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A DIFFERENT PERSPECTIVE

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I have a different perspective on “Mass Incarceration” because I have worked at prosecuting, defending, and sentencing persons accused of criminal offenses.

In “Just Mercy,” Bryan Stevenson explains: that the prison population had increased from 300,000 in the 1970s to 2.3 million by 2011, that hundreds of thousands of nonviolent offenders are incarcerated, that over 500,000 substance abusers are in prison compared to about 41,000 in 1980.

In February, 2021 the Idaho Press indicates Idaho had 8,140 people in its facilities, which is down from 9,515 in 2020. There is no factual dispute that Idaho has a Mass Incarceration problem.

The Idaho Center for Fiscal Policy (ICFP) in its 2020 report states that policy choices over the last 40 years have caused the growth in prison population. Sentencing laws enacted in the 1980s required judges to order a fixed sentence before a prisoner was eligible for parole and a fixed sentence before discharge. ICFP urges these changes: sentencing reform for less serious drug and property offenses; re-examine the threshold dollar amount for certain property crimes to be felonies; end mandatory minimum sentences for drug offenses; revise sentencing guidelines which require prison for persons likely to commit another crime, which causes a nonviolent drug addict to go to prison.

ICFP claims that Idaho’s Justice Reinvestment Initiative (JRI) reforms in 2014 and 2017 have produced limited cost savings. What Idaho’s future efforts will be is difficult to predict.

Idaho is unlikely to follow Oregon’s path on drug offenses. Oregon made marijuana possession a non-criminal offense in 1973, legalized medical cannabis in 1998, and recreational cannabis in 2014. Oregon uses some of the 130 million in annual tax revenue for a Drug Treatment and Recovery Services Fund. In 2020 Oregon passed Measure 101 which reclassifies personal possession of a controlled substance as a non-criminal offense.

In the 2020 election several states passed measures to legalize marijuana: Arizona, Montana, New Jersey, and South Dakota. Mississippi passed medical marijuana.

This Essay tells about some of my experiences with Idaho’s criminal justice system.

In 1959-60 I served as Deputy Prosecuting Attorney in Canyon County, which was Idaho’s second most populous county. The Prosecutor’s office had only two attorneys and one secretary. The criminal case load was managed along with legal civil issues for county officials.

I recall only two significant drug cases. An attempted burglary during daytime of a pharmacy in Parma by a man with several prior drug convictions. The Defendant was charged with burglary and, being a habitual offender, was bound over to District Court for trial after a preliminary hearing. However, he failed to show up for trial after he posted bail. He was found dead in Washington. The second

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case involved a search warrant to search for marijuana at a small house and shed just outside the city of Nampa. No drugs were found.

At that time Idaho's Sentencing Statutes had as a goal the rehabilitation of the defendant found guilty of a crime and gave District Judges discretion to sentence defendants to an indeterminate sentence. One unusual case resulted in allowing the Board of Pardons and Parole to help a Canyon County man save his job, keep his large family off relief and maybe save his marriage. He had written a no-account check for an amount that made it a felony.

The man had a checking account but had over drawn it several times so the bank had closed his account. He had moved and did not receive the bank's notice that his account was closed. The small business that accepted his no-account check wanted the Canyon County Prosecutor to collect its loss. The Prosecutor did not want to act as a debt collector, so he required that if he filed criminal charges that the business agree that the case would go forward even if the defendant paid in cash its loss. Charges were filed, and the defendant was arrested. Defendant's employer loaned the money to the defendant to pay off the check, and to hire an attorney to represent him. The attorney convinced the judge to release defendant on his own recognizance so he could return to work. The defendant was considered a key employee by his employer. The case moved quickly to District Court where the defendant pled guilty.

Defendant's attorney asked for probation but the District Judge, who was in a hurry that day to go to Cascade to hear cases, denied the request and sentenced him to 1 year indeterminate. Defendant was taken to prison the same day, where he was processed and interviewed. The employer was able to persuade the Board to act within a week to place defendant on parole, with conditions that provided for restitution for any other bad checks and management of a new checking account by the employer's accountant. The defendant did not have to serve a minimum sentence in order to be considered for parole.

After I was in private law practice, I was appointed to represent defendants who were indigent. Two cases in the 1960s caused me to question Idaho's jury selection system and its use of arrests on minor offenses as a pretext to make searches of minority persons.

I was appointed to represent a defendant on a charge of passing a forged check. The charge had been filed several years before he was placed in jail. The defendant told me he could not remember anything about the check, which was not written by the defendant. He pled not guilty, and the case was set for trial. The defendant, a U.S. citizen, was a Mexican American.

The Idaho Code at that time provided that a jury panel was selected from names submitted by County Commissioners from the election rolls. I had never seen a Mexican American juror in the years I had practiced law in Canyon County. After reviewing the jury lists submitted by County Commissioners over ten years, I discovered that no Mexican-American names were listed. With some legal research I found a U.S. Supreme Court case from Texas which held that systematic jury exclusion based on the national origin of citizens violated the U.S. Constitution.

When I discussed this with my client, he was at first reluctant to raise the jury issue. He thought it would make the jury and the judge mad at him. Finally, he agreed to let me raise the issue. Then I asked Tony Rodriguez, a World War II Veteran and businessman from Nampa, to review the jury lists. He found that no

Mexican American names were listed. I then filed a Motion to challenge the jury panel set to try the forgery case. This caused an uproar. The local newspaper ran a front-page story on the case.

At the hearing on the motion, Tony Rodriguez testified that he knew many Mexican American citizens who voted and that no persons with Mexican surnames appeared on any jury lists submitted during the last ten years. The Prosecutor argued the evidence did not show systematic exclusion because very few Mexicans voted. The District Judge denied the motion.

The jury panel for the case was largely made up of retired farmers and businessmen and a few women. Each juror answered "no" to questions about whether he or she had any prejudice against persons of Mexican national origin or descent. One juror who was a farmer volunteered that he had hired Mexican farm workers and could not be prejudiced against them.

The Prosecutor presented a police officer's testimony that after the defendant was arrested, he was asked if the check was forged and he responded, "its forged." After the State rested its case, and outside of the presence of the jury, I renewed my Motion to Challenge the Panel and to dismiss the case. The District Judge denied the motions. The defense presented no evidence. I anticipated filing an appeal.

During oral argument I suggested to the jury that the defendant had stated "its forged" as a question, that Mexicans often do this, especially if there is a language problem. I also argued that the State had not proven beyond a reasonable doubt that the defendant knew the check not written by him was forged. To my surprise, the jury returned a "Not Guilty" verdict. Did the jury decide to give the defendant the benefit of the doubt? The case drew attention to the need to reform the jury selection process. In 1971 and 1973, Idaho enacted reform legislation. I was later told the defendant, who could not work as a farm laborer due a foot disability, found a job as a commercial artist.

A second court appointed defense involved a felony charge of possession of Marijuana. When I first talked to the Mexican American defendant in the Canyon County jail he told me: he was arrested on a phony charge at night when he was walking on a downtown sidewalk in Nampa, that he had no drugs and that after he was searched by the policeman, and that when he was taken to the Nampa jail a baggy with drugs was presented as being taken from him. At the preliminary hearing, the police officer who arrested him testified that he arrested the defendant on a charge of Vagrancy, that he searched pursuant to that arrest, and that he found the baggy of marijuana. The Vagrancy charge was later dismissed, and the defendant was then charged with possession of marijuana. At the end of the State's evidence, I made an oral motion to dismiss on the basis that the arrest and search were a violation of the U.S. and Idaho Constitutions. The motion was denied, and defendant was ordered to stand trial in District Court. The defendant had no funds to make bail. He said he had no prior criminal record and was very anxious to get out of jail. However, the transcript of the preliminary hearing and his arraignment in District Court were delayed.

I filed a Motion to Suppress the drugs obtained by the arrest and search and noticed it for a hearing with the District Judge assigned to the case. I prepared and

filed a brief and told the defendant what I was doing. He had now been in jail already for about four months. When I arrived at the District Judge's courtroom, I was told he had vacated the hearing and left for the week, and his next available date was a month away. I wondered if the judge viewed the defendant as just another Mexican drug user who was probably guilty.

When I talked to the defendant, he told me he had been told by the jailor that if he pled guilty, he would get probation because he had no prior criminal record and would be released right away.

I explained to him that doing that was a big risk for him because this was a felony which carried a maximum sentence of ten years, and that a felony conviction would bar him from many future employments and opportunities. I advised him never to plead guilty to something he was not guilty of. He asked me if I could transfer the case to another judge. I explained that this could be done by filing a motion to disqualify the present judge. He told me to do that, so I prepared the defendant's affidavit and filed the motion. The case was transferred to different District Judge who set a hearing on the motion to suppress, held a hearing, and denied the Motion to Suppress.

The defendant wanted to plead guilty so he could get out of jail. I again advised him not to plead guilty. He insisted he would tell the judge when next in court he wanted to change his plea. I was notified that a hearing was set in the case. At the hearing the defendant told the judge he wanted to plead guilty. The new District Judge spent a lot of time to explain to defendant his rights and that he should not plead guilty unless in fact he was guilty. Defendant pled guilty and was sentenced to three years in prison. However, he was quickly deported to Mexico. He had been born in Mexico but had spent from age 1 in the United States.

About 6 months after this case was over, I learned the Idaho Supreme Court had held in a case that arrests for Vagrancy were illegal and that any evidence obtained by searches pursuant to an illegal arrest was not admissible evidence.

In "Dreamland" Sam Quinones tells about the true tale of America's Opiate Epidemic. He explains that pain medications containing OxyContin were marketed through advertising as not addictive. However, this was not true and led to widespread addiction and eventual use of illegal drugs such as heroin. The author relates how in the 1990s in Boise, Idaho investigators found substantial use of heroin and a system that no matter how many drivers who delivered heroin were arrested, that the drug was still readily available.

The increase in drug cases during the 1970s, and 1980s changed how both Congress and the Idaho legislature viewed sentencing and the discretion of trial judges.

In 1985 I was appointed as a District Judge in the Third Judicial District, which included Canyon County, where about 65 percent of the criminal felony cases were filed, including many drug cases. I served for nine years. In sentencing when it was appropriate, I used probation or retained jurisdiction, which allowed a defendant to go to the Cottonwood facility to see if the defendant would be a good candidate for probation.

I was assigned a marijuana sale case in which the Defendant claimed his home was subjected to an illegal search. At the hearing on the Motion to Suppress the police officer who had signed the affidavit for the search warrant testified he had no personal knowledge of drugs at Defendant's house, but had relied on an

informant who said he had recently purchased marijuana at defendant's home. Defendant's attorney argued that Defendant's rights under the Fourth Amendment were being violated, by using hearsay and not personal knowledge to establish "probable cause." At the end of the hearing, I took the Motion to Suppress under advisement. After doing research on the legal issue of "probable cause" in the Fourth Amendment, I found that the U.S. Supreme Court had recently ruled that "reasonable suspicion" by a police officer was sufficient for a search. I decided I was bound by this new ruling, even though I disagreed with it, and denied the Motion to Suppress.

A case in Adams County was assigned to me that involved a civil proceeding to forfeit a woman's home on the basis that drugs were found there. The State had moved for Summary Judgement based on the affidavit of a State Drug Enforcement officer who had attached the return on the search warrant which showed that marijuana had been found in the home and that the woman owned the home as her separate property.

The woman defendant filed an affidavit that stated: she was not a drug user; that the drugs belonged to her ex-husband who was a drug user whom she had divorced; that he came uninvited from out of state and that she told him to leave her home immediately; that she did not know the drugs were in her home; and she called the sheriff's office to notify it that her ex-husband was in the county. I held a hearing and listened to the oral arguments by the state's attorney and the woman's attorney.

I took the motion under advisement and did some research. I found a U. S. Supreme Court case from the 1920s during Prohibition that held that forfeiture of a yacht used to bring alcohol to the U. S. was a violation of due process because the owner of the yacht had not been present and had not known and had not agreed to allow any alcohol on the boat. I decided to deny the State's motion and to dismiss the petition that sought forfeiture.

I have a different perspective about Mass Incarceration. I contend prison does not deter drug addicts from wanting drugs, does not rehabilitate a nonviolent property crime offender, and can harm minority persons unjustly.