

# **INTERIM JOINT COMMITTEE ON JUDICIARY**

## **Minutes of the 4th Meeting of the 2019 Interim**

**September 13, 2019**

### **Call to Order and Roll Call**

The 4th meeting of the Interim Joint Committee on Judiciary was held on Friday, September 13, 2019, at 10:00 AM, in Room 154 of the Capitol Annex. Senator Whitney Westerfield, 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, John Schickel, Dan "Malano" Seum, Robert Stivers II, Robin L. Webb, Stephen West, and Phillip Wheeler; Representatives Kevin D. Bratcher, McKenzie Cantrell, Daniel Elliott, Angie Hatton, Joni L. Jenkins, Stan Lee, Derek Lewis, Chad McCoy, Reginald Meeks, Patti Minter, Kimberly Poore Moser, Jason Nemes, Brandon Reed, and Maria Sorolis.

Guests: Chief Justice John D. Minton, Jr., Kentucky Supreme Court; Deputy Chief Justice Lisabeth Hughes, Kentucky Supreme Court; Laurie Dudgeon, Director of the Administrative Office of the Courts; John Meyers, Executive Director of the Kentucky Bar Association; Chris Cohron, Commonwealth's Attorney for the 8<sup>th</sup> Judicial Circuit; Rob Sanders, Commonwealth's Attorney for the 16<sup>th</sup> Judicial Circuit; Martin Hatfield, Pulaski County Attorney; Damon Preston, Public Advocate for the Department of Public Advocacy; Rebecca Ballard DiLoreto, Legislative Agent for the Kentucky Association of Criminal Defense Lawyers.

LRC Staff: Katie Comstock, Alice Lyon, Chandani Kemper, Dale Hardy, Matt Trebelhorn, Raleigh Dixon, and Yvonne Beghtol.

### **Approval of the Minutes**

Senator Schickel made a motion to approve the August 23, 2019 minutes, seconded by Representative Petrie, and passed by voice vote.

### **State of the Judiciary**

Chief Justice John D. Minton, Jr. of the Kentucky Supreme Court presented the 2019 State of the Judiciary Address. The Supreme Court adopted the Civil Justice Reform Commission's recommendation for a Business Court Docket pilot to begin in Jefferson County. A Business Court Docket Advisory Committee was created to develop eligibility criteria and to draft a set of rules. The Business Court Docket is expected to be up and

running on January 1, 2020. Chief Justice Minton highlighted the Supreme Court's civil justice reform initiative to address concerns regarding the cost, delay, and complexity of civil litigation.

The Civil Justice Reform Commission has also focused on case triage and case management. The goal of case triage is to move less complex cases through the system quickly. Case management emphasizes the judge's role in moving cases forward rather than attorneys and other parties. The Civil Justice Reform Commission recommended a limited pilot project that would focus on a case triage and case management system that would provide for mandatory use of a uniform civil case cover sheet to allow for early identification of case types, use of a streamlined case management approach for simple contract disputes, use of separate docket calls for streamlined cases, and use of telephonic scheduling and status conferences.

Chief Justice Minton noted that the Court Efficiency Committee began meeting in 2018 to address and identify issues that lead to court delays. The committee has met with Laura Sudkamp, director of the Kentucky State Police Forensic Laboratory System, to discuss delays in processing toxicology and forensic lab reports. The committee has also reviewed internal procedures for notifying judges of their pending cases relevant to the 90-day submission rule, the Court of Appeals and Supreme Court pending case reports and time frames for disposition, and the 48-hour presentation rule in criminal cases.

Judicial redistricting continues in preparation of the caseload study to be performed in 2020. To ensure that proposals for judicial redistricting or reallocation are based on current data, the study is to be conducted every eight years. In January of 2019, the Judicial Workload Assessment Committee held their first meeting and requested that "Delphi" meetings be held to provide a qualitative assessment of the results of the judicial time study. The National Center for State Courts will facilitate the Delphi meeting in October of 2019. Results will determine if a new judicial time study is needed, or if the time study conducted in 2015 can be used. If determined necessary, recommendations will be made to the General Assembly before the 2021 legislative session.

