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THE NEXT STEP IN PRETRIAL RELEASE IS HERE: THE ADMINISTRATIVE RELEASE PROGRAM

by B. Scott West

B. Scott West
General Counsel
Department of Public Advocacy

Without exaggeration, the biggest reform in pretrial release since the 1976 Kentucky Bail Reform Act – HB 463 notwithstanding – arrives in all 120 counties on January 1, 2017. District Court practitioners should see a great increase in the number of their misdemeanant clients being let out of jail, even before first appearance in Court.

The reason is Kentucky Supreme Court Order 2015-24, which authorizes the Non-Financial Uniform Schedule of Bail Administrative Release Program, goes statewide after a successful implementation as a pilot program in 20 counties. "Administrative release" means that certain persons charged with misdemeanors – those who are low risk (or on the low side of moderate risk) to fail to appear in court or to reoffend by committing new criminal activity – will be subject to automatic pretrial release upon their "own recognizance" if they meet the other criteria specified in the Order. As lawyers are fond of saying, "certain exclusions apply," but for the most part, most non-sexual, non-violent, non-DUI misdemeanants who fall outside of the high risk category will be able to be released even before arraignment.

Order 2015-24 was adopted by the Supreme Court in December, 2015, with only one justice dissenting, and is therefore binding upon all the district courts. At present, the Order currently is binding only upon the 20 counties in the pilot program, although other counties were allowed to, and did, "opt in." Starting January 1, 2017, all district courts shall begin releasing all those who fall within the mandatory R.O.R. release categories. To summarize the Order:

- Pretrial Officers will continue to assess all verified and eligible defendants by use of the pretrial risk assessment, on a scale of 2-12, and will specify whether a defendant is a low risk (2-5), moderate risk (6-9) or high risk (10-12). The risk assessment instrument will be applied to the defendant prior to or at the approximate time of the pretrial interview;
- Defendants who score in the "low risk" category and who are not otherwise ineligible shall be released on their own recognizance with conditions as ordered by the court;
- Defendants who score in the "moderate risk" category with either a 6 or a 7 and who are not otherwise ineligible shall be released on their own recognizance with supervision as per the Pretrial Services risk/needs matrix.
- Persons excluded from eligibility under this Order are those persons charged with:
  - A "violent crime" listed in Appendix B to the Order;
  - A "sexual offense" listed in Appendix C to the Order;
  - Aggravated DUI 1st (other than one aggravated by a refusal) or any second offense or greater DUI;
  - Contempt of court;
  - Violation of an order of conditional discharge of a misdemeanor; or
  - Violation of an order of probation of a felony.
- Defendants who have previously failed to appear on the charge, or decline the pretrial services interview are not eligible under the schedule.
- Persons who are assessed as a "moderate risk" of 8 or 9, or who are a "high risk" shall only be released upon judicial review with supervision and conditions of release.
- Judges may deviate from the schedule, but only in two respects: The court may expand the schedule to include certain non-violent, non-sexual Class D felonies, other than a charge of "fugitive from justice," or may expand the schedule to include "moderate risk" defendants who score an 8 or 9. Such deviations may be made by passage of a local rule, and no other deviations are permitted by the Order.

Such a broad and sweeping change in pretrial practice, which is scheduled to occur overnight, may not occur without some hiccups and snafus. Criminal defense attorneys must be diligent to make sure that their clients who are eligible under the Order are in fact released, and that conditions ordered by the court are reasonably tailored to the defendant. The criminal rules which pertain to bail appeals still apply.

Supreme Court Order 2015-24 in its entirety, with Appendices, can be found at: http://courts.ky.gov/courts/supreme/Rules_Procedures/201524.pdf.

FIVE BAIL CASES THE KENTUCKY CRIMINAL DEFENSE ATTORNEY ABSOLUTELY MUST KNOW (AND WHY)

by B. Scott West

The "presumption of innocence" is meaningless to the defendant in a criminal case who cannot obtain pretrial release and get out of jail. More than the merits of his case, more than any defense he may have to his prosecution, your client wants to talk to you first about bail and how he is going to get out of jail. The need to get out of jail is immediate, and working on the defense of his case can wait. Moreover, the Performance Guidelines for Criminal Defense Representation, published by the National Legal Aid and Defender Association, devotes Section 2 – the first substantive chapter devoted to specific practice guidelines – wholly to pretrial release, citing the "obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client." Guideline 2.1. Finally, *Kentucky Bar Association v. Donsky*, 924 S.W.2d 257 (Ky. 1996) underscores the importance of pretrial release advocacy by adopting the recommendation of the Kentucky Bar Association's Board of Governors for a six-month period of suspension when an attorney was charged, among other things, for his "failure to appear at his client's first arraignment and his failure to move the court for bond reduction at the second scheduled arraignment."

Thus, in order to effectively and ethically defend the criminally accused, the defense attorney must be ready and able to zealously advocate for the release of his client. To do that, the Kentucky attorney should be aware of five major bail decisions, two of them decisions of the United States Supreme Court, and three of them decisions of Kentucky courts. Just about every meaningful bail argument that can be made finds authority in one of these cases, or several in combination. Consider these cases the "Pentateuch" of bail advocacy in this Commonwealth, and cite to them early and often in bail hearings and in bail appeals / writs of habeas corpus.

#1: *Stack v. Boyle*, 342 U.S. 1 (1951)

This case is the granddaddy of all bail cases. It was decided in the height of the "red scare" – the investigation of un-American activities – when Loretta Stack and eleven other members of the Communist Party were arrested and charged with violating the Smith Act, 18 U.S.C. § 2385, also known as the "Alien registration Act of 1940," for allegedly advocating the overthrow of the United States Government. Each defendant's bail was set at varying amounts, ranging from $2,500 to $100,000. Defendants challenged the bail via writ of habeas corpus as violating the Eighth Amendment prohibition of "excessive bail." Although a very short opinion, the case is chock-full of holdings pertinent to bail advocacy both at the bail hearing level and upon appeal:

The presumption of innocence implies a right to pretrial release. "[F]ederal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction…[citation omitted]. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack*, at 3.

Bail set higher than necessary to assure presence of the accused in court is excessive. "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." *Stack*, at 4.

Judges do not have plenary and absolute discretion when setting bail, but must do so within a "zone of reasonableness." "Petitioners' motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a zone of reasonableness, but challenged the bail as violating statutory and constitutional standards. As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a 'final decision' of the District Court…" *Stack*, at 6.

***Stack v. Boyle* stands for the proposition that the amount of bail must be tied to the purpose of assuring attendance at trial, not to detain, and must be tailored to the individual.** "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. … Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant." *Stack*, at 4-5.

***Stack v. Boyle* applies to the states, and therefore is relevant in Kentucky bail hearings.** It is now understood that the "excessive bail" prohibition of the Eighth Amendment has been applied to the states. *Schilb v. Kuebel*, 404 U.S. 357 (1971), stated that "the Eighth Amendment's proscription against excessive bail has been assumed to have application to the states through the Fourteenth Amendment," citing *Pilkinton v. Circuit Ct.*, 234 F.2d 45 (8th. Cir. 1963); *Robinson v. California*, 370 U.S. 660 (1965). However, the actual holding in *Schilb* was that the Eighth Amendment was not applicable to the facts in that case, leaving

constitutional scholars to doubt whether this case actually held that the excessive bail provision had actually been applied to the states. That doubt was resolved in the famous Second Amendment case, *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), wherein the Supreme Court noted in footnote 12 that the "excessive bail clause" of the Eighth Amendment had been applied to the states, citing *Schilb v. Kuebel*.

#2: *U.S. v. Salerno*, 481 U.S. 739 (1987)

After *Stack v. Boyle*, *supra*, was decided, it was long assumed that the sole consideration when setting bail in a federal case was tied to the purpose of assuring attendance at trial, and that there were no circumstances where other considerations – like public safety – could be considered as a reason not to grant a make-able bail. It was not until the arrest of Anthony "Fat Tony" Salerno, the "street boss" of the Genovese Crime Family in New York, that the United States Supreme Court carved out an exception to the *Stack v. Boyle* rule, and created the additional bail consideration of "future dangerousness." Charged with crimes under the Racketeer Influenced and Corrupt Organizations Act (RICO), the government argued for detention in lieu of bail, under the Bail Reform Act of 1984 as it was then written, arguing that "no condition or combination of conditions [would] reasonably assure the appearance of [Salerno] as required and the safety of any other person and the community." Pursuant to the Bail Reform Act, Salerno, represented by counsel, was given a hearing at which the Government introduced evidence of Salerno's future dangerousness, including wiretap evidence that Salerno was the "boss" of a crime family, and that he had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. Additionally, the Government called two witnesses who asserted that Salerno was involved in two murder conspiracies. Finally, as per the Act, the judge had to make a finding of future dangerousness by "clear and convincing evidence" before Salerno could be detained without bail.

The Eighth Amendment does not establish an absolute right to bail, but holds only that where bail is granted, it cannot be excessive. (The same cannot be stated about Kentucky's Constitution, which does in fact create a substantive right to bail.) "The Eighth Amendment addresses pretrial release by providing merely that '[e]xcessive bail shall not be required.' This Clause, of course, says nothing about whether bail shall be available at all. Respondents concede that the right to bail they have discovered in the Eighth Amendment is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses. While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release." *Salerno*, at 752-53.

It is important to note that in this way the United States Constitution is different from that of the Commonwealth of Kentucky. Section 17 of the Kentucky Constitution parrots the language of the Eighth Amendment's "excessive bail provision," and therefore – having been applied to the states – exports all Eighth Amendment bail cases into the substantive law of the states. However, Kentucky also has Section 16 which establishes a right to bail in language that is absent from the United States Constitution: "All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great…" Thus, Chief Justice Rehnquist's sidestep of the Eighth Amendment would not work when interpreting the Kentucky Constitution which affirmatively holds that there is right to bail except in the case of a death penalty case. Even then, the defendant is entitled to a hearing wherein the Commonwealth has to prove that the defendant is likely guilty of the death penalty offense.

Nevertheless, pretrial release should be the rule, and detention the exception: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, at 755.

Pretrial Detention without bail must satisfy the "Due Process" Clause. The Bail Reform Act of 1984 required a showing of "clear and convincing evidence" in order for the Government to detain an arrestee without bail. "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934)). *Salerno*, at 751.

Some prosecutors may argue that *Salerno* only held that a "clear and convincing evidence" standard suffices to satisfy due process, but that it did not mandate such a standard, and that a lesser standard may also suffice. But see, e.g., *Kleinbart v. U.S.*, 604 A.2d 861 (D.C. Circ. – 1992)("[T]he government must justify pretrial detention, based on the danger the defendant poses to others or the community, by clear and convincing evidence"); *State v. Furgal*, 13 A.3d 272 (N.H. – 2010)("We conclude that the clear and convincing evidence standard is the standard for determining whether or not the State has shown that the proof is evident or the presumption great"); *Wheeler v. State*, 864 A.2d 1058 (Md. App. – 2005)("[P]reventive detention" may be ordered … provided that the judicial officer is persuaded by clear and convincing evidence that no condition or combination of conditions of pretrial release can reasonably protect against the danger that the defendant presents to an identifiable potential

victim and/or to the community"); *Aime v. Commonwealth*, 611 N.E.2d 204 (MA – 1993)("The challenged portions of the amendments to the Massachusetts bail statute do not pass due process scrutiny under the principles set forth in *Salerno*…. The Bail Reform Act requires that the government provide clear and convincing evidence to support its showing that an arrestee's release would endanger the community… The amendments [to the Massachusetts statute] do not impose any such burden of proof on the Commonwealth"). In any event, the standard for detention must be a heightened evidentiary standard, higher than probable cause or judicial discretion.

***Salerno* applies to the states.** The portion of the opinion which references the Fifth Amendment Due Process Clause necessarily applies to the states because the identical clause is contained in the Fourteenth Amendment, which applies to the states. Thus, in order for any pretrial release detention statute or case decision to pass constitutional muster, it must also pass the *Salerno* tests.

#3: *Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950)

In *Adkins v. Regan* an arrestee charged with two counts of breach of the peace was released upon a bond of $100 for each charge. Later, his bail was raised to $5,000, which Adkins could not post, which resulted in his pretrial detention.

Money cannot be used to detain in a case bailable by law. "Reasonableness in the amount of bail should be the governing principle. The determination of that question must take into consideration the nature of the offense with some regard to the prisoner's pecuniary circumstances. If the amount required is so excessive as to be prohibitory, the result is a denial of bail. Under the circumstances of this case, obviously bailable by law, it appears to us that the requirement of $5,000 bail is so clearly disproportionate and excessive as to be an invasion of appellant's constitutional right." *Adkins*, at 405. This case equates a bail set in an amount too high to be made by the defendant to be excessive, and therefore a "denial of bail." Accordingly, there is no difference between detaining someone without setting a bail, or setting bail so high that gaining release is prohibitory. Thus, under Kentucky law – which grants a substantive right to bail – there is a persuasive argument that bail cannot be set so high that a person cannot gain release, period. But assuming that *Salerno*, *supra*, impliedly overrules this case, even then, a decision to set a bail for purposes of detention can only be reached upon clear and convincing evidence that the person is such a flight risk, or a danger to the public, that he should be detained.

#4: *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971)

Long was charged with unlawful possession and trafficking of heroin. Bail was fixed in the amount of one hundred fifty thousand ($150,000) dollars. In finding the amount to be excessive under the Kentucky Constitution, Kentucky's highest court held:

Bail honors the presumption of innocence. "A defendant in a criminal action is presumed innocent of any charge until convicted. The allowance of bail pending trial honors the presumption of innocence and allows a defendant freedom to assist in the preparation of his defense." *Long*, at 141.

"Bail is for the purpose of guaranteeing the appearance of the defendant and his compliance with the terms of the bond." *Long*, at 141. "It is manifest that the amount of the bail should be that which in the judgment of the court will insure compliance with the terms of the bond. In determining that amount the trial court should give due regard to the ability of the defendant to give bail, the nature and circumstances of the offense charged, the weight of the evidence against him, and the character and reputation of the defendant, but he should regard these factors only to the extent that they have a bearing upon the likelihood that the defendant will flee from the jurisdiction of the court or that he will comply with the terms of the bond." *Long*, at 141.

A large bail requires a showing of risk of flight or of some other unusual circumstance. "As we have indicated there are many circumstances in this case which would justify the requirement of bail in a large amount to insure the appearance of the accused at trial but there was no evidence of intended flight or that the accused was a fugitive when arrested or any other circumstance so unusual as to require bail in an amount so greatly in excess of that generally required under similar circumstances. We therefore feel that the requirement of bail in the amount of $150,000.00 in this case was an abuse of discretion." *Long*, at 142.

The propensity of some persons released on bail to commit new crimes is not a reason to ignore the constitutional guarantees of bail. "We are not unmindful that some defendants, at liberty on bail pending trial of charges, commit other crimes and engage in conduct which focuses attention upon the fact that the charges remain untried. We think that there is an undercurrent of public dissatisfaction at this state of affairs. Nevertheless, the constitutional guarantees to bail remain unaltered. Any attempt to impose excessive bail as a means to deny freedom pending trial of charges amounts to a punishment of the prisoner for charges upon which he has not been convicted and of which he may be entirely innocent. Such a procedure strikes a blow at the liberty of every citizen. The answer to the problem posed by the increasing number of defendants who commit other crimes while awaiting trial is a speedier trial of the charges against them. Prompt disposition of criminal charges redounds to the benefit of the accused and the public alike." *Long*, at 142.

#5: *Abraham v. Comm.*, 565 S.W.2d 152 (Ky. App. 1977)

Abraham was the first case to be decided under the 1975 Kentucky Bail Bond Reform Act. In addition to abolishing paid bail bondsmen in this state, the Act also made some sweeping changes to the practice of bail, not all of which were welcomed. Among them was the creation of KRS 431.525, which mandated that the amount of bail fixed for a criminal offense shall be:

(a) Sufficient to insure compliance with the conditions of release set by the court;
(b) Not oppressive;
(c) Commensurate with the nature of the offense charged;
(d) Considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released; and
(e) Considerate of the financial ability of the defendant.

Following passage of the Act, and after a bail hearing, the trial judge set bail on a theft case in the amount of twenty-five thousand ($25,000) dollars on each count of theft, which was the "bond always set by this Court in theft and related cases." *Abraham*, at 157. In finding this amount of bail to be excessive, the Court of Appeals made the following findings:

The source of judicial discretion if the General Assembly and the Supreme Court, not inherent powers based in the Kentucky Constitution. "Great discretion is vested in the circuit judge respecting bail. When there has been an exercise of discretion by the circuit judge in fixing bail, that decision will not be disturbed by this court on appeal. *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971). However, the record should demonstrate that the circuit judge did in fact exercise the discretion vested in him under the statutes and rules [emphasis added.]" *Abraham*, at 158. Since the General Assembly is the source of the statutes, and the Kentucky Supreme Court is the author of court rules, the trial judge's discretion is derived NOT from inherent powers of the judicial branch in the Kentucky Constitution, but rather are as provided by the legislature and the Supreme Court. This is important, as it implies that the amount of discretion afforded to trial judges are subject to change via legislative enactment and/or changes in Supreme Court rules.

Under the statutes, a trial judge must make decisions concerning the "amount of bail" pursuant to ALL of the factors listed in KRS 431.525, not just one or several. "The order reflects that the trial court considered only the nature of the offenses in fixing the amount of bail. This is a proper factor to consider in fixing the amount of bail. However, under KRS 431.525 (1) and RCr 4.16(1), the trial court is also required to consider the defendant's past criminal record, his reasonably anticipated conduct if released, and his financial ability to give bail.... Even though the circuit judge had discretionary authority respecting bail, the record should clearly reflect that the circuit judge did give consideration to KRS 431.520 and RCr 4.10 and that the amount of any bail was determined according to the standards set forth in KRS 431.525 and RCr 4.16(1). See *Brewer v. Commonwealth*, 550 S.W.2d 474, 478 (Ky. 1977)." *Abraham* at 157-58.

Deciding bail after consideration of only ONE factor listed in KRS 431.525 is an abuse of discretion. "[T]he record should demonstrate that the circuit judge did in fact exercise the discretion vested in him under the statutes and rules. In the present case, the record shows only that the circuit judge always sets the bond at $25,000.00 on every theft charge. This does not constitute the exercise of judicial discretion. See, *Wyatt v. Ropke*, 407 S.W.2d 410 (Ky. 1966)." *Abraham*, at 158.

Courts should give written reasons for their bail decisions. "If there is to be meaningful appellate review, either the order or the record of the hearing should contain a statement of the circuit judge's reasons for refusing to reduce bail." *Abraham*, at 158.

***Stack v. Boyle*'s language concerning the use of a writ of habeas corpus for the trial court's failure to set bail "within a zone of reasonableness" was quoted and adopted by the *Abraham* court.** "We believe that the decision of the Supreme Court holding such orders appealable is sound, and we adopt it." *Abraham*, at 155.

Putting All of the Cases Together...

In Kentucky, the trial court has the discretion to set bail in an amount so as to ensure appearance in court and compliance with conditions of release. (*Long*, *Abraham*) But this discretion is not unlimited (*Long*, *Abraham*); it must be within a "zone of reasonableness." (*Stack*, *Abraham*) In exercising that discretion, the trial court must consider all of the factors pertaining to bail in KRS 431.525, as well as the defendant's risk of flight, and risk of not complying with judicial orders. (*Abraham*, *Long*) Considering only one, or less than all of the KRS 431.525 factors is an abuse of discretion. (*Abraham*) However, the trial court cannot fix the amount of bail to detain, as bail set in an amount so excessive as to be prohibitory amounts to denial of bail, that is, detention. (*Adkins*, *Long*) Even if the court believes that the defendant has a propensity to commit another criminal act while on release, any detention (or bail set in an amount so as to detain) must be done in accordance with due process, which requires a finding by "clear and convincing evidence" of risk of flight or future dangerousness. (*Salerno*) In any event, the court must give written reasons for its bail decision, so that there will be record on appeal. (*Abraham*)

REPORT DOCUMENTS IMPACT OF PARENTAL INCARCERATION ON CHILDREN: KENTUCKY HAS HIGHEST RATE IN NATION

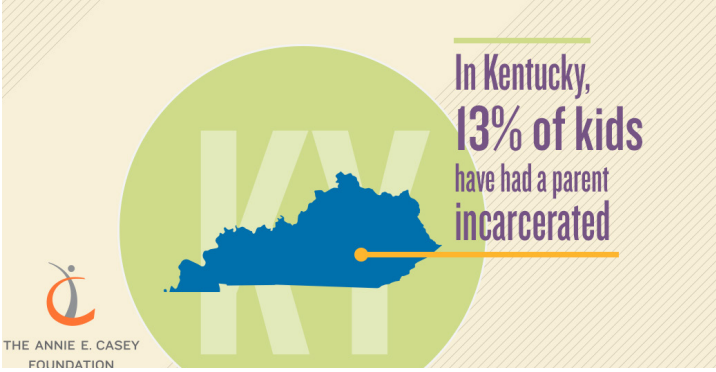
by Tara Grieshop-Goodwin

Tara Grieshop-Goodwin
Chief Policy Officer
Kentucky Youth Advocates

A Shared Sentence. That's the title of a report on the impact of parental incarceration released this year by the Annie E. Casey Foundation. The report reflects the reality that when a parent is sentenced to serve time in jail or prison, the children feel the impact too. That impact can be felt in multiple ways, from the parent and child being physically separated to the loss of income for the family.

A Shared Sentence: the Devastating Toll of Parental Incarceration on Kids, Families and Communities, The Annie E. Casey Foundation (www.aecf.org/resources/a-shared-sentence/), provides some new insight to this challenging problem. The report shares data on the number of children impacted by parental incarceration, documents the impact on children and families, and identifies ways to ease the impact of incarceration.

Nationally, an estimated 5.1 million children have experienced parental incarceration. Among all states in the nation, Kentucky ranks highest at 13 percent of children. Kentucky's rate is nearly double the national rate of 7 percent.



A closer look at the numbers reveals that some Kentuckians are more likely to be impacted by parental incarceration. African-American children are slightly more likely than White children to have experienced the incarceration of a parent (16 percent compared to 13 percent). More than one in five children living in poverty has experienced parental incarceration.

Impact on the child

Experiencing parental incarceration can have a profound and lasting impact on a child and on their future. As the report states, "having a parent incarcerated is a stressful, traumatic experience of the same magnitude as abuse, domestic violence and divorce." Children who have a parent incarcerated are more likely to experience housing instability, and moves can disrupt their connections to friends, school, and other support networks.

When a child's mother is incarcerated, the child is more likely to end up living with grandparents, close family friends or in foster care, typically meaning even more disruption in their lives.

Having a parent incarcerated also takes its toll on a child's health. This experience causes trauma to children and has been identified as one of 10 adverse childhood experiences that can have a long-term impact on health, including early death. The trauma contributes to increased mental health issues among children.

> ***"Having a parent incarcerated is a stressful, traumatic experience of the same magnitude as abuse, domestic violence and divorce."***

Additionally, having a parent incarcerated often impacts a child's ability to learn. Especially when the incarcerated parent is the mother, children are more likely to drop out of school than their peers.

Impact on families and communities

The impact of incarceration extends beyond the traumatic experience for children. Family members who are left behind typically experience high levels of stress as they adjust to the loss of income and shouldering more of the responsibilities of caring for children.

Families with a breadwinner who is incarcerated are more likely to rely on government assistance to meet basic needs. Job stability for family members can also be impacted by new challenges with child care.

The impacts often continue after a parent's release, because having a criminal record limits job opportunities, in turn limiting a parent's ability to earn a decent living to cover a family's needs.

A Kentucky story

A young woman from Eastern Kentucky shared her experience of having a mother incarcerated. Katie (whose name has been changed to protect her identity) was twelve years old when the story began. She realized at that young age that her mother had a drug addiction.

She describes the instability that she and her two younger siblings experienced as they watched their mother struggle with addiction. They were homeless, sleeping on the living room

floors of friends' homes. Except Katie got to sleep in the recliner when her mom was in jail.

For Katie, living in this chaotic situation meant that learning was not a priority for her at school. She focused on trying to "look normal." This meant washing laundry in the sink with dish soap to try and look presentable.

She also described the struggle of just trying to survive. She and her siblings would eat meals at a church nearby. Sometimes they stole food from the kitchen, and they even broke in on days when the church wasn't open to be able to eat.

Katie's story is one of a child living beyond her years. Her mom cycling in and out of jail became the new routine. And at just 13 years old, she acted as a "mom" to her siblings. Luckily, Katie's grandma stepped up to take care of the children. But the children have experienced that trauma of having their mother locked up.

Supporting children and families

Many opportunities exist to minimize the impact on children when a parent is incarcerated. To begin, Kentucky can look at current policies and practices to make sure we aren't locking up people for minor offenses who don't pose a risk to public safety. Children need their parents to care for them and to earn a living to support them. When a parent is incarcerated who doesn't pose a risk to public safety, he or she loses the ability to earn a living.

Opportunities to reduce the impact on children include ensuring information is gathered on whether defendants have children during the pre-trial release process. That information should be utilized when making a determination on whether a defendant should be released while their case is pending and under what conditions they should be released. Especially for parents who are supporting children, non-monetary conditions (such as restrictions on the defendant's movement or activities) of release should be considered.

Another opportunity to minimize the impact on children occurs when the parent is first incarcerated. Especially for school-age children, alerting the school immediately that a traumatic event occurred with the child's family encourages school personnel to respond in a caring and understanding way to the child. With knowledge that a child's parent was incarcerated, school personnel can greet the child in the morning and make a personal connection. Teachers can be alert to the child's behavior throughout the day and watch for signs that the child needs to talk with a caring adult or time to cool off. Handle with Care West Virginia offers a model that creates such a response for kids who have experienced the trauma of a parent being locked up.

Children need to maintain a relationship with their parent during the period of incarceration. Decisions on where a parent is placed while incarcerated should factor in whether children will be able to visit. For young children, traveling long distances and waiting for long periods of time for visitation creates substantial barriers to maintaining a relationship between the child and parent.

Another option to help children and families deal effectively with the trauma of a parent being incarcerated are community-based services such as support groups and counseling for those left behind. Many private options exist across the state, yet the opportunity exists to proactively track supportive programs and communicate options to families while the parent is incarcerated.

Parenting classes also exist in some prisons and local jails for parents who are incarcerated. Regardless of where a parent is incarcerated, such programs would promote healthy parent/child relationships that can ease the transition home for parent and child.

Finally, the return home marks another critical point for supporting children and families. The reentry period can be a challenging time as families adjust to having the incarcerated person return home. This represents an important time for community supports, such as family counseling or support groups, to navigate the changes.

Supporting parents in caregiving

One of the most effective ways people can avoid returning to jail or prison is to improve their work and earnings capacity. Access to educational and vocational training while incarcerated increases the likelihood that a parent will find a job with sufficient income to support the family when released.

Conclusion

No one is above being held accountable for breaking the law. But Kentucky children need Kentucky's justice system to use incarceration carefully. The impacts on children must be considered, because the impacts are serious and long lasting. When incarceration is necessary, a child needs Kentucky prisons and jails to have visitation policies that work for the child. Identifying and implementing policy changes that address a child's needs will benefit that child but also increase the chances of keeping the parent from returning to prison. It creates a win-win situation.

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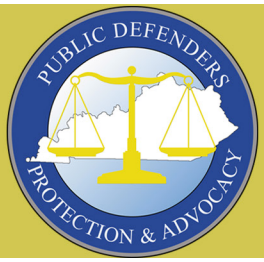

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