

Public Safety and Offender Accountability Act (HB 463): Justice Reinvestment Summary

Where we were: Challenges Facing Kentucky

Correctional Population

During the decade preceding the passage of HB 463, Kentucky had one of the fastest growing prison populations in the nation. The Commonwealth's inmate population experienced a 45 percent growth between 2000 and 2010, compared with 13 percent growth in the U.S. state prison system as a whole. Looking back over a longer period, the state's prison population had jumped more than 260 percent between 1985 and 2010 (5,700 inmates increased to almost 21,000). At year-end 2007, 1 of every 92 adults in Kentucky was incarcerated, compared with 1 of every 100 adults nationally. This high rate of prison expansion was not due to an increase in crime. Kentucky's serious crime rate has been well below that of the nation and other southern states since the 1960s, and the current crime rate is about what it was in 1974. Also in 2010, Kentucky had the fifth highest imprisonment rate for females, many of whom were incarcerated for drug offenses.

Corrections Status: Rising Costs, Low Public Safety Return

Over the last 20 years, the Commonwealth's spending for the increased incarceration had grown dramatically. In fiscal year 1990, general fund corrections spending in Kentucky totaled \$140 million. In FY 2010, the state spent \$440 million on corrections, an increase of 214 percent. It currently costs over \$21,900 per year to house each inmate in a state institution. (Class D felons are usually housed in county jails: the average annual cost is \$ 12,742.15 with substance abuse programs and \$12,402.70 without substance abuse programs.)

Meanwhile, resources to reduce recidivism and hold offenders accountable in the community were scarce. The department reported that spending for offenders on probation and parole between FY 2005 and FY 2010 dropped from \$1,191 per year to \$961 per year. Greater spending on prisons did not translate into a better return for public safety. The state's recidivism rate—the number of offenders who return to prison within 3 years of release—remained above the levels from the late 1990s. The recidivism rate for those leaving prison in 1997 was 37 percent. The Kentucky Department of Corrections reported that the rate peaked for those leaving prison in 2003 at 44 percent, and it was 40 percent for those who left prison in 2007. In addition, while the state's crime rate declined 6 percent between 2000 and 2010, that drop was only one-third the size of the 19 percent drop nationwide.

The state prison system was at capacity and local jails held more than one-third of state inmates, which is significantly higher than the 6 percent average for all states.

Creation of the Task Force on the Penal Code and Controlled Substances Act

Seeking new ways to protect public safety while controlling the growth of prison costs, the General Assembly in 2010 (via HCR 250) established the bipartisan, inter-branch Task Force on the Penal Code and Controlled Substances Act. The task force members included:

- Senator Tom Jensen, task force Co-Chair and Chair of the Senate Judiciary Committee;
- Representative John Tilley, task force Co-Chair and Chair of the House Judiciary Committee;
- Secretary J. Michael Brown, Justice and Public Safety Cabinet;
- Chief Justice John D. Minton, Jr., Kentucky Supreme Court;
- Tom Handy, former Commonwealth’s attorney;
- J. Guthrie True, former public advocate; and
- Judge/executive Tommy Turner, Larue County.

The task force was directed to provide to the Interim Joint Committee on Judiciary and the Legislative Research Commission draft changes to the Penal Code, the Controlled Substances Act, and other necessary statutes. The draft was required to be based on the principles of “Justice Reinvestment” and provide for alternatives to incarceration; the use of community treatment, education, and rehabilitation programs that have been proven to reduce recidivism; the monitoring of defendants where necessary; and a reduction of recidivism while protecting and enhancing public safety.

The task force was given authority to request assistance from outside organizations, which it did from the Public Safety Performance Project of the Pew Center on the States. Pew and its partners have provided assistance to many states, analyzing state data to identify what is driving prison growth and developing research-based, fiscally sound policy options to protect public safety and strengthen offender accountability, while containing corrections costs. Pew partnered in Kentucky with the Crime and Justice Institute and the JFA Institute.

With the Assistance of the Pew Center on the States and its partners, the group conducted a detailed analysis of Kentucky’s sentencing and corrections data; solicited input from a wide range of stakeholders; used that information to develop tailored policy options, including proposals that would reinvest a portion of any savings from averted prison spending into evidence-based¹ strategies to strengthen probation and parole programs and reduce recidivism; and facilitated the construction of a package of legislative and administrative reforms.

