

# INTERIM JOINT COMMITTEE ON STATE GOVERNMENT

## Minutes of the 4th Meeting of the 2021 Interim

September 1, 2021

### Call to Order and Roll Call

The fourth meeting of the Interim Joint Committee on State Government was held on Wednesday, September 1, 2021, at 10:00 AM, in Room 149 of the Capitol Annex. The committee met jointly with the Interim Joint Committee on Local Government in a special called meeting. Senator Robby Mills, Chair, called the meeting to order, and the secretary called the roll. Senator Mills co-chaired the meeting with Representative Michael Meredith, Co-Chair of the Interim Joint Committee on Local Government.

Present were:

Members: Senator Robby Mills, Co-Chair; Representatives Jerry T. Miller, Co-Chair, and Kevin D. Bratcher, Co-Chair; Senators Ralph Alvarado, Denise Harper Angel, Christian McDaniel, Morgan McGarvey, Michael J. Nemes, Wil Schroder, Adrienne Southworth, Brandon J. Storm, Damon Thayer, and Phillip Wheeler; Representatives John Blanton, Adam Bowling, McKenzie Cantrell, Jennifer Decker, Jim DuPlessis, Joseph M. Fischer, Kelly Flood, Jim Gooch Jr., Derrick Graham, Richard Heath, Samara Heavrin, Mary Beth Imes, DJ Johnson, Matthew Koch, Derek Lewis, Scott Lewis, Savannah Maddox, Patti Minter, Kimberly Poore Moser, Jason Nemes, Attica Scott, Tom Smith, Pamela Stevenson, Nancy Tate, James Tipton, Ken Upchurch, Russell Webber, and Buddy Wheatley.

Guests: Daniel Cameron and Chad Meredith, Office of the Attorney General; Cookie Crews and Robyn Bender, Justice & Public Safety Cabinet; and Jim Daley, Kentucky Jailers Association.

LRC Staff: Alisha Miller, Michael Callan, Andrew Salman, and Peggy Sciantarelli.

### Discussion of Kentucky Supreme Court Ruling

The guest speaker was Daniel Cameron, Attorney General for the Commonwealth of Kentucky. He was accompanied by a member of his staff, Solicitor General Chad Meredith. Attorney General Cameron updated the committee regarding the August 21, 2020, ruling of the Kentucky Supreme Court in the case, *Cameron v. Beshear*.

Mr. Cameron stated that the Governor initiated *Cameron v. Beshear* in February when he filed in Franklin Circuit Court, seeking to invalidate SB 1, SB 2 and HB 1, the newly enacted legislation placing checks and balances on the Governor's emergency

power. The Governor asked the Franklin Circuit Court to enjoin the legislation, and the circuit court did so—first by entering a temporary restraining order and, later in March, a temporary injunction. After the General Assembly enacted HJR 77, the Franklin Circuit Court expanded the temporary injunction, including that legislation as well. Mr. Cameron said that after the Franklin Circuit Court entered a temporary injunction, his office asked the Court of Appeals for relief from that injunction. Recognizing the public importance of the case, the Court of Appeals recommended that the matter be transferred to the Supreme Court. The Supreme Court granted transfer of the case and heard oral arguments on June 10.

On August 21, the Supreme Court issued its decision, holding that the Franklin Circuit “abused its discretion in issuing the temporary injunction.” Therefore, it reversed the Franklin Circuit Court and remanded the case with instruction to the Circuit Court to dissolve that injunction. In evaluating this case, the Supreme Court looked at whether any of the parties to the lawsuit would be irreparably harmed by a decision. The Governor claimed that he would suffer harm because the new legislation, if it went into effect, because it would reduce his power. The Supreme Court rejected this argument because the Constitution does not expressly give the Governor any emergency powers. This means that the governor is not injured in any legal sense when the General Assembly places limits or checks and balances on emergency powers. The Supreme Court found that the public would be injured if the challenged statutes do not go into effect which is a well-established rule of law that the nonenforcement of a statute constitutes irreparable harm to the public and the government.

