

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 7th Meeting of the 2020 Interim

December 3, 2020

Call to Order and Roll Call

The 7th meeting of the Interim Joint Committee on Judiciary was held on Thursday, December 3, 2020, at 10:00 AM, in Room 149 of the Capitol Annex. Senator Whitney Westerfield, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Whitney Westerfield, Co-Chair; Representative Jason Petrie, Co-Chair; Senators Danny Carroll, Alice Forgy Kerr, Gerald A. Neal, Michael J. Nemes, John Schickel, Wil Schroder, Robin L. Webb, Stephen West, and Phillip Wheeler; Representatives Kim Banta, John Blanton, Charles Booker, Kevin D. Bratcher, McKenzie Cantrell, Daniel Elliott, Joseph M. Fischer, Chris Harris, Angie Hatton, Samara Heavrin, Nima Kulkarni, Derek Lewis, Savannah Maddox, Chad McCoy, Reginald Meeks, Patti Minter, Kimberly Poore Moser, Jason Nemes, Brandon Reed, Maria Sorolis, and Rob Wiederstein.

Guests: Jennifer Hancock, Libby Mills, Sheryl Snyder, Secretary Mary Noble, Robyn Bender, and Commissioner Lisa Lamb.

LRC Staff: Katie Comstock and Yvonne Beghtol.

Approval of the Minutes

Representative Moser made a motion to approve the November 18, 2020, minutes, seconded by Senator Nemes, and passed by voice vote.

Chairman Westerfield notified the committee of Katie Comstock's resignation from the Legislative Research Commission, commended her for her years of service, and wished her well in her new endeavor.

Restorative Justice

Jennifer Hancock, President & CEO of Volunteers of America (VOA), began by stating that Restorative Justice is not only an effective approach to reducing crime, but also a cost-saving approach. The program is an innovative, outcome-based alternative to the juvenile justice system, allowing victims to be heard and healed, offenders to be held accountable and healed, and for the community to feel restored. Restorative Justice began in 2011 in Jefferson County and resolves more than 200 cases annually. The restorative

approach finds alternatives to the current criminal justice system, using a four-step process: 1) meeting with offenders; 2) meeting with victims; 3) bringing both parties together to be heard and to facilitate a plan of restoration where the offender is held accountable for following through on the plan; and 4) ongoing case management to offer support for underlying dysfunctions in their lives.

Ms. Hancock stated that Spaulding University's data shows the traditional rate of recidivism for juveniles in Kentucky is 56 percent, but only 23 percent of Restorative Justice participants commit additional offenses.

Ms. Hancock stated that the Restorative Justice program costs approximately \$1,014 per case, whereas the traditional juvenile justice system costs \$3,166 per case.

Libby Mills, Senior Director of VOA, stated that VOA offers a diversion option for youth, a disposition option for youth, and a diversion option for young adults who are 18 to 25. Ms. Mills stated that there has been no lapse in intakes or processing when working online, due to the COVID-19 pandemic, became mandatory. Compared to the same time last year, referrals decreased 55 percent in the juvenile justice system but only 22 percent for Restorative Justice.

Ms. Mills stated that a new youth restorative justice project began in seven southeastern Kentucky counties in July 2020. Training and information sessions were provided for judges, county attorneys, Department of Public Advocacy attorneys, and Administrative Office of the Courts (AOC) Court Designated Workers. The Southeastern Kentucky Project is a member of AOC's Family Accountability Intervention and Response (FAIR) teams and the Regional Interagency Council for all seven counties. Referrals started being received in August 2020, lowering the juvenile justice system approximately 50 percent in those seven counties. Ms. Mills stated that involvement in the juvenile justice system is a critical turning point in keeping youth from progressing in the criminal justice system.

In response to Representative Moser, Ms. Mills stated that the average time an offender spends in the program is approximately six months. One of the barriers keeping this program from going statewide is not having internet access to meet online. To help reduce this obstacle, VOA goes out into the community to meet with participants. Another barrier is that some of the youth do not have the necessary support services needed to participate.

Representative Sorolis commented that she has worked with Restorative Justice in Louisville and encourages its expansion.

In response to Representative Banta, Ms. Mills stated that the goal is to reduce the need for a Juvenile Detention Center by reaching youth early and keeping them from

progressing to the point that they receive a charge that requires secured detention. Referral to Restorative Justice is an alternative disposition option, not an alternative to detention option.

Governor's Commutation Powers

Overview of the Governor's Commutation Powers

Sheryl Snyder, an attorney with Frost Brown Todd, stated that Section 77 of the Kentucky Constitution, which allows the governor to remit fines and forfeitures and grant reprieves and pardons, was adopted in 1792. The pardon power was viewed as an act of mercy and appropriate for the governor. However, the governor may not pardon for impeachment or treason. He or she can grant a reprieve in a case of treason until the next session of the legislature when the legislature decides whether or not to pardon. Courts have ruled that the power to reprieve and pardon is an unbridled power, with the exception being that courts can refuse to recognize a pardon that was procured by fraud. The legal effect of a pardon is to stop the criminal justice system from proceeding further as to that individual. It does not affect expungement. It otherwise negates all of the legal consequences of the crime. The 1890 Constitutional Convention added the phrase "commute sentences" to Section 77. The governor may pardon prior to conviction or prior to indictment. However, the governor cannot pardon future conduct. The governor also has the power to restore a felon's civil rights.

