SUMMARY OF 2020 PROPOSED LEGISLATION

Justice Forward Virginia: *End the Trial Penalty* and Other Initiatives

For the 2020 session, Justice Forward Virginia urges the General Assembly to **"End The Trial Penalty."** The Trial Penalty is the phenomenon that occurs when the government makes losing a trial such a frightening proposition—through the way they charge and prosecute the case—that any reasonable person would accept a plea bargain. Essentially, it is the power of the government to threaten harsh consequences if a defendant asserts the right to trial. The Trial Penalty is the reason 95% of felony convictions are now obtained via guilty plea, a figure nearly 20% greater than just a few decades ago. Before the 1960s, between one-fourth and one-third of state felony charges led to a trial; today, just one-twentieth do.

The Trial Penalty is what drives mass incarceration. It is also a core concern of prosecutorial reformers, who acknowledge that the legislature has given prosecutors such overwhelming power, they can virtually dictate the outcomes of cases through overcharging, mandatory minimums, exploiting unfair sentencing procedures and the like.

As discussed below, many of the bills Justice Forward supports for the 2020 session seek to address The Trial Penalty by limiting the ability of prosecutors to unreasonably coerce guilty pleas. In addition, Justice Forward backs efforts to reform Virginia's system of cash bail and allow fair access to expert funding by indigent defendants. We also support several initiatives spearheaded by other advocacy groups, such as reform of marijuana laws, abolishing the death penalty, raising the larceny threshold, reinstating parole, increasing the age at which a juvenile may be tried as an adult, expungement reform, and strengthening Virginia's public defender system.

Legislation Drafted by Justice Forward Virginia

JFV1: Eliminate Mandatory Minimums

- Virginia prosecutors have roughly 230 different ways to charge a crime that would result in a mandatory sentence after trial, covering about 70 types of offenses. When facing the prospect of decades of mandatory time, a five-year plea bargain can look awfully appealing—even to defendants who are factually innocent.
- JFV proposes eliminating dozens of minimums from the Va. Code, and redefining "mandatory minimums" to restore discretion to judges.

JFV2: Tell Jurors the Truth About Sentencing (2019: HB 2627)

- Virginia is one of 6 states where juries not only determine guilt/innocence, but also the sentence. It is the only one of the 6 that does not give jurors the right to know what sentence they'll have to impose if they convict—even if there are lengthy minimums involved. This frequently results in juries feeling tricked, esp. with "compromise verdicts," where they agree to convict but impose a minimal sentence.

- Currently no statute directly governs voir dire (jury selection) in a criminal case; this bill fills that need. The bill permits the judge, prosecution or defense to inform the jury during jury selection about the range of punishment for the charges the defendant faces.
- Allowing parties to tell the jury the truth about sentencing ensures a fair and impartial jury for both the guilt and sentencing phases of the trial. It also prevents mistrials at sentencing if a juror cannot consider the applicable range of punishment.
- This is just the first step in much-needed reforms to jury sentencing. Our juries lack power to suspend prison time or recommend alternatives to prison (probation, drug treatment, etc.). They aren't allowed to see sentencing guidelines or learn local sentencing customs. They're simply told to impose incarceration, without being given information necessary to impose it fairly. The results can be wildly disparate, and severe "outlier" sentences are common—sentences judges are loath to disturb.

JFV3: Create "Degrees" of Robbery

- In Virginia, de minimis conduct can be and often is charged as robbery. For example, a bully who pushes a younger student and steals lunch money has committed robbery, the same as someone who brutally pistol whips someone with a loaded firearm and steals expensive jewelry. Despite covering a broad range of conduct, Virginia has only one punishment for robbery: 5 years to life in prison.
- Besides often being disproportionate to the conduct, the punishment scheme for robbery implicates a phenomenon known as a "jury minimum": a severe sentence likely to be imposed after a jury trial, not because of a mandatory minimum, but because the jury must recommend a term of years, it is prohibited from suspending the time it recommends, and judges are trained not to disturb jury recommendations.
- If a sentence is "suspended," that means it is held in abeyance; the defendant won't have to serve it, as long as he or she complies with other conditions, like probation or drug treatment.
- If a defendant pleads guilty to robbery or is convicted after a bench trial, a judge is required by law to impose 5 years—the low-end of the range—but unlike a mandatory minimum, the judge can and usually will "suspend" part of that sentence. For example, the 18-year-old high school bully described above might even have all 5 years suspended, and not serve time unless he violates probation.
- If a defendant is convicted of robbery after a jury trial, however, the jury must impose 5 years, and it cannot suspend that sentence. Although judges have the power to suspend jury sentences, in practice they rarely do. As a result, the 18-year-old high school bully above realistically faces the prospect of 5 years to serve in prison if he chooses to exercise his right to trial by jury.
- Justice Forward proposes to establish degrees of robbery, eliminating the 5-year "jury minimum" and making the maximum penalty depend on the seriousness of the offense (e.g. whether violence or a weapon was used, or the victim suffered injury).

JFV4: Reform Virginia's Arcane Criminal Discovery Rules

- Virginia remains one of only 9 states with so-called "closed discovery" rules, where a defendant has no right to witness statements, witness lists, or even the police reports from his own criminal case. Ours are arguably the second-most restrictive rules in the country, trailing only Alabama.

- Restrictive discovery rules discourage defendants from exercising their right to trial by requiring them to "fly blind," without the benefit of information critical to the preparation of a defense.
- In 2018, the Va. Supreme Court approved several marginal reforms to its discovery rules. It later tabled them, however, citing the need to study costs. It is unclear if or when those rules will ever go into effect.
- In 2017 the Virginia Senate passed—by a vote of 39-1—far broader reforms to the discovery process that would have brought us into line with states with true "open discovery" practices.
- The GA should implement these much-needed reforms & end "trial by ambush" once and for all.

JFV5: Stop Rewarding Prosecutors for Overcharging

- In Virginia, state funding for individual Commonwealth's Attorneys is determined in large part by the frequency with which each office charges felony offenses and obtains felony convictions.
- This creates an obvious financial incentive for prosecutors to overcharge cases, and a disincentive to offering leniency where warranted. The overcharging of cases as felonies is thought to be a primary cause of over-incarceration.
- The legislature should prohibit the State Compensation Board funding formula for Comm's Attorney's Offices and require funding be tied to objective crime or population data (e.g. arrests, criminal incidents, etc.) that are not affected by prosecutors' charging practices.

JFV6: Let Indigent Defendants Request Expert Funding Without Disclosing Strategy

- Currently the Commonwealth or wealthy criminal defendants can pay for their own experts and not tell the other side anything about what they are doing.
- Poor defendants, however, must go to court and argue publicly for expert funds in front of the very party that is their adversary at trial.
- To obtain the funds they must state, in open court, their particularized need for the expert. In doing so, they often must reveal their trial strategy, and the Commonwealth can object to the request. This puts poor people at a supreme disadvantage compared to their more affluent peers and the Commonwealth.
- This bill still requires the defendant to state his particularized need, but allows him to do so before the judge only—without informing his opponent of his trial strategy. This puts poor people on the same footing as richer defendants and the Commonwealth.
- An ex parte procedure is already used in capital cases, but it is far more complex than it needs to be. Our bill is modeled after the federal analogue; a much simpler scheme that is widely thought to be the model.

TBD: Move Toward Eliminating Cash Bail (Pretrial Coalition legislation)

- Our current system of cash bail isn't working. More than 28,000 people are held in Virginia jails each night, 46% of whom haven't been convicted of any crime. Many are detained simply because they're too poor to afford the cash bail amount set.
- Between 1978 and 2013, Virginia's pretrial detention population tripled. Our pretrial incarceration rate exceeds the national average.

- Alternatives exist to this wealth-based system that are evidence-based, non-discriminatory, and more effective at protecting both the community and the rights of the accused.
- In 2019, Justice Forward joined other advocates of pretrial reform to support HB2121/SB1687, a pretrial data collection bill. This year, JFV remains a key member of the Virginia Bail Reform Coalition, which is currently determining whether to again propose data collection, or pursue substantive fixes to Virginia's current system of cash bail.
- In addition, JFV joins the coalition in proposing to require that counsel be provided to detained defendants at first appearance, a measure that could dramatically expedite judicial bail review and decrease pretrial detention.

Other Initiatives Supported by Justice Forward Virginia

Approve the Indigent Defense Commission's Request for New Attorney Positions

- Virginia public defenders' offices understaffed. Many public defenders' offices have caseloads that exceed maximum annual workload standards adopted by the National Legal Aid and Defender Center. An adequately-staffed public defender system is critical both to protect the rights of indigent defendants, but also to limit collateral costs to the Commonwealth.

Reform Virginia's Marijuana Laws

- Decriminalization is not enough. It preserves a black market (and therefore the War on Drugs) and does little to reduce the racially disparate impact of searches and seizures based on marijuana possession or use.
- As it stands, 11 states have legalized marijuana for recreational use and another 21 have legalized it for medical purposes, with dramatically-increased tax revenue and few negative consequences.
- Marijuana is among the most harmless therapeutically-significant drugs known. It has never caused a fatal overdose and its use is not correlated with other criminal behavior.
- If not legalized or decriminalized, the legislature should consider making possession of marijuana extracts—the substance found in most edibles, with the exact same psychoactive compound as marijuana flower—a misdemeanor. Currently, possession of marijuana extracts is a felony in Virginia.
- The General Assembly should also repeal mandatory minimums and statutory minimums for possession with the intent to distribute marijuana based on weight and prior record.

Reform or Repeal Virginia's Capital Punishment Statutes

- Pass former SB 1137 (2019; Favola), which removes the death penalty as a sentencing option for those with severe mental illness at the time the crime was committed.
- Eliminate murder in the commission of robbery and murder-for-hire as predicates that render a defendant eligible for the death penalty. Relative to other homicides, robbery and murder-for-hire are not especially egregious, and almost never satisfy the vileness prong of the punishment phase of a capital trial. They continue to be charged not because prosecutors think death is appropriate, but in order gain leverage and coerce guilty pleas—at great cost to the Commonwealth.

- Jury instructions: (1) Require that jurors be informed during the penalty phase that they do not have to reach a unanimous verdict, and; (2) Give jurors an explicit "agree to disagree" option on the penalty verdict form. When jurors are informed that the penalty verdict is their individual moral choice (as the case law describes it) and don't have to submit to pressure to change their minds in the interest of unanimity or consensus, it dramatically increases the odds of a life verdict.
- Bifurcate the penalty phase of capital trials: an initial "eligibility phase" to consider whether future dangerousness or vileness were proved beyond a reasonable doubt, and a subsequent "selection phase" to apply individual moral judgment and determine whether mitigating evidence weighs sufficiently in favor of a life sentence, rather than death.

Other Legislation

- Larceny Threshold: In 2018, the General Assembly raised the petit larceny threshold to $500, which remains among the lowest in the country. It should be raised to $2000.
- Restore Parole: Virginia ended discretionary parole in 1995, which resulted in inmates serving a greater portion of their sentences, and removed a tremendous incentive for self-improvement and rehabilitation.
- Expungement Reform: We support efforts to make expungement automatic following an acquittal or dismissal, and to create an expungement process for misdemeanor convictions.
- Raise Age of Juvenile Transfer: As it stands, Virginia prosecutors can try children as young as 14-years-old as adults, often without even seeking authorization from a judge. These "transfer and certification" laws were adopted before advances in neuroimaging and brain research determined that the human brain continues maturing until age 25 or later, and before the U.S. Supreme Court found that juveniles are "categorically less culpable" than adults.