The second factor the Supreme Court looked at was whether the Governor’s claim involved a substantial question on the merits. In asking whether the claim had legal merit, the Supreme Court determined generally that the Governor’s claim had no legal merit. The Supreme Court first took up the Governor’s claim that the new legislation violates the separation of powers. Because the Governor only has the emergency powers given to him by the General Assembly, the Supreme Court said it does not violate the separation of powers for the legislature to define and place limits on the Governor’s emergency powers.

The Supreme Court examined the Governor’s claim that the new legislation infringes on his discretion to call special sessions by limiting the state of emergency to 30 days. In the Governor’s view, the 30-day limit would force him to call a special session, thereby taking away his discretion. The Supreme Court expressed great skepticism about this claim, finding that the assertion that the Governor would be forced to call a special session every 30 days is not credible. The Supreme Court felt that it did not have enough information about this claim to opine on its merit, so the Supreme Court declined to make a definitive pronouncement concerning the constitutionality of the 30-day limitation.

Next, the Supreme Court evaluated the Governor’s claim that SB 1 violates his executive supremacy under Section 69 of the Constitution, by requiring the Attorney

General's consent in any suspension of statute during emergencies. The Supreme Court rejected this claim, concluding that SB 1, Section 4, constitutes a valid exercise of the General Assembly's authority to suspend a statute. The Supreme Court then turned to the claim that the new legislation is arbitrary. The Supreme Court rejected that claim, too, finding that the Governor has no standing to make such a claim. Finally, the Supreme Court ruled against the Governor's claims that SB 1 was unconstitutional special or local legislation. After evaluating the merits of the Governor's claims, the final element of the Supreme Court's analysis involved balancing the equity and the public interest. It had little trouble in determining that both the equity and the public interest weighed in favor of adherence to the new legislation.

According to the Rules of Civil Procedure, the Supreme Court's decision will become final 21 days after it was issued. When that happens, the matter will officially be back in front of Franklin Circuit Court, with instructions for the injunction to be dissolved. In the meantime, the Circuit Court has instructed the parties to provide it with a status report no later than September 7.

Mr. Cameron said that the issue before the Supreme Court was whether the Franklin Circuit Court's temporary injunction was proper. The decision is precedential, meaning that its reasoning is binding on the lower court. On all but one claim, the Supreme Court's reason leaves no room to conclude anything but that the statutes are constitutional. The only claim that the Supreme Court did not find to be meritless was the one about the 30-day limitation on emergencies. The Supreme Court simply concluded that it needed more information before making a decision.

Mr. Cameron said that, while the Supreme Court did not officially declare the statutes constitutional, he is confident after reviewing the court's reasoning, that the only potential obstruction of the 30-day limitation on a state of emergency will be upheld. The only way the Governor could prevail on his other claim would be for the Supreme Court to reverse itself, and that would be exceptionally unusual, especially considering that its decision against the Governor in affirming the legislature's authority was unanimous.

On or before September 13, the Franklin Circuit Court's injunction will dissolve, rendering SB 1, SB 2, HB 1, and HJR 77 enforceable. In the meantime and beyond, the Boone County Circuit Court's injunction precludes the Governor from doing anything that would contravene or violate these laws. The Supreme Court spoke clearly in its opinion when it said: "As we have noted time and again, so many times that we need not provide citation, the General Assembly establishes the public policy of the Commonwealth." With this language the Supreme Court reaffirmed the legislature's unique ability to represent the diversity of the Commonwealth. Concluding his remarks, Mr. Cameron said he is hopeful that the Governor and the General Assembly, moving forward, can find consensus on what is needed to protect Kentuckians. Representative Meredith thanked Mr. Cameron for his helpful, detailed summation of the Supreme Court ruling.

In response to a question from Senator Alvarado regarding the opinion that judges sometimes inject politics in their decision-making, Mr. Cameron replied that it is his responsibility to make sure that he is respectful of all members of the judiciary, though he may vigorously disagree with some decisions that are made—whether at the circuit court, court of appeals, and even the Supreme Court level. He said it is not uncommon for a trial court, or even the Court of Appeals, to get things wrong and for reversals to occur. He thinks the Supreme Court made the point that the legislature holds the keys in terms of statutory authority and the ability to change emergency powers. This should hopefully empower the legislature as it considers its role in continuing to fight the virus.

Representative Wheatley said he hopes the legislature and the executive branch can continue to work collaboratively. He raised the question whether the legislature should have the power to call itself into session, a topic of past arguments on the floor of the House and the Senate. He also spoke about the necessity for the governor to call a special session in order to put in place the results of collaborative work with the legislature. Mr. Cameron said the Supreme Court made it clear that discretion resides with the legislature to place limits on the governor’s emergency powers, and the Constitution grants the governor express power to call a special session. He said he hopes the legislature and the governor can continue to work together during times of emergency and will be able to agree on how to ultimately handle additional measures to confront COVID-19.

When asked by Senator Nemes, Mr. Cameron said the Franklin Circuit Court should lift the injunction no later than September 13 and should not be able to place any conditions on dissolution of the injunction.

Representative Nemes said that the Supreme Court ruling represents a seminal moment in the relationship between the legislature and the executive branch. The governor argued that he alone got to declare when an emergency exists, how to respond to that emergency, and how long his declared emergency exists. The Supreme Court, in a very strong opinion, stated, “In fact, non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government.” The court also said, “Furthermore, the assertion that the Governor would be forced to call a special session every 30 days is not credible.” That argument was considered and unanimously thrown aside by the Kentucky Supreme Court. Representative Nemes asked the Attorney General to comment on the magnitude of the opinion and its importance in establishing the policy-making rights of the legislature. Mr. Cameron responded that the Supreme Court recognized that the framers of the Kentucky Constitution wanted to have a robust legislature that would be “in the driver’s seat” relating to statutory change. It is also important to note that the Supreme Court repeatedly expressed the point that the Governor has no inherent or implied authority and that his authority is derived from statute.

Senator Thayer said that for the first time during his tenure in the General Assembly, Kentucky has an attorney general who is willing to defend the actions of the General Assembly, the people's branch of government. He said that the bills in question that were vetoed by the Governor had emergency clauses and went into effect after the vetoes were overridden by the legislature. He questioned whether the Governor had followed the law during the intervening time between passage of the bills into law and the recent ruling of the Supreme Court that upheld the laws. Mr. Cameron said there is an open question whether the governor was faithfully executing the laws during that intervening time period, but he is not willing to pass judgment on the Governor without taking the issue under advisement. Viewed from the Governor's perspective, the laws were stayed in Franklin Circuit Court; viewed from another perspective, the ruling by the judge in Boone County would have enjoined the Governor from doing anything that was inconsistent with the bills that were passed.

Representative Smith asked whether there is an opinion or research relating to businesses requiring employees to be vaccinated against COVID-19. Representative Meredith said he believes that issue is a matter of public policy that has not been addressed at this point—and which the Attorney General may or may not wish to address. Mr. Cameron said he does not believe his office has received any inquiries regarding that question. He is not able to comment further at this point, without looking specifically at an actual opinion request, or specific factual information related to a vaccine requirement in a private business.

Representative Meredith asked about KRS Chapter 39A, with respect to extending the time period for emergency declarations. Mr. Cameron said that the statutes (39A.090) provide a mechanism for local governments to request an extension of a 30-day period—for up to 90 days, he believes. There were no more questions, and Representative Meredith thanked Mr. Cameron and Mr. Meredith.

### **Discussion of Issues Relative to COVID-19 in Kentucky Correctional Facilities**

The guest speakers were Jim Daley, Campbell County jailer and President of the Kentucky Jailers Association; Cookie Crews, Commissioner, Kentucky Department of Corrections, Justice & Public Safety Cabinet; and Robyn Bender, General Counsel, Justice & Public Safety Cabinet.