In response to Senator Carroll, Mr. Snyder stated that commutation does not negate the conviction the same as a pardon. A pardon does not expunge the record, but the commutation of the sentence stops short of the pardon and just reduces the sentence. The conviction remains on the books. In regards to the restoration of civil rights, typically the person has served their sentence and been released, whereas commutation effectuates the release but does not restore civil rights. Restoration of civil rights is a separate step the governor would need to do. It can be put all in the same document, but they are legally separate steps. Mr. Snyder was not able to confirm if an individual who receives a commutation is allowed to have voting rights restored during the period of early release.

Governor Beshear's Commutations Due to COVID-19

Secretary Mary Noble, with the Justice and Public Safety Cabinet, stated that we are in an unprecedented time. The Justice and Public Safety Cabinet is responsible for the lives of inmates, the lives of correctional officers and staff, and the people that live in the communities surrounding institutions. Secretary Noble stated that in an enclosed environment an airborne disease will spread and people will die. Controlling and preventing the spread is difficult. An emergency analysis was done to protect and save the lives of inmates, staff, and the surrounding community. Sanitation of the institutions, the wearing of face masks, and social distancing was immediately put into action. A process of separation and isolation helped manage an outbreak once in a facility. Reduction of population was the final step. Secretary Noble stated that there are currently six prisons with active infections, and 19 inmates and two staff members have died of COVID-19

related illnesses to date. The governor chose to use the tool of population reduction through the carefully considered exercise of conditional commutations. If the conditions are violated, the sentences are reinstituted.

Robyn Bender, General Counsel of the Justice and Public Safety Cabinet, reiterated that the concern was to keep the staff, inmates, and the community as safe as possible. Ms. Bender stated that Kentucky jails statutorily house lower level offenders. The older facilities make it harder to implement CDC social distancing recommendations. As such, Governor Beshear issued four executive orders granting conditional commutations for offenders, and all had to be non-violent/non-sexual offenses. On April 2, 2020, 186 prison inmates who were within five years of their release date and were considered medically vulnerable had their sentences commuted. On April 10, 2020, the focus was on reducing the facility population to enable more social distancing. The second commutation was granted for 697 inmates who had less than six months sentencing remaining. On April 24, 2020, the focus was on the medically vulnerable in jails and over the age of 65. There were 352 inmates who received the commutation. On August 25, 2020, 646 inmates who had become eligible under the previous requirements received commutations. The criteria for non-violent, non-sex offense does not apply to the crime in which they were charged, but to the crime they were convicted of. The screening criteria included: crimes categorized as violent by statute and by the Association of State Correctional Administrators, sex crimes regardless of crime type, sentences of life and life without parole, arson, sex, manslaughter, homicide, stalking, assault, robbery, abuse, torture, kidnapping, and immoral practice with another. Class B felons not excluded under the previous criteria were removed from the medically vulnerable lists, but were kept on the lists of offenders who had less than six months to serve. Ms. Bender gave a breakdown of the crime types of those commuted: drug crimes being 33.86 percent, other public order crimes being 33.92 percent, property crimes being 25.62 percent, and other crimes being 6.58 percent. The medically vulnerable criteria was based on the CDC's identified medical conditions, which was revised between April 2020 and August 2020. Commutations were given for those at an increased age (over the age of 65) due to the CDC identifying it as an increased risk of severe illness or death. The CDC reported that eight out of ten COVID-19 deaths have been in adults age 65 and older.

Ms. Bender stated that the commutations were conditional, and the inmate had to agree to meet the conditions in order to be released. If they violate the conditions their commuted sentence would be restored.

In response to Chairman Westerfield, Ms. Bender stated that not having contact with the victim was not included in the conditions. However, all of the victims were notified of the release through the VINE system. If the victim was not registered in the VINE system, they would not have received notification.

Ms. Bender stated that an inmate could not be released if he or she: 1) tested positive for COVID-19 or displayed symptoms; 2) did not have a verifiable home address to allow for a 14-day quarantine; or 3) was convicted of another felony offense during the period of early release. Being charged or arrested is not a violation of the condition until convicted. If convicted, their commuted sentence will be reinstated and served prior to the sentence for the new conviction. The inmate had to sign a conditional commutation notice stating they understand the conditions of their release and had to agree to abide by them.