Task Force Findings: Drivers of the Prison Population

The task force’s analysis indicates several leading causes of Kentucky’s prison growth.

Increase in Arrests and Court Cases. While reported crime remained basically flat between 2001 and 2009, adult arrests increased 32 percent during that time. This was driven by a 70 percent increase in arrests for drug offenses, a 22 percent increase in arrests for Part 1

¹ Evidence-based practices means policies, procedures, programs, and practices proven by scientific research to reliably produce reductions in recidivism when implemented competently.

offenses and an increase of 33 percent for Part 2 offenses. Meanwhile, the Administrative Office of the Courts reported that the number of criminal cases filed in Kentucky's circuit courts rose from 25,591 in 2002 to 32,026 in 2009.

High Percentage of Offenders Being Sent to Prison and low use of probation and other alternatives. Kentucky sentenced offenders to prison as opposed to probation or other alternative sentences at a much higher rate than most other states. In 2009, district and circuit courts sentenced 57 percent of all convicted felony offenders to prison, which was higher than other jurisdictions. The federal Bureau of Justice Statistics reports that in 2006, 41 percent of all felony convictions resulted in a sentence to state prison.

Increase in Technical Parole Violators. Offenders on parole who were sent back to prison for a technical violation of parole and did not have a new felony conviction had nearly doubled as a percentage of prison admissions. The Kentucky Department of Corrections reported that technical parole violations accounted for 10.2 percent of total prison admissions in FY 1998, yet rose to 19.5 percent of all admissions in FY 2010. Admissions by parole violators who had a new felony conviction accounted for just 2.2 percent of total admissions in FY 2010, up from 1.8 percent of total admissions in FY 1998.

Drug Offenders. The Kentucky Department of Corrections reported that between 2000 and 2009, the percentage of all admissions that were drug offenders rose from 30 percent to 38 percent. In addition, 25 percent of prison inmates in 2010 were being held for drug offenses. 75 percent of these drug offenders were in prison for possession offenses or for their first trafficking offense.

Other Challenges in Kentucky

The Department of Corrections, and the Commonwealth as a whole, struggled with a lack of community intervention resources, notably for substance abuse. Risk reduction interventions in concert with supervision are essential to reduce recidivism among medium- and high-risk offenders. However, resources for those interventions were at a premium within the DOC and in the community. For example, a review by the University of Kentucky Center on Drug and Alcohol Research stated that residential substance abuse treatment beds, including those funded by the Department of Corrections, are consistently at capacity and most report waitlists, indicating an extremely over-burdened system of care.

Barriers existed to accessing available community-based sentencing options. Inmates who were eligible for home incarceration often lacked stable home environments and thus remained in prison to serve out their sentences. Some parole-eligible offenders opted for incarceration over community treatment because they could receive earned-time credits for treatment in prison but not for community treatment. In addition, the use of global positioning systems (GPS) supervision is available for pretrial, probation, and parole populations, but its application varied widely.

The Cost of Doing Nothing

Despite these longer-term trends, Kentucky's prison population had declined for the 3 years preceding the work of the task force. A significant reason for this drop was an increase in the parole grant rate. Parole officials indicated the grant rate had risen as a result of the use of a validated risk assessment tool. Use of this tool enabled the parole board to begin granting release at a higher rate to lower-risk offenders who were incarcerated for less severe offenses. However, even given that higher level of parole, prison growth was expected to resume in Kentucky if no changes were made to the state's criminal justice system. If previous policies remained in place, independent experts and the Department of Corrections projected the prison population would have increased by nearly 1,400 inmates during the next 10 years.

If the state had not acted to contain this growth, policy makers would have been forced to increase Kentucky's current spending on corrections significantly. According to 2010 projections from the Department of Corrections, by 2020, the state would have needed to spend at least \$161 million more on corrections to cover this growth. This included an additional \$120 million in cumulative operational costs for the Kentucky Department of Corrections and \$41 million for construction of an additional 800 prison beds; these additional beds would still have left the state nearly 600 beds short, requiring officials to find beds within existing facilities. In addition, if the necessary prison construction had been financed through bonds, debt service may have nearly tripled the cost.