Chief Justice Minton highlighted that a community engagement listening session was held in Jefferson County and that the Jefferson County Racial Fairness Commission has issued four reports since its inception: sentencing, bail, jury selection, and courtroom environment. While group surveys indicate a favorable perception of the Jefferson County judicial system, African Americans believe both race and financial status affect how parties are treated. Following the lead of the National Center and building upon conversations started by the Racial Fairness Commission, a public listening session was held in Jefferson County on May 16, followed by a series of focus groups on bail and incarceration, evictions, Family Court, Drug Court and expungements.

Chief Justice Minton noted the move to electronic records. KYeCourts launched KY3 this year in eight pilot counties in an effort to improve court operations through updated technology. KY3 allows clerks to scan and store documents digitally. The Electronic Court Record Committee was created to produce new rules to govern the creation and availability of electronic court records to availability while protecting the privacy of the personal information contained within.

The Administrative Office of the Courts (AOC) Department of Family & Juvenile Services is administering the Open Courts Pilot Project, which opens child protection cases to the public from 2018-2021 in selected counties. The first annual report from AOC was released in September of 2018. The second phase of this pilot project will start this fall in Fayette Family Court.

Chief Justice Minton highlighted the court system's effort to help mitigate Kentucky's drug epidemic. A three-year Regional Judicial Opioid Initiative (RJOI) addresses the need for education, resources, and services. The first year focused on best practices, child welfare, prescription drug monitoring, treatment capacity, and research. The second year produced resources for judges when evaluating treatment options. The third year will include the implementation of teleservices and other online resources for judges.

Responsive Education to Support Treatment in Opioid Recovery Efforts (RESTORE) was created in 2019 to provide evidence-based information on best court practices to support the treatment of opioid use disorders for court-involved individuals and their families. Through RESTORE, AOC is offering two one-day summits; one in the summer and one in the fall, in seven locations throughout the state. The summits help court officials understand substance use disorders.

The Drug Court experiment began in 1996, serving only high-risk, high-need individuals who had been convicted of a non-violent felony and entered Drug Court through a plea agreement or referral. The current model is not designed to support the influx of people coming into the courts with lesser charges. These court-involved individuals, their families, and their communities would benefit from access to case management resources and treatment providers at every level of the court system. The Kentucky Supreme Court is working on a budget request to address these issues.

Chief Justice Minton agrees that the court system needs to be at the table when addressing solutions to the overcrowding of jails and bail reform.

Chief Justice Minton informed the committee that Kentucky still lags behind most states in judicial salaries, and believes this affects attracting and retaining a well-qualified bench.

In response to the recent audit, AOC implemented a new organizational structure that took effect in May of 2019. An Audit Oversight Committee is also being created to review internal audits and authorize annual internal audit plans.

In response to Chairman Westerfield, Chief Justice Minton said that Judge John McCarty handles DUI Court in Hancock, Butler, Ohio, and Edmonson counties through a federal grant, which is about to expire.

In response to Chairman Westerfield's question on behalf of Senator Schroder, Laurie Dudgeon, Director of the Administrative Office of the Courts, said Jefferson County had a court process in which judges would take calls on emergency custody orders. The process has been changed to issue those as an electronic warrant, with an electronically signed affidavit, presented to judges from cabinet workers, and returned to the cabinet.

In response to Representative Bratcher, Chief Justice Minton said that Kentucky's law schools operate on their own. The Supreme Court is responsible for the credentialing of lawyers, administering the bar examination, and coordinate with the law schools on the topics that will be tested.

In response to Senator Wheeler, Chief Justice Minton said there are many qualified candidates applying for judicial openings, which helps keep Kentucky competitive with other states.

In response to Representative Nemes, Chief Justice Minton stated that because budget reductions led to the removal of Family Drug Courts, he plans to submit a budget request to expand Family Drug Courts across the state.