In response to Chairman Westerfield, Commissioner Lisa Lamb, Deputy Commissioner of the Department of Corrections, stated that there were conditional commutations issued under former Governor Patton. Ms. Bender stated that, because the individual is not under supervision, violation of the quarantine condition must be reported to the DOC. Notice of Violation letters were sent to those individuals to remind them of the conditions of the commutation, that any additional violation would require their commutation to be revoked, and they would return to incarceration. The local health departments were notified of any individuals who may have had an exposure to COVID-19.

Services were provided to those being commuted to help them transition back into the community. The services included enrolling eligible individuals in Medicaid and allowing inmate IDs to be used for assistance programs such as Medicaid and food stamps. In addition, they were provided with prescription medication for a limited period, Narcan kits, community resource contact information, and substance abuse resources. Ms. Bender noted that some of these services are above and beyond the general services provided when an individual has served out their sentence and released.

In response to Senator Carroll, Secretary Noble stated that nothing the Justice and Public Safety Cabinet does is done without considering the full range of public safety. The only motivation was to stop deaths and permanently damaging illness. Prosecutors were not consulted but law enforcement partners were taken into consideration. Commissioner Lamb also advised that some of those released with more than five years left may have received Statutory Good Time to reduce their sentencing.

Senator Carroll stated that adding obesity to the medically vulnerable list did not make sense, but understands that it is a CDC guideline.

Ms. Bender verified that those commuted met the criteria to have their rights restored and were able to register to vote, the same as every offender who is released. A voter registration card was included in the release packet, as is always. Commissioner Lamb stated that she was not aware of any instructions given to jailers to have the voter cards completed before release.

In response to Chairman Westerfield, Secretary Noble stated that the restoration of rights of an individual who fails to meet commutation conditions has not been litigated, but if the basis for the commutation is voided, you would expect that every right that streamed from that commutation would also be voided.

In response to Senator Carroll, Commissioner Lamb said she would check on how many of those released were exposed to or tested positive for COVID-19. The sign-up for Medicaid was done by the DOC prior to commutations, and jail inmates names were provided to CHFS to enroll.

In response to Senator Carroll, Commissioner Lamb stated that the DOC does not have the authority to release anyone outside of the executive orders.

In response to Senator Carroll, Secretary Noble stated that only those with a life sentence or death sentence will stay in prison forever, all other inmates will return to the community. A considered decision was made about when it was appropriate to release these specific individuals based up on their health conditions and the risk to them. No one convicted of a violent offense or sex offense was released.

In response to Senator Schickel, Commissioner Lamb clarified that the list presented was of offenders who received conditional commutations. Senator Schickel stated that releasing those in the prison system affects justice.

In response to Senator West, Secretary Noble stated she is not aware of anyone who has been incarcerated for defying the governor's COVID-19 executive orders. Senator West stated that enforcing these executive orders gives the possibility of jail time to anyone who defies them.

In response to Representative Moser, Ms. Bender stated that as long as the DOC takes reasonable action, based on their understanding and knowledge of the disease, it is unlikely that there would be liability for someone becoming sick or dying of COVID-19 while in custody. The courts have ruled in favor of the DOC for taking all reasonable measures. Secretary Noble and Ms. Bender were not aware of why inmates have been added to phase one of the vaccine distribution.

Senator Wheeler stated that he is aware of someone who violated the governor's executive order for having more than one household member in a store at a time. He had to appear in court and was released with a warning.

In response to Senator Wheeler, Commissioner Lamb clarified that, in partnership with CHFS, a Narcan kit was provided upon release. Commissioner Lamb stated that there was no cost to the DOC and CHFS received a grant to provide the kits.

In response to Representative Minter, Commissioner Lamb stated that she will have to check with their addiction specialist to know if Narcan kits help reduce recidivism. Representative Minter commented that no one has been incarcerated for violating the governor's executive orders related to COVID-19.

Senator Webb commented that she appreciates the efforts of the Justice and Public Safety Cabinet in keeping inmates and staff safe, and hopes the success of these releases will be documented.

Representative Hatton commented that the punishment should fit the crime. If no actions were taken to help protect the inmates, we could possibly be looking at a death sentence for theft. Representative Hatton also commented that the cost for a Narcan kit is less than an emergency room visit for having an overdose, and that these commutations were very carefully considered releases.

In response to Representative Nemes, Secretary Noble stated the release process could not satisfy everyone; but you have to set criteria, make them as reasonable as you can, and apply it uniformly. If appropriate, an inmate is released to a treatment facility that has been verified to adequately protect against the virus.

Chairman Westerfield reminded members of the virtual Kentucky Smart on Crime Boot Camp for legislators on December 15, 2020 at 9:00 AM, and the Kentucky Chamber's virtual legislative presentation at the Marriott Griffin Gate in Lexington that will include a criminal justice program. Chairman Westerfield encouraged members to check out the National Conference of State Legislators database to review updated information on matters such as police reform bills, pretrial release, and much more.

There being no further business, the meeting adjourned at 12:00 PM.