Building Stakeholder Consensus

Facing a myriad of challenges, the task force worked to solicit input from stakeholders within the criminal justice system and the community and worked to build a consensus around the resulting reforms. Many stakeholders were invited to testify before the task force and help develop the reforms in HB 463, including: prosecutors, judges, defense attorneys, law enforcement officials, jailers, county officials, victim advocacy groups, probation and parole officers, treatment providers, and business leaders.

Criminal Justice Reform under HB 463

The tailored policy options recommended by the task force focused on five areas:

- **Determining and addressing the risks and needs of individuals in the system**
- **Strengthening probation and parole**
- **Adopting common sense sentencing reforms**
- **Supporting and respecting victims**
- **Improving government performance**

The 2011 General Assembly enacted many reforms to address these areas of concern based in part on recommendations from the task force. The resulting legislation was HB 463, The Public Safety and Offender Accountability Act, which was the first major overhaul of the state's criminal laws in over 30 years. The new law reflected a paradigm shift in Kentucky's criminal justice system.

Provisions in HB 463

I. Use of Risks and Needs assessment² tools within the criminal justice system that are research-based and validated to allow officials to make decisions regarding supervision levels and address the risks and needs of individuals within the system.

A. Assessment for pretrial release and supervision. AOC administers a pretrial risk assessment instrument to all defendants who are being considered for incarceration while awaiting trial. The assessment measures the risk the individual poses to public safety and the risk that the individual will not return to court and categorizes the individual by risk level, such as “low,” “moderate,” or “high.” HB 463 requires this information to be provided to the judge who is required to consider the assessment, along with other factors, when determining the most appropriate level of supervision for the individual.

- If the defendant is considered low risk, the judge must release the defendant on unsecured bond or on his or her own recognizance.
- If a defendant is a moderate risk, the court must release the person under the same conditions as a low-risk defendant, but shall consider ordering the defendant to participate in GPS monitoring, increased supervision, or controlled substance testing.
- The Supreme Court was required to establish guidelines for courts to use when ordering pretrial release and supervision and monitored conditional release when a defendant is moderate or high risk.

These provisions reflect a defendant’s constitutional right to reasonable bail and the presumption of innocence while recognizing the government’s need to provide public safety.

Pretrial Data. Kentucky Pretrial Services compared data from June 8, 2011 (the effective date of HB 463) through June 8, 2012 to the same time period the year before. These statistics, discussed at greater length below, show the provisions of HB 463 pertaining to pretrial release have been implemented with great success, resulting in more defendants being released pretrial and an increase in the appearance rate and the public safety rate.

- **Pretrial release rates have increased.** The overall pretrial release rate increased by 5%, which represents 11,000 additional defendants who were released pretrial during the year after the enactment of HB 463. Nonfinancial release increased 15% over that same period. 85% of low-risk defendants were placed on pretrial release (an increase of 8% over the pre-HB 463 time period), and 67% of moderate-risk defendants were placed on pretrial release (an increase of 7%). The release of high-risk

² Risk and needs assessment means an actuarial tool scientifically proven to determine a person's risk to reoffend and criminal risk factors, that when properly addressed, can reduce that person's likelihood of committing future criminal behavior

defendants has only increased very slightly. The total percentage of defendants released pretrial increased from 65% to 70%.

- **Appearance rates have increased.** Even with the dramatic increase in the number of defendants released from jail pretrial, the appearance rate, the percentage of pretrial released defendants who show up for all scheduled court appearances, actually increased from 89% to 90% the year after the passage of HB 463.
- **Public safety rates have increased.** Another important point to note is that even though more defendants were released in the year following the passage of HB 463, the public safety rate, the percentage of defendants who have not been charged with a new crime while on pretrial release, also improved from 91% to 92%.
- **More defendants have been ordered into the Monitored Conditional Release (MCR) program in lieu of staying in jail pretrial.** The language in HB 463 strongly encourages the release of more moderate-risk defendants with supervision in lieu of cash bail or pretrial detention. Because of this, Pretrial Services' MCR program, which is a formal program to supervise defendants released from jail before trial, has experienced a significant 40% increase in its caseload, representing more than 2,500 defendants. To assist in the increased workload, in the 2012 Regular Session, the General Assembly appropriated funds to the AOC to hire an additional 25 pretrial officers.

B. Presentence Investigation (PSI) Report (effective July 1, 2013). KRS 532.050, pertaining to the presentence procedure for a felony conviction, was amended to require the risk assessment results be included in the presentence report, which will be provided to the sentencing judge for consideration when determining the terms of an individual's sentence.