In response to Senator Stivers, Chief Justice Minton stated that the Supreme Court has obligations under the constitution for the credentialing of lawyers. The Kentucky Bar Association (KBA) is responsible for lawyer discipline but the Supreme Court has the ultimate authority to disbar the lawyer. The Kentucky Lawyer Assistance Program is in place to protect the public by maintaining the integrity of the profession. John Meyers, Executive Director of the KBA, stated that the KBA will receive the complaint and investigate without it being public knowledge until it reaches a higher level charge authorized by the KBA's Inquiry Commission. That hearing may lead to public discipline. Deputy Chief Justice Lisabeth Hughes added that there is a temporary suspension rule for instances that contain a level of emergency. Mr. Meyers stated that a complaint can come from different sources.

Regarding Senator Stivers question on the number and cost of drug court cases, Chief Justice Minton verified that there are approximately 2,500 cases per year and the cost has been funded by federal grants and the state budget. Ms. Dudgeon added that looking at

a different funding model may be necessary. There is also a need for probation services for District Court clients.

In response to Chairman Westerfield, Ms. Dudgeon stated that approximately 2,400 of the 2,500 participants throughout all the specialty courts are in drug court.

In response to Representative Cantrell, Chief Justice Minton stated that the jury selection procedure is being reviewed to make sure there is a random selection of peers.

### **Prosecutorial Issues and Concerns: Commonwealth's Attorneys**

Chris Cohron, Commonwealth's Attorney for the 8<sup>th</sup> Judicial Circuit, announced the approval of the FY19 Rocket Docket report. Money allocated to the Rocket Docket Program in FY19 allows for 41 circuits to create their own program. Since the inception of the Rocket Docket Program in 2015, there has been a cost savings of \$100 million and cases are being evaluated to find an alternative to incarceration while still ensuring public safety. Mr. Cohron stated that the goal in Warren County is to have a treatment plan for the individual by the time of the preliminary hearing, which moves cases through the system more quickly, lowering jail costs and increasing public safety. He would like to see the program codified as a part of the unified prosecutorial system, allowing the program to expand to all 57 circuits.

Rob Sanders, Commonwealth's Attorney for the 16<sup>th</sup> Judicial Circuit, spoke about the Rocket Docket Program in Kenton County. The Heroin Expedited Addiction Recovery and Treatment (HEART) Program was established in an effort to move defendants out of jail custody and into drug treatment as quickly as possible. Defendants held on possession of a controlled substance are released on their own recognizance if they agree to go into recommended treatment. Public transportation picks them up from the jail and transfers them to drug treatment. The Rocket Docket Program is now servicing the cases of 8,000 defendants per year across the state.

Mr. Cohron added that the deferred prosecution statute needs amending as there is no meaningful supervision at the District Court level. In addition, drug intervention at the Juvenile Court level is so important.

In response to Chairman Petrie, Mr. Sanders assured the committee that Rocket Docket funding is revoked or denied to programs that do not meet grant requirements. Mr. Cohron added that the Rocket Docket grant requires constant reporting to ensure the program is not being used as a means of leverage for plea bargains. Mr. Sanders noted that Rocket Docket funds only pay one employee salary for data collection, making it difficult to meet all data requests.

In response to Senator Webb, Mr. Cohron agrees that some plea deals may be revoked if the person does not participate in Rocket Docket, but it is a voluntary program.

Mr. Sanders added that each circuit is different and there are ways to work around some of those situations.

In response to Representative Moser, Mr. Sanders stated there is no meaningful supervision for deferred prosecution for misdemeanors and that those on probation are not sent back to prison without due cause.

In response to Senator West, Mr. Sanders stated that the qualifications to be a law enforcement officer in Kentucky are not very high. Therefore, Mr. Sanders is hesitant to allow officers to make the determination as to whether treatment or incarceration should be allowed. Looking at other states, such as Ohio, that offer treatment in lieu of prosecution is recommended. Mr. Cohron added that there is not enough data to start such a program. The liability to those officers would be exponential.

Mr. Cohron highlighted an article discussing individuals in the criminal justice system that are incompetent to stand trial but not committable. He noted that defendants found barely competent to stand trial end up going to prison when they need to be in a mental health facility. He stated that this loophole needs to be closed. Mr. Sanders stated he is handling a similar case right now.

In response to Senator Carroll, Mr. Cohron suggests turning a Department of Corrections institution into a small lockdown in-patient treatment center. Senator Carroll offered any assistance needed to help remedy this situation.

### **Prosecutorial Issues and Concerns: County Attorneys**

Martin Hatfield, Pulaski County Attorney, addressed the needs of District Courts in regards to pretrial release, search warrants in DUI investigations, child support guidelines and budgeting, and County Attorney lawsuits. More cases are seen at a District Court level than the Circuit Court level. Mr. Hatfield pushed for funding at the District Court level, which would lessen the burden on Circuit Courts. He also noted that the County Attorney Association supported the Ignition Interlock legislation. However, the association would like to see the search warrant language that was removed in the House passed this session. Mr. Hatfield also gave testimony on a lawsuit where he and other county officials are being sued and the state is not providing a defense. He recommended amending KRS 65.2005 to provide representation for officials who are sued due to performing prosecutorial duties, when there is no insurance coverage.

In response to Senator Carroll, Mr. Hatfield stated that the association is not aware of any issues regarding criminal records being brought before juries in misdemeanor trials, so they have not taken any action on the topic, but he will check into it.

### **Criminal Defense Issues and Concerns: Department of Public Advocacy**

Damon Preston, Public Advocate, provided members with the Department of Public Advocacy's 2019 FY Annual Report for them to review. Mr. Preston stated that Department of Public Advocacy (DPA) continues to help with the expungement clinics throughout the state. Though Criminal Justice Reform is discussed, he noted that 31 legislative changes in 2019 added crimes, increased penalties, or expanded the elements of crimes. In addition, the strangulation bill data from June 27, 2019 to September 6, 2019 shows that DPA has already handled 84 charges.

Mr. Preston believes that trials help the system. Only one out of 300 DPA cases go to trial, largely due to the high risk for the defendant. Mr. Preston noted that those who are innocent and convicted will serve more time than if a person is guilty and admits his or her guilt.

Mr. Preston advocated for a bill that would allow juries upon convicting a defendant of a class D felony, to reduce the Class D felony to a Class A misdemeanor if a felony conviction would be "unduly harsh." He also advocated for the passage of bills like 2019 HB 388, 389, and 390.

In response to Chairman Westerfield, Mr. Preston clarified that a jury could reduce an offense, even if given an instruction on a lesser included offense, because they had already been found guilty of a Class D felony and had just come back for sentencing.

In response to Senator Carroll, Mr. Preston confirmed that a public defender can be called upon arrest, without the court appointing the public defender, because the individual has the right to counsel at that time.

### **Criminal Defense Issues and Concerns: Kentucky Association of Criminal Defense Lawyers**

Rebecca Ballard DiLoreto, Legislative Agent for the Kentucky Association of Criminal Defense Lawyers (KACDL), stated that pretrial release exists to protect the individual against the power of the state. Studies show that those incarcerated at pretrial are more likely to be found guilty, because they are locked up. This leads to collateral consequences such as loss of jobs and families. Ms. DiLoreto suggested three remedies to be considered by the committee: 1) guide courts not to use cash bail as a means to keep people incarcerated when they can be safely released and will return; 2) implement a clear and convincing evidence standard; and 3) a fast and speedy trial right.

Ms. DiLoreto highlighted several other concerns such as the need for guidance from the legislature that Probation and Parole are to consider what the conviction was, not all of the offender's prior allegations. In addition, District Courts do not have the resources they need to supervise those on probation and possession of marijuana needs to be regulated but not criminalized. Further, she noted that those incarcerated between the ages of 18-25 should not be treated the same as the adult population and that KACDL would like to see

the death penalty applications reduced, if not abolished. In addition, the application of civil asset forfeiture needs to be reviewed.

In response to Senator Carroll, Ms. DiLoreto believes that focusing on the 18-25 age group is a moral imperative. She stated that we have a duty to help them turn their lives around. Since they are of the age to procreate, this will also have a positive effect on the next generation.

### **Adjournment**

Chairman Westerfield reminded members of the October 4th meeting. There being no further business the meeting adjourned at 1:00 pm.