Mr. Daley said that beginning in March 2020, jails began having a lot of problems and issues that required significant changes to operations at local detention facilities. With those changes came substantial costs. The emergency orders from the executive branch and the Supreme Court had a major impact. Some of the increased costs suffered by jails and counties are intangible. The Campbell County jail has a budget this year of approximately \$17 million and is the largest employer in the county. Full service jails are very expensive, and county fiscal courts are tasked with that cost by statute. However, the greatest cost to

Campbell County has been the loss of a 20-plus year sergeant and a three-year deputy to COVID.

Mr. Daley said that, as an elected jailer, he does not control who is admitted, how long they are there, or when they are released. He does not control his own budget. All of that is set by statute. It is particularly true for every full-service jail and becomes an item of contention for many detention facilities. He is extremely fortunate, in that Campbell County has a wonderful fiscal court and a wonderful judge/executive. Because of jailers' lack of control, most jails are not equipped to deal with quarantine or other issues relating to COVID. For a long time the Campbell County jail did not have any issues and then suddenly had 200 people infected by COVID. Within one month the jail was COVID-free. Today, approximately 18 people in the jail are COVID-positive. Even prior to COVID, it was difficult to hire people for jail work. The jail is a potential 656-bed facility that currently has about 450 inmates. Campbell County has a suggested capacity of 85 for deputies but is down by 50 due to COVID. These intangible costs—not seen from the outside—are personnel-related. Overtime is another big issue. In July 2020, the monthly overtime bill was \$80,000, due to a shortage of staff, and the fiscal court had to step up and put that money into the jail. In July 2021, the overtime budget was \$30,000. For the year 2020, the total spent for overtime was \$698,543; so far, the 2021 cost of overtime is \$601,312. Some staff have quit because they cannot take a vacation. Due to staff shortages, there are people on-call every week. They not only have to worry about their own health but also the health of their families.

Transport between jails for the last 18 or 19 months was temporarily shut down because of COVID and may have to be shut down again. Campbell County had to bear the cost of implementing virtual court. Without virtual court, inmates have to be transported, because some judges want the person in front of them. Online visits for attorneys have to be set up and maintained. Because of its number of state inmates, Campbell County has to do that for counties throughout the state which is expensive. Mr. Daley said he hired his own IT staff person to deal with the issue, at a cost of \$60,000, plus the cost of benefits and equipment. He felt it was his facility's duty because it holds inmates from all over the state.

Mr. Daley said that his jail received a call from the Department of Corrections regarding a need to limit visitations, but a couple of jails have been written up, upon inspection, for not allowing visitation. Campbell County had to stop faith-based services, substance use treatment, and monoclonal reconnection therapy. Those programs are really needed in local jails. Campbell County was planning to start them again but had to shut them down again because of renewed problems with COVID and the new variant.

Mr. Daley said that all of the changes that were required were made with no extra funding from the Commonwealth, and jail revenue has taken a drastic hit from the pandemic. He paid the county police department for several months to supply people to

work in the jail. His prison account for 2021 lost \$1.6 million in revenue that would have been received for housing state inmates. He said he has those figures broken down by month, and he offered to share that information.

Mr. Daley said that passage of HB 556 during the 2021 regular session was supposed to provide an extra \$2/day per diem for the duration of COVID. However, not a single county facility has received any of the funding outlined in that bill, and the Department of Corrections has recently communicated that expenses are not recoverable without a line itemization of the expenses. Campbell County has a great jail staff and a fiscal court that takes care of a lot of things relating to funding, but smaller jails do not have the ability to do that. It is a very expensive process, and they would not be able to provide numbers to substantiate all the expenditures.

Responding to questions from Representative Matt Lockett, Mr. Daley said he can only speak for the Campbell County Detention Center, which has a mask mandate and also checks temperatures when people come in. In-person visitation has stopped, but attorneys can meet with their clients online. They can also provide written materials for the jail to pass on to their clients. About 50 percent of jail staff have been vaccinated. Vaccination is offered every day, and a lot of state inmates choose to be vaccinated. At least a dozen staff or inmates have had COVID and recovered. Two died. He does not have that information for other facilities.

In response to a question from Representative Moser about utilization of substance use disorder beds that are contracted with various vendors around the state by the Department of Corrections, Mr. Daley said he does not know the answer to that and does not know of any problems or questions about that from other jailers. Representative Moser said there are inmates who could benefit from that treatment. Use of those beds would also help alleviate overcrowding issues in jails and is an issue that should be reviewed.

Senator McDaniel spoke about the budget impact of the jail's loss of revenue for state inmates who leave the jail. Mr. Daley confirmed that, because of lack of staffing, he shipped out about 85 state inmates a couple of months ago. Senator McDaniel said that jails should have received money that was allocated to begin setting up videoconferencing with the court system, and Mr. Daley said they "had not seen a dime." Senator McDaniel also spoke about the legislature's appropriation of monies to defray costs related to COVID. He suggested that the Department of Corrections should begin to reconsider its position and not decide that those who serve on the front line deserve less.

When Representative Deanna Frazier asked about vaccination rates in the jails, Mr. Daley said there was a slow start, with some jails being late in having the ability to get the vaccinations. In northern Kentucky the health departments acted quickly, and the Campbell County jail has vaccinated about 50 percent of its current population. Also, many released inmates have been vaccinated.

In response to a question from Representative Tate about policies relating to quarantine, Mr. Daley said there is no statewide quarantine policy for jails. In Campbell County, inmates are quarantined for seven days when they come in, but that may be changing to 10 days because of the influx of new cases. If inmates have symptoms, they are placed in a separate quarantine area for another 10 to 15 days. He discussed the guidelines in more detail and stated that the decisions are made at the local level.

Responding to Representative Stevenson, Mr. Daley discussed the protocols for protecting inmates from COVID. He noted that they include housing COVID-positive inmates together and requiring inmates to wear masks when outside their cells.

Representative Adam Koenig asked about the visitation policy. Mr. Daley said that jails are doing visitation in different forms. His jail does not currently have in-person visitation. Every facility is different. Kenton County, for example, has a beautiful facility that has the ability move people around and that has a nice visitation area. A lot of jails do not have that. Representative Koenig also stated that it is time for the legislature to seriously consider increasing the per diem for jail staff on a permanent basis, not just COVID-related.

Representative Derek Lewis said that the jails in his district—Clay, Laurel, and Leslie Counties—are also struggling as a result of COVID, and he also echoed Senator McDaniel’s concerns about defraying expenses.

There were no more questions, and Representative Meredith thanked Mr. Daley for his testimony. The next speakers were Cookie Crews, Commissioner of the Department of Corrections, and Robyn Bender, General Counsel for the Justice and Public Safety Cabinet.

Ms. Crews said that the first COVID-positive test of an inmate occurred in April 2020. Dealing with the virus has been extremely hard for staff. Last year, 48 inmates and five staff were lost to COVID. Around April 2020, the prisons began vaccinating the vulnerable group of ages 60 to 80 and later began to vaccinate staff and the general inmate population. Currently, the vaccination rate for the inmate population has increased to 83.02 percent, but the rate at individual institutions can range from 35 percent to 75 percent. There are efforts to test staff twice a week if they are unvaccinated. Ms. Crews expressed concern for the health and safety of staff and their families. The prisons continue to do mask wearing and testing. When inmates enter the system, each is given a rapid test after leaving the bus. They are tested again twice after seven-day intervals.

Responding to Representative Decker, Ms. Crews said she does not have the information with her about the number of inmates that have recovered from COVID but offered to get that information, broken down by institution. Regarding treatment protocols, this is dealt with on a case by case basis whether the person is vaccinated or unvaccinated.

Responding to Representative Heavrin, Ms. Crews said that the power at the Peewee Valley facility was restored the previous night. The power structure has not been fixed, but power is being provided by generators.

Representative Johnson said he would appreciate receiving information about the percentage of staff and guards that have been vaccinated and the percentage that have had COVID and recovered. Ms. Crews said she can only speak generally. It depends on the location in the state. In Oldham County, for instance, the three prisons have a vaccination rate of 50-70 percent. In the eastern part of the state, the rate is probably about 32-34 percent and around 40 percent in the west. She offered to get the number of COVID recoveries for Representative Johnson.