C. Making decisions on parole release and in setting terms of parole. The Department of Corrections is required to administer a validated risk and needs assessment instrument to all inmates who are eligible for parole release, provide the risk and need assessment information to the Parole Board, and incorporate that information into the development of the inmate's reentry plan.

D. Throughout the period of incarceration, and throughout the period of probation and parole supervision. The Department of Corrections is required to administer a validated risk and needs assessment upon intake to an institution and upon intake to probation or parole supervision, unless an initial assessment has been conducted previously. The Department of Corrections is also required to readminister the risk and needs assessment at regular intervals during supervision.

In addition, the Department of Corrections must apply the results of the risk and needs assessment to establish the appropriate level of supervision, to determine the content of a supervision plan that addresses the offender's criminal needs, and to respond to compliant and noncompliant offender behavior.

II. Increasing Successful Transition to the Community after Incarceration

A. Mandatory Reentry Supervision (MRS). Studies show the first 6 months after release from incarceration are the most crucial in determining whether an ex-offender's reintegration into society will be successful. During this period, making resources available to these individuals based on their risks and needs assessment will drastically reduce their likelihood to reoffend. The provisions of HB 463 require mandatory reentry supervision which facilitates reentry into society by coordinating resources for housing, employment, treatment and other programs for the released individuals and by monitoring their compliance with the conditions of their release. HB 463 requires the DOC to release qualified inmates from custody 6 months before their minimum expiration date and place them under the supervision of the Division of Probation and Parole. These individuals would otherwise serve out their entire sentences and be released into Kentucky communities without supervision or resources for reentry assistance within the community. Inmates who do not qualify for MRS are: offenders who are not eligible for parole, those who are sentenced to class A and capital felonies, offenders with significant discipline problems, offenders with maximum- or close-security classification, offenders who have been sentenced to two years or less of incarceration, and who have nine months or less to be served after his or her sentencing by a court. The effective date for MRS was delayed until January 2012 to give the DOC time to build the Division of Probation and Parole and train employees on the risk and needs assessment tool. HB 463 requires the DOC to report to the legislature after Feb. 1, 2015 to determine efficacy of MRS.

Recent data and testimony from the Justice Cabinet reveals that MRS to date has been successful. As of July 26, 2012, the data is as follows:

- Total number of MRS releases to date: 2398
- Number of clients on active MRS supervision: 1094
- Number of clients who have successfully completed MRS: 823
- MRS revoked - discharged after completing sentence: 171
- MRS revoked – currently in custody: 97
- Revocation pending – currently in custody: 99
- Currently on absconder status – not currently in custody: 114

In order to implement MRS effectively and handle the resulting increased caseloads, the Division of Probation and Parole has, since July 2011, reorganized from three to four branches, added one district, and added staff members to include:

- 73 Probation and Parole Officers
- 22 Probation and Parole Investigators
- 11 Assistant Supervisors
- 12 Infrastructure Staff (Support Staff)

- B. Post-incarceration supervision.** A separate provision in HB 463 requires the following offenders to be subject to one year of post-incarceration supervision upon the expiration of their sentences: those convicted of a capital offense or a class A felony, inmates with maximum- or close-security classification, or those who would not otherwise be eligible for parole by statute. Post-incarceration supervision will provide serious offenders the same reentry resources and supervision as MRS. This provisions applies to offenders convicted after the effective date of the legislation.
- C. Efficiency of the Parole Process.** Before HB 463, parole hearings were not held until the month of the inmate's parole eligibility date and because of lags in processing, many offenders were held beyond their parole eligibility date before being released. Under HB 463, the Parole Board is now required to hear cases at least 60 days prior to the parole eligibility date for all sentenced felons confined in penal institutions, halfway houses, or local jails. In FY 2010, 86 percent (7,076 out of 8,196) of the discretionary parole releases were released late and were held an average of 31.5 days beyond their parole eligibility dates before being released. This created a significant cost to the state. This new 60-day requirement ensures inmates granted parole will be released on their eligibility dates.
- D. Parolees allowed to complete programming in the community.** Another problem area within the parole system was when the parole board ordered parole for an inmate contingent upon completion of a program, the inmate would often be forced to be placed in a waiting list for the program within a correctional institution. This created a large backlog for the programs within the institutions. Under HB 463, the Department of Corrections was authorized to determine an appropriate residential or nonresidential placement for qualified parolees who are required to complete an intervention program as a condition of release. The Department of Corrections may release a parolee from a DOC facility to a residential intervention program or release a parolee to appropriate community housing in order to complete a nonresidential intervention program.
- E. Parole Board deferments.** Another issue discovered by the task force was when inmates were denied parole, many times their deferment until their next parole hearing was very lengthy, and sometimes the inmates were given the order to serve out their sentences. Under HB 463, the Parole Board's deferment authority was limited as follows:
- The maximum deferment was limited to 24 months for Class C or D nonviolent, nonsexual offenders;
 - For other inmates eligible for parole, no parole deferment greater than 5 years could be ordered unless approved by a majority of the full board;
 - 10-year limitation on all other deferments, except for life sentences; and
 - The Parole Board was also required to reconsider those inmates previously given a deferment or serve-out of longer than 5 years, with some exceptions, i.e., violent or sexual offenders.
- F. Placement of offenders in local jails at the end of their sentences.** The Department of Corrections was authorized to work with counties to place eligible inmates in local jails

