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The Presumption of Innocence Podcast Series: Episode 9

On the Inside: Preparing for Incarceration

Featuring Matthew Adams of Fox Rothschild LLP with Jeff Kluge

Adams: Hi everyone, and welcome to “The Presumption of Innocence.” My name is Matthew Adams. I'll be your host today, and I'm also one of the Co-Chairs of the White-Collar Criminal Defense and Regulatory Compliance Practice Group at Fox Rothschild.

I have the great pleasure of being joined today by Jeff Kluge, who is the Director of Strategic Partnerships with Prisonology.

Jeff, how are you doing today?

Kluge: I'm excellent Matt, how about yourself?

Adams: That's great. So, Jeff, you're a prison consultant with Prisonology. As much as we strive to keep folks out of prison in my line of work, the inevitable is that, in some respects, it's almost a foregone conclusion that at least a significant percentage of federal criminal defendants may very well see some prison time. Right now, according to the Federal Bureau of Prison Statistics, there's approximately 155,000 plus total federal inmates across the United States. That's an astonishing number of federal inmates. Roughly 136,000 federal inmates in Bureau of Prison (BOP) custody. Something like 6,000 federal inmates in privately managed facilities. Then another roughly 14,000 federal inmates are in other types of facilities, mostly state prisons, where the federal government has essentially leased space to house these inmates.

I have to ask you from the outset, Jeff, how did you become a prison consultant?

Kluge: Well, the story starts – and we'll go through the executive summary – some 25 years ago. I ran a very successful, well-decorated investment management practice. Along the way, I made a really stupid decision. I wound up lying to a bank to get a personal line of credit. I was young. I was smarter than everybody else. I figured I could invest the money and make well more than what the bank was charging in their interest rate.

For the first couple of months that was spectacular. Unfortunately, that started in May of 2001. The market corrected on September 11. My portfolio was well below what I owed, and I began digging a hole that I would continue in for the better part of 15 years.

It got to a point where I tried to repair it. That's probably another podcast, to go through that whole sequence. But it got to a point where I couldn't live with not having it repaired. I wanted to get back in the light and out of the shadows. So, I hired a criminal defense team and we walked into the U.S. Attorney and the FBI's office and I self-reported what I had done. I basically turned myself in and gave the AUSA a freebie. That resulted in time, actually, in a federal prison camp.

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Adams: How much time did you serve, Jeff?

Kluge: The sentence was for 50 months. I was inside – inside is a misnomer because there really is no fence at a camp. I was incarcerated for 30 months away from home.

Adams: I'm sure you learned firsthand what it's like to be a guest of the Federal Bureau of Prisons?

Kluge: I did. What was more powerful was not only my experience, but to see what others deal with. It was eye opening.

Adams: One of the things I think that the COVID-19 pandemic has done: It has shed a light on the conditions inside a prison. We've come to learn, through compassionate release applications and a lot of media coverage, about essentially what was the thinning of prison populations due to, in many locations, significant COVID-19 outbreaks. What would you say is the most earth shattering or difficult thing to adjust to? Going from one minute, walking free and being out with the liberty to do whatever you please, and the next minute, being restricted in a lot of respects, because you're in a federal facility?

Kluge: Wow. That's a deep question. I think the diversity of where you end up going…the camp that I went to, approximately 20-25% of the population that was white-collar. The remaining were for drug offenses.

In a camp setting, there isn't violence. People with a violent background cannot be there, nor people with sex offender crimes to them. The population is rather calm. But you get this diversity of experiences: Where people grew up and how they grew up, how the "system" has interacted with them and upon them for the better part of their lives. To get that perspective was just really eye opening.

Adams: I'm sure that that translates into an ability to really reconcile with the experiences that your clients are now facing as you join with criminal defense teams throughout the country in an effort to try to plan for a potential prison experience that may flow from a white-collar case. What is it from your experience that you draw most significantly from in that new role as a prison consultant?

Kluge: I think you mentioned it at the start, Matt, that the prosecution, the AUSAs, have an amazing track record of 98% conviction and prosecution-related rate. Which means oftentimes, when someone comes to one of the defense teams, the criminal defense teams, they're going to prison. It's a question of, how do you minimize that? What other factors are there along the way?

The experience that I had is that there were many men, even in a camp setting, who had medical-related issues. One specifically had diabetes. He wound up losing a foot during this time because it was neglected from care. The range of health care and experiences and programs that are offered to rehabilitate, to educate, to give people some format so when they get out, they can get a real W2-related job, was just not there. I think a lot of people on the outside expect that these are really cushy, that there's tons of programming, they get these free educations. But that's really not what happens inside.

