. The Everetts have spoken with people from around the country who are getting the relief that they would like for her to have. Representative Nemes stated that there is no panacea, but everyone needs to know that medical marijuana helps people.

In response to Senator Webb, Mr. Everett stated the current monthly medication cost, after insurance, is \$500.

Senator Seum testified that his granddaughter has epilepsy. She is 22 years of age now and is an illegal user of medical cannabis. Because of the help it has given her, she now has a man in her life, a job, and a life.

Representative Donahue testified that he lost a sister to cancer who was assisted by the use of medical marijuana to improve her quality of life towards the end.

Representative Sinnette testified that his mother is 90 years old and a retired oncology nurse, and has been an advocate of medical marijuana since the 1970s, after seeing so many patients die, not from the cancer, but from lack of nutrition. He stated that his sister died from lack of nutrition while having liver cancer. Representative Sinnette believes some of the reasons for not legalizing medical marijuana may be due to farmers not being geared for it and wanting to stick with what they know, as well as law enforcement and social workers being concerned that legalizing marijuana could result in a loss of jobs for their profession. There will always be illegal drugs, so he does not believe this will be an issue. People want to use natural products to treat symptoms and pain rather than chemicals.

Representative St. Onge confirmed Friday, September 14th, as the date this issue will be taken up at the Licensing, Occupations, and Administrative Regulations Committee meeting.

In response to Representative Moser, Representative Nemes stated the FDA cannot approve marijuana because it is a Schedule I drug. Representative Nemes reminded the committee that he and Representative Moser both voted for the Right to Try legislation, allowing the state to go around the FDA. Hemp is currently being used and it violates federal law. Marijuana should not be held under a different standard. A recent study from the University of Kentucky shows a 6 percent decrease in the prescription of opioids in states where medical marijuana is approved. Representative Moser stated she has a report showing states that have approved medical marijuana have an upward trend on opioid overdoses. Representative St. Onge said she has studies showing the opposite and will be happy to supply those to Representative Moser. Representative St. Onge agrees that the FDA is not the “end all, be all.”

Mr. Everett commented that Epidiolex is a drug approved by the FDA that comes from a fractured marijuana plant, but the neurologist cannot prescribe it because it stems from a Schedule I plant. Representative Moser mentioned a six month expedited FDA fast track system available. She also stated she will look into the Schedule I rating for Epidiolex.

In response to Representative Moser, Representative Nemes does not know the cost to regulate, enforce the new laws, and establish a cannabis commission. They will receive the fiscal note when the bill is finished. Their understanding is that it will not be a big money maker for Kentucky but will pay for itself and have a little extra to put into the General Fund. Representative Moser stated that for every \$1 raised in taxing alcohol and tobacco, Kentucky spends about \$10 enforcing those laws and regulations. Kentucky does not tax pharmaceuticals, so she believes this will end up costing more than it generates. Representative Nemes stated that medical marijuana will be taxed at the wholesale level, but not on the retail side.

In response to Representative Cantrell, Representative St. Onge said the wholesale taxes collected will be outlined in the bill. What is leftover will go to law enforcement to help support their needs regarding this issue. The main thing to remember is that legalizing medicinal marijuana is not expected or intended to be a major money maker for Kentucky. Representative Nemes commented that one intention is to keep it affordable and accessible to those who need it, without adding taxes.

In response to Senator Webb, Representative Nemes does not know what the average monthly cost for this prescription would be. The University of Kentucky study indicates a 6 percent decrease for opioid prescriptions, giving a significant savings. Reducing opioid overdoses saves on hospital costs, and transportation.

Representative St. Onge mentioned how helpful this can be in reducing anxiety in veterans, allowing them to function.

Mr. Everett commented that in the amount of savings for them, one bottle of the oil would cost them \$300.00 and would last approximately three months.

In response to Representative Petrie, Representative Nemes agrees that the bill needs to be presented in a timely manner, allowing time to review each issue. They want to make sure it is the right bill when presented.

There being no further business, the meeting adjourned at 12:19 pm.