on conditional parole to serve the final months of their sentences. Such arrangements would only occur if the county has available beds for such inmates and agrees to accept those inmates. Inmates on conditional parole may be authorized for work release.

G. Expanded community-based transitional housing options and GPS monitoring. The Department of Corrections is authorized to continue to expand the use of transitional housing or GPS monitoring to facilitate reentry for inmates eligible for conditional release. The bill's provisions authorize the DOC to place an inmate on home incarceration or conditional release while using a monitoring device within 9 months remaining on an inmate's sentence (this was increased from 6 months).

H. Expands Medical Parole. HB 463 also amended Kentucky's medical parole statute to clarify the scope of eligibility for medical parole and requires the medical director of the Department of Corrections, rather than the warden of the institution, to submit the recommendation for or against medical parole to the commissioner of the Department of Corrections. The Parole Board is also required to conduct a hearing prior to considering medical parole of a prisoner convicted of a Class A, Class B, or Class C felony involving a violent or sex offense.

III. Improving Supervision: Pretrial, Probation, and Parole

Use of Technology and Proven Supervision Practices and Programs To Improve Outcomes

A. Expands the use of GPS for pretrial supervision. The Supreme Court was required to establish guidelines for courts to use when ordering pretrial release and supervision and monitored conditional release when a defendant is moderate or high risk.

B. Targets pretrial supervision to medium- and high-risk offenders. HB 463's provisions require more assessment and pretrial release for eligible defendants. Pretrial services is utilizing its monitored conditional release program to focus supervision on defendants that are assessed as at least moderate risk by a validated pretrial risk assessment tool.

C. Requires DOC to supervise offenders according to evidence-based practices. The Department of Corrections is required to establish administrative policy for probation and parole that includes:

- Administering a validated risk and needs assessment to all probationers and parolees to determine risk to the community and to identify intervention targets.
- Allocating caseload and workload based on offender risk level, with more resources dedicated to higher-risk offenders.
- Developing a supervision plan for medium- and high-risk offenders that targets the criminal risk factors identified in the risk and needs assessment and supervising offenders according to that supervision plan.
- Requiring interventions applied through the Department of Corrections and through contract and referral agencies to be proven by research to be effective in reducing recidivism.

- Providing appropriate training on evidence-based supervision and intervention to Department of Corrections employees who interact with probationers and parolees.

D. Requires that state funding be used for programs and practices that are evidence-based. The Department of Corrections is required to demonstrate that state-funded intervention programs provided by the department for inmates, probationers, and parolees have been evaluated for effectiveness in reducing recidivism or that similar programs have research demonstrating such effectiveness.

The Administrative Office of the Courts must also demonstrate that state-funded supervision and intervention programs provided to defendants have a documented evidence base or have been evaluated for effectiveness in reducing absconding and criminal activity. The Chief Justice is required to submit an annual report to the IJC on Judiciary on recidivism reduction efforts, intervention programs, and their outcomes.