Responding to Representative Lockett, Ms. Crews confirmed that personal protective equipment is provided as needed. When he asked about factors contributing to staff shortages, Mr. Crews said it is a combination of things. Because of COVID, people are worried about their families. She also spoke about the relatively low pay, the long hours, and the unpleasant aspects of dealing with prisoners.

When Representative Moser asked about the use of substance use disorder beds contracted to vendors, Ms. Crews said that those are being utilized to the best of the Corrections Department's ability. She thinks all the beds are filled but offered to get that information. She believes that inmates are getting substance use treatment but that COVID has slowed the process down. Sometimes when inmates leave, due to the pandemic, it may cause them to reconnect with their families as opposed to going to a halfway house.

Representative Moser discussed Regeneron and monoclonal antibody infusion, which are treatments available for individuals who test positive if they meet certain criteria. She asked whether DOC would consider use of these treatments. They have been shown to reduce severe illness and hospitalization. Ms. Crews responded affirmatively. Representative Moser said the treatment should be utilized and she would be happy to assist any effort to expand use of the treatment.

Senator Alvarado urged anyone who has not been infected to get a vaccination. Even those who have been infected that may have an adequate antibody response should get a vaccine as a booster to their immune level. He also said that the nursing home environment is also struggling with staffing issues, with about 36,000 clinical beds in the state.

Representative Walker Thomas said he would like to know how many non-US residents are in the state's prison system this year, compared to last year, and how many might have tested positive for COVID. Ms. Bender agreed to get that information.

Responding to questions from Representative Tipton, Ms. Crews said that 83.02 percent of inmates have been vaccinated. Regarding the vaccination rate of state prisoners

in local jails, she said she would probably not have information on them until they actually enter the prison system. As to inmate capacity at the institutions, she said she does not know the capacity last year but can get that information. Today the capacity is 10,027, with 1,645 of those inmates being vaccinated. Ms. Bender said she believes the population in March 2020 was approximately 12,000 but that she would get that information for Representative Tipton.

Representative Koenig suggested that there was some ambiguity in previous testimony regarding visitation policy. Ms. Crews said that DOC does not provide direction for county jails.

Representative Meredith asked about public health guidance that was provided by the Justice & Public Safety Cabinet and the Department of Public Health. He said it seems as though the Jailers Association may have been working from those guidelines. Ms. Bender described documents from various agencies and government offices that addressed guidance for visitation in penal institutions and said that the Department of Corrections did not issue a directive about jail visitation.

Senator Robin Webb asked about opportunities for vaccination at the prison institutions. Ms. Crews said that vaccination is voluntary. They are given one-on-one information about what it would mean to them as an individual and why getting vaccinated is recommended. Senator Webb also asked whether accurate reporting data is available regarding state inmates that are in county jails. Ms. Crews said she would get an answer to that for Senator Webb.

Responding to Representative Tate, Ms. Crews briefly discussed how COVID has impacted services to the inmates. She said that early on during the pandemic most programs were shut down for about a year, but all programming and education shifts have now been restored.

Responding to Senator Southworth, Ms. Crews said that unvaccinated inmates are able to have visitation. In order to provide stability and safety, visitors are required to be vaccinated. The plan is to gradually open up visitation to children and eventually the unvaccinated, but they have not reached that point yet. Senator Southworth said she heard from a constituent that a child was not allowed to be included in a visit that took place via Zoom. Ms. Crews said that should not have happened and that children should be able to visit via Zoom. Her plan is to fully restore visitation in person at some point. It is important both to the inmate and to family members.

Representative Meredith asked whether any local jails that house state prisoners have requested help because of overcrowding. Ms. Crews said that small jails are not able to quarantine like they should, and from time to time DOC has removed state inmates from jails that reach out to DOC. In the early days of COVID, several jails requested help. One

request, she recalled, came from Nelson County. When Nelson County was able to house them, the inmates were shipped back.

There was no further business. Representative Meredith thanked the speakers, and the meeting was adjourned at 12:08 p.m.