That's what drove me for this, now, to really help other defendants and those teams use the policies that the Bureau of Prison has. How do we use the laws to really impact or affect some form of positive outcome and fairness? This is really around a social justice call from my work of, how do you get people to have something that's reasonable?

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Adams: When you were inside – and I want to shift over to some of the work you're doing on the consultancy side now – but when you were inside, did you see people who really were kind of lost or floundering because they couldn't properly navigate the system, the programs that exist? They didn't have a way of finding themselves once they were in a prison setting?

Kluge: Oh, absolutely. On the non-white-collar side, you have men who were, almost for their entire life, in or out of some state or federal facility. If you have ever seen someone who has lost hope or lost the drive of life, looking into their eyes, it's incredibly sad. You see – I saw – a lot of men who were like that, who just really gave up hope, because whatever fighting that they could try to do never had a result. I think there's this element too, that the system has so much power with very little transparency, I'll be bold to say no accountability. The system gets to do whatever it wants.

It's hard for people then to find the right programming, find the right health care, advocate for themselves or have someone advocate for them, because it's big. It's massive. To navigate that, many people just don't have the social and/or educational skills to get through it.

Adams: Let's jump into that, then. Let's shift out from your own personal experience as a federal inmate and move into the direction of the proactive consulting that you're doing now for people who are similarly situated to where you were back in your early, less wise days, as you mentioned at the outset.

As I see it, and from my personal experience, there are really two separate value-adds that a prison consultant such as yourself brings to the table as part of the overall defense team. The first one is placement. The second is getting the right programs lined up to make prison an experience that doesn't result in that despair, what you described as that malaise, of not being able to find your way.

Let's start first with placement. How can a defense team craft and influence a plan for their client, who might be potentially entering into the Bureau of Prisons for the first time, to have a successful experience from that placement perspective?

Kluge: From that placement perspective, health-related issues are what we see as the standout, and perhaps most powerful issue, to be able to present and/or give a counter-argument.

The prosecution will receive, more often than not, a letter from the Bureau of Prisons that states, "We can take care of anything." That goes to the judge, and the judge reads this which says, "You have diabetes, or health issues, or heart, or whatever the spectrum, dialysis. The BOP says that it can take care of you." And there you go. It's just a box that they check.

I think the well-crafted argument really gets to what a day in the life is like for that individual within the institution. Whether that is a camp, or low or medium type of setting. What does it look like for those health care-related issues in general population through the course of the day? If you begin to argue that, I think what we've begun to see over the past year of the pandemic is the bench beginning to realize that the sentence is more than just punishment. It really gets to what happens to that individual. What does that experience of education programs or health care look like for that person? When they see, "Boy, a day in the life is going to look like this," compassion starts coming in a little bit more and the thought process of, "How can we issue justice? How can that stand, given a different path?" That really becomes the argument, I think.

Adams: It's funny, Jeff, that you should mention COVID-19, the impact of the pandemic, on the broader construct of sentencing in the United States. Because I have a colleague who likes to say – and she was on an earlier version of this podcast talking about certain aspects of sentencing as well

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– she likes to say that COVID-19 has changed, for many judges, the view on sentencing, the view on punishment, and what is and is not a fair and just punishment. It's interesting to hear someone from your perspective echo those same sentiments.

Now, in talking through this idea of placement, how specifically can you help a defense team influence placement? From my experience, judges are willing to make recommendations to the Federal Bureau of Prisons, but typically those recommendations are just that. The Federal Bureau of Prisons gets a broad berth of discretion as it relates to a placement decision. The judge gets the ability to mold and shape it through the judgment of conviction.

How early in the process do you have to start thinking about those placement decisions? Because as I see it, if you're waiting until sentencing, you're waiting until you're standing before a judge on your day of judgment and saying, "Hey, I got these couple or three medical conditions that I'd like to use as a basis to get me into a different type of facility." I see that as probably too late, right?

Kluge: It is suboptimal to be at that point, right at sentencing. The earlier the better. If at the indictment… this is where, I think, defense teams could be even more powerful. When the indictment comes down and you go into that first change of plea and then into the pre-sentencing investigation, you want to make sure that any health-related issues – any anxiety, mental illness, drug or alcohol use that have spiked because of the crime – are really in that investigation so that it's documented. Once it's documented, now it's a point where, in further arguments, should it ever get to that point, you can come back to and say, "Well look, this person, we said that they had diabetes in this stage level, or cancer and it was in remission, or it was still being treated." These are the types of things with which you can use to build stronger arguments.

So, Matt, it's almost a tangent to your defense on the crime side. A process of, if this goes to incarceration, what does it look like and how do we prepare for that?

Adams: Interesting perspective. How have you helped your clients prepare to enter custody specifically?

Kluge: That's where, when people talk about prison consulting, the general definition is, "Oh, well you just help people who are going in." Because of the experience that I have, having gone through it, knowing what that whole process is like. From what is the surrender like, what's going to happen? More importantly, to the family that's left behind. We see the impact. While it is difficult for the person going in – and most often it's the dad, right? The father is going in – what happens to mom and the kids and the grandparents or other family members who are on the outside, at home? What's the impact for them?

You mentioned COVID. We saw so much pause in terms of connection with family because [COVID operational level three] prevented family visits or any visits, even from legal counsel in many places. It really became an isolation factor. I think that's what, in part, was building for the bench and that judicial part to have a bit more empathy and compassion in sentencing. Just realizing how really punitive some of this can end up being.

The consulting goes to what's it going to be like. We talk about phones, talk about the programs that are inside and how can you avail yourself of them. How can you come out of the term of incarceration being a better person and not being bitter?

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Adams: What disrupted your daily routine the most significant? Think back to those first 48, 24 hours that you were in. If you could distill it down to one thing that just was the most difficult to get your hands around as a new federal inmate, what was it?

Kluge: That's a really tough question. That's going back now a long way to think of that initial, almost PTSD, where it just such an overwhelming response, having come from one environment into that one.

For those going into a camp, there's no security. In fact, there was no fence. You could walk through the lift gate that was on the driveway and be in town in 10 to 15 minutes. You wouldn't do that, because then you're an escapee, and there's a whole bunch of other consequences with that.

I think the surprise was that those who were in…you began to see people who really became bitter. They felt that they were wrongly incarcerated. This gets into the arguments and how the prosecution builds their case. For some people, they couldn't let go of that. For some, they just acknowledged that this was a part of business. For many of the non-white collar men, a cost of doing business was being incarcerated. For some, it was a second home. For others, they hated every single minute. For others, it was, “Okay, what can I do here that gives myself some meaning, some purpose in my daily life?” Part of it is, everybody had their own story. There was no prejudgment. Just accept people for who they are and how they interacted with you. You treat people well and they end up treating you well back. Or at least, nothing is against you.

Adams: I think that probably helps us segue into our next topic, which is the programs. Of all those various ways of dealing with the shock to the system that prison creates, the one that seems to me most constructive is finding a way to pass the time. Finding a way to use the time constructively and not to resist it, because if you resist it…I mean, you're there, whether you like it or not. Finding a place, finding something to keep yourself occupied, finding a constructive way to deal with the passage of the days and the months, and potentially the years, seems to me the most constructive. Would you agree?

Kluge: Oh, absolutely. The one phrase that kept going through my head was, “Resistance is futile.”

If you tried to resist it, the days became really long. I was tapped on the shoulder because again, I had turned myself in, so there was already a realization that I screwed up. I've got to put this right somehow. To do that, that's going to involve being away from home. I came in wanting to, one, understand why did I do what I did, and two, how could I teach and/or help others?

One of the officers there tapped me on the shoulder, saw what I was working on, and invited me to teach a program that was entitled “Positive Mental Attitude.” That then turned into a Positive Psychology Class, which then turned into a Happiness Class. For the better part of two years, I was teaching happiness to men in prison. I had 10 cohorts. There were 25 to 30 men in each group. I am a nerd. I'm going to disclose that here. I built a spreadsheet after having a survey at the beginning of class and at the end of class. I was able to get an 11.67% increase in the levels of happiness of men in prison over a 10-week course period.

I began to realize, Matt, that I had two profound discoveries. One is that we teach ethics in this country wrong, or fundamentally flawed. And two, we talk about happiness as something very different than what it is.

That's perhaps a longer answer. But for me, it was about how could I use some of the skills I had from my previous life coaching and mentoring, and turn that into something that was very meaningful

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and powerful for me. That was helping men, not only deal with the day-to-day of what was happening there better, but also when they came out. What was life going to look like? What were their expectations of what the future could be? It was really cool. That's a big chunk of what my work in the ethics-related field continues to be.

Adams: That's fascinating to hear that perspective, from somebody who's lived this.

Let's move in, then, to the specific programming that the Bureau of Prisons provides for its inmates. It strikes me that the prison system has somewhat of an inconsistent – I'll dare say spotty – level of programming that could be beneficial.

There's a few that we can kind of get our arms around pretty quickly, related to drugs and alcohol, because those are sort of the staples. We want people who have dependency issues to get that kind of treatment once they get inside so that they are productively rehabilitated.

Talk to us about the types of, and your experiences with, programming that the Bureau of Prisons provides to inmates. It's not like a university setting where the curriculum is established, and the course selections are published in a beautiful catalog every semester and there's constant reflection on what's being taught. It strikes me as something that's there, but you really need to know how to use it for it to be beneficial.

Kluge: Boy, there's a lot that you just said right there that is incredibly valuable. I'm going to try and take some of these in a sense of order and link them together.

Programming or the lack thereof, and you use the word spotty, and I think is still very kind to the BOP. Programming, especially something around the drug and alcohol program – whether it's the residential program or the non-residential program – are highly valuable. Those types of requests, if they're made in the Pre-sentence Investigation Report (PSR), and you can present them at a sentencing, those are included in what we talked about in terms of placement. So, if you're requesting a certain set of programming, that can help on the placement side.

COVID threw programming really out the window. There wasn't any. I think as we move down from level three to level two, perhaps to level one, it will be interesting to see what the BOP does in terms of the programming part.

When I was in, the First Step Act had passed. In there, they use the term "Evidence-Based Recidivism Reduction Programing (EBRR)." The BOP acknowledges this, third-party institutions have acknowledged it: People who go through these proven, evidence-based programs come out better people. They come out with new skills. They come out with different perspectives that are very pro-social. So, the programming, and getting access to programming… if the BOP isn't doing that, we find that's a powerful platform to be able to argue with, of the day in the life that we spoke of earlier, in terms of what our declarations can be for a defense team. That's really powerful. How can you tell a judge that programming doesn't exist or isn't happening as frequently? How is this person going to get the EBRR that can help them leave as a better person?

Inside, there was a CDL (commercial driver's license) program where I was that was not used very effectively. There were men who were in it who wanted to take the class, who wanted to come out. I guess we could argue whether they're decent jobs now or not. But the fact is that it was a skill that people could have had coming out to make a good or decent living, and institution just didn't follow it. It all rested on the warden. The warden just didn't really have the interest. I know that seems a rather

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powerful thing to say, but there were men who wanted to take the class, and they just didn't get approval to do on-the-road training.

So, some of those programs are missed. When you get this, it is that balance of being bitter. When you want to take a program and the system doesn't allow it, you have to maintain a very strong, positive, mental attitude to get through some of those issues when you're trying to advocate for yourself. That's probably a really long answer to that, sorry.

Adams: But insightful at that. How do you get a client, now in your new life, who you're working with as a prison consultant, ready to avail themself of programming that you recognize as spotty, poorly construed or constructed, and maybe a little hit or miss, depending upon which institution you're in? How is it that you can figure out for your client that, “Okay, maybe the CDL program isn't there, but there's a great trades program in this institution. Although you always wanted to be a CDL driver, when you get out, you're going to have to learn a trade.”

How do you convince a perspective inmate on their way in that having something, learning something, availing themselves one of these spotty and poorly executed programs, is better than nothing?

Kluge: Just saying it that way. That whatever programs are available, engage in them somehow. Find what is there. You mentioned the course curriculum, if you will, these big books. They actually did have that. It was a 20-page document that they had that you could look through, a PDF version at times.

Part of it is, as you're going into that transition, it's overwhelming. But just be on the lookout for what you can do to pass time productively. Productive activity is one of the other things that is the Evidence-Based Recidivism Reduction Programing. Productive activities are a job, a trade. I wound up working in the construction group and wound up becoming a clerk for one of the foremen of the construction team. It wasn't something where I said, “Hey, this is going to be great. I'm going to go do this.” It was just something that availed itself. I found a way in, a window, and worked my way through it and learned some things along the way. Being open to learn, being humbled by what you're going through, working to help others, are all things that, as a demeanor going in, can be highly valuable.

Adams: I'm hearing, something's better than nothing, so whatever's available, take advantage of it.

Kluge: Absolutely. Absolutely. People can get books inside. It's a convoluted system, but it works right. It's just being able to adapt to an environment that is ever-changing and doesn't follow reason. Just being flexible.

Adams: One of the most common programs that we hear of in the Federal Bureau of Prisons is Residential Drug Abuse Programs (RDAP). Walk us through a little bit about your experience with RDAP, both from the perspective of being a former federal inmate, and from now, being a prison consultant.

Kluge: RDAP is one that guys who wanted to change, who knew they had a problem, got a significant amount of benefit from. There were a lot of people who didn't want to change. They didn't want to stop using or drinking, and that type of behavior perhaps continued in and out of their prison experience and also while they were inside. But those who really do want to make a difference, you do get time off from that, upwards of a year accelerated to home. Based on the sentence, nine months, six months, depending on the time.

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It can be a very valuable tool to help understand why you go about making decisions and what were some of the triggers. This is what I wound up studying and researching through the Positive Psychology Class. What are some of the cognitive behavioral therapy triggers that people see or experience? How to be aware of them and help change your behavior in the midst of emotion, perhaps.

Adams: I find that really fascinating. I want to move towards the end of our conversation by going back to where we started.

We started with your time as a federal inmate, your experience being convicted and sentenced, and how that plays on where you have gone professionally as a consultant and your new endeavor today. When we think about the punitive or the punishment aspects of our criminal justice system, I harken back to one of the first days of criminal law as a first-year law student. We learned about the theories of punishment, the deterrence and the rehabilitation. As somebody who went in, served their sentence and now is very actively consulting with people who are basically taking that same trajectory as you did … looking back on your time as an inmate, do you feel that the prison sentence you received fulfilled both a deterrence aspect and a rehabilitative aspect? Or do you feel one or the other maybe lacking at this point?

Kluge: For me, I shared with you before that I had argued on a pro se basis to my sentencing judge regarding the First Step Act. I recall a number of instances where I wrote that going to prison was actually beneficial for me. It was a good thing. It pulled me out of the craziness. It got life to stop. It got me to look at and create some awareness around what I was doing, who I had become in the world that I was in.

Adams: It rehabilitated you.

Kluge: I was on that path prior to going in, but I definitely used it as a lever to come out far better than when I went in. Restorative justice does work. I think so many of the men who I came across and had conversations with – and in a way, researched – bitterness and anger comes about. One, they just don't acknowledge that they did anything wrong or that they had any aspect of it.

There were some – and I'm sure there are colleagues of yours across the country and around the globe who do see that there are moments that just do not seem fair, disproportionately to one group versus another. That's another podcast, I think.

But being able to just reflect. Restorative justice…one of the officers there was actually had a program specifically on that, and it worked. If you let people try to repair the damage, the errors of their way, it is a really powerful tool.

Apology is a powerful tool. But apology without new behavior and or new action falls flat, and it doesn't matter. If one can understand the reasonings behind it, and come out and try to repair what has occurred, I think that the experience and the whole process is better. There are some, perhaps in other institutions, where the punitive aspect, the old-world testament, as I might say, is the only way that people will actually stop to create some awareness. But I do see that the first step is, give people the chance to reflect and repair and work on it first. If they don't, well, then that really is their choice.

Adams: How about deterrence?

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Kluge: We look at the "three strikes and you're out" and the war on drugs. If we think of deterrence in a white-collar setting, we've seen such a spotty implementation of what deterrence looks like. This is the work I do from an ethics perspective. It's not consistent. People realize, "Okay, if I'm at a certain level, I can get away with it."

We could talk about plenty of cases… the financial crisis in 2008-2009. Very, very few executives saw any form of penalty for their involvement in that period of time. I think that's what becomes somewhat frustrating. I think as a societal basis, that if there were deterrence for everybody, then it becomes a deterrent. When it's hit and miss, and somewhat of a rifle approach of, "We're going to pick on this one person," then others realize, "Okay, I can get away with it." Or, "I can find a way around this rule." Does that make sense?

Adams: Yes. It's a lot to think about, Jeff, and I think you've given our audience a tremendous perspective today. I can't thank you enough. You're obviously sharing some very personal accounts of a portion of your life that you've clearly moved on from, but that's clearly had a tremendous impact. You're now using it for the benefit of others who are similarly situated, and that's a good thing.

We can't thank you enough for joining us today. That's all the time we have on "The Presumption of Innocence" this time, but we'll see you next time. Jeff, I think there's plenty of things that we'll probably have a follow-up episode that we can talk about, but you've given us a nice overview and a lot to think about today.

Thanks so much for being with us.

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