Reducing Supervision Caseloads So Officers Can Focus on High-Risk Offenders

E. Requires the use of administrative caseloads. One of the primary tenets of justice reinvestment is to utilize resources more efficiently by focusing higher levels of supervision on higher risk offenders. In order to do this, policies must be implemented to supervise lower risk offenders more efficiently. Under HB 463, the Department of Corrections is required to establish administrative policy for the supervision of low-risk offenders through administrative caseloads. Administrative supervision will include monitoring offenders to ensure that they have not engaged in new criminal activity and are fulfilling financial obligations to the court. Offenders on administrative supervision who fail to meet financial obligations can be placed on a higher level of supervision at the discretion of the Department of Corrections. Those who engage in criminal activity can be prosecuted, can be revoked, or can be placed on a higher level of supervision.

Offenders on higher levels of supervision who, upon reassessment demonstrate a reduction in dynamic risk factors and who achieve the goals established on their supervision plans can be placed on administrative supervision at the discretion of the Department of Corrections. If the supervised person who has his or her conditions or level of community supervision modified is a probationer, the provisions require notice to the court of the modification.

F. Authorizes earned-time credits for parolees. The Department of Corrections is required to extend earned-time credit to parolees in the community using similar criteria to what currently applies to inmates.

G. Authorizes recommendation to court for early termination for probationers. The Department of Corrections also is required to consult with the Supreme Court to establish administrative policy to allow probation and parole officers to recommend early termination for probationers who have demonstrated a reduction in dynamic risk factors upon reassessment, have achieved the goals established in their supervision plans, have no new arrests, and have fulfilled all financial obligations to the court. In addition, eligible probationers who have met the above criteria must have served at least 18 months of their

probation. The probation and parole officer will review offender's alignment with these criteria at regular intervals that coincide with reassessment. If the offender meets the above criteria, the probation and parole officer will petition the court with a request for early termination of supervision. Whether to grant the petition for early termination remains within the court's discretion. The Department of Corrections may establish conditions for overriding the presumption for submitting a termination petition by administrative policy.

Increased Accountability for Violations

H. Authorizes intermediate/graduated sanctions for technical violations of parole. In an effort to reduce the number of technical parole violators – persons who violate the terms and conditions of their parole rather than commit a new offense – who are returning to prison, HB 463 implemented a system of graduated sanctions for violations of conditions of community supervision. The Department of Corrections is authorized to respond administratively to technical parole violations not warranting revocation (missed appointment with probation and parole officer, missing curfew, etc.) according to a sanctions grid established through administrative policy. The sanctions grid provides intermediate, or graduated, sanctions that are required to be appropriate to the severity of the behavior, the risk of future criminal behavior, and other available interventions that will be more effective in keeping the offender compliant and crime free. Examples: random drug testing, more intensive supervision, GPS monitoring, community service, few days in jail to be served immediately (paid by the state). DOC will establish regulations for due process for the administrative sanctions system for parolees.

As part of the graduated sanctions system, sanctions may include placement in jail for up to 10 days consecutively, but not more than 30 days in one year (DOC to reimburse jail). Due process will apply if a supervised individual objects to the imposition of sanctions.

However, when the violation of supervision conditions poses a significant risk to prior victims or the community, revocation proceedings and possible incarceration will result.

I. Authorizes administrative responses to probation violations with the consent of the court. The Department of Corrections, in cooperation with the Administrative Office of the Courts and the Court of Justice, are required to develop an administrative sanctions grid for responding to violations of probation, including the use of short jail stays. The administrative sanctions grid has the following objectives:

- Responding quickly and consistently to violations, based on the nature of the violation and the risk level of the offender
- Reducing the time and resources expended by the Department of Corrections and the Courts to respond to offender violations
- Reducing the commission of new crimes and revocation rates

Administrative sanctions may only be imposed on probationers if the court determines the sanctions will be a part of the conditions of probation.

J. Authorizes a pilot project based on the “swift and certain sanctions” of the HOPE model. The Department of Corrections was authorized to partner with the Court of Justice and at least two local courts (one urban circuit court or docket and one rural circuit court or docket) to implement a pilot of the highly successful Hawaii Opportunity Probation and Enforcement (HOPE) model, with the objectives of:

- Identifying probationers at high risk of violating their terms of supervision, specifically in relation to substance use;
- Responding swiftly and certainly to violations, using brief jail stays as primary sanctions;
- Targeting treatment resources to offenders who are unable to comply with their probation conditions after an initial sanction and who need treatment; and
- Reducing violation behavior and new crimes, thereby reducing revocations to prison.

Current status: The Department of Corrections and the Administrative Office of the Courts are partnering together on “SMART,” or “Supervision, Monitoring, Accountability, Responsibility and Treatment.” The program is based on the HOPE Model. The AOC recently obtained a grant for 12 months to implement the SMART program. Currently six Kentucky jurisdictions are involved: Pike; Jefferson; Green/Taylor/Marion/Washington; Shelby/Anderson/Spencer; Lincoln/Pulaski/Rockcastle and Allen/Simpson.

Adopts Common Sense Sentencing Reforms

An increasing number of states are implementing changes in their criminal controlled substance laws as part of a strategy to reinvest scarce corrections resources from less cost-effective sanctions and programs to more cost-effective ones. These reinvestments are based on an analysis of their marginal justice system costs and benefits and on returns on their public safety investments.

As discussed earlier, in Kentucky, a growing number of offenders were being sent to prison for drug offenses. The task force found that many of these low-risk, nonviolent offenders could be effectively supervised in the community at a lower cost. By not spending so much to incarcerate nonviolent offenders, the state will have more prison beds for dangerous offenders and can shift some of those prison dollars to create a stronger system of treatment and community programs that will reduce recidivism.

In HB 463, The General Assembly declared that regulation of controlled substances is important and necessary and that community-based treatment can be used as an effective alternative to incarceration in appropriate circumstances.

IV. Modernization of the Controlled Substances Act to focus resources on high-level offenders and provide effective alternatives for non-violent offenders

A. Implements presumptive probation for simple possession of drugs. HB 463 established a sentence of presumptive probation for simple possession of drugs. The new provisions also require pretrial release on unsecured bond or a person’s own recognizance for an offense for

which a conviction may result in presumptive probation. There are exceptions if the person is found to be a danger to others or a flight risk.

B. Creates the Deferred Prosecution program for first and second offenders of felony possession of controlled substances. Recognizing that possession offenses often stem from addiction and result in felony records, further diminishing the addicted person’s chance for a successful recovery and economic future, HB 463 implemented the new concept of deferred prosecution. Deferred prosecution has been statutorily recognized as the preferred alternative for first offense felony possession cases. The elements of deferred prosecution (DP) are as follows:

- Prosecutor has to agree and set conditions
- Maximum length of participation is two years
- Defendant does not enter a guilty plea
- If defendant’s request for DP is denied, prosecutors are required to state on the record “substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety.”
- Upon successful completion, charges are dismissed and records are sealed, except for purposes of determining future eligibility for DP
- Options after violation of DP: may continue program, change terms, or remove the defendant from the program and proceed with regular prosecution

Currently, defendants given deferred prosecution are monitored by either Drug Court or Pretrial Services. Supervision strategies for the DP program are similar to those for MCR supervision.

Since the implementation of HB 463, Pretrial Services has received 148 DP cases to supervise in 25 different counties. Pretrial Services and the Commonwealth’s Attorneys continue to work together to develop the process and conditions for DP.

C. Distinguishes between trafficking and peddling. Before the implementation of HB 463, a person was guilty of certain trafficking offenses based on the type of controlled substance, regardless of the amount involved. Someone who trafficked a small one-use amount of a substance would be punished the same as someone who sold large quantities of the same substance. In order to distinguish between a true drug trafficker and a peddler who is selling to support his or her own habit, HB 463 takes into account the amount trafficked by designating new quantities for each type of controlled substance, which will act as a threshold amount for the larger trafficking penalty. Trafficking in higher quantities of controlled substances will result in larger penalties than trafficking in smaller amounts. The designated amounts may be accumulated by law enforcement over a 90-day period to show a larger amount trafficked. (Possession offenses were not modified through quantities in HB 463.)

D. Revises the “Drug-free School Zone.” The bill also narrowed the scope of the drug-free school zone by amending the Trafficking in Controlled Substance in or near a School statute, to change the distance required from the school building and the trafficking offense from

1,000 yards to 1,000 feet, which was the original language in the Uniform Controlled Substances Act.

- E. Revises sentencing enhancements.** HB 463 reformed drug possession sentencing by eliminating sentence enhancements for subsequent drug possession offenses and limiting the application of the persistent felony offender statute in possession cases. Addiction is very often a disease of relapse. The provisions in the bill reflect this fact by eliminating penalty enhancements for subsequent possession offenses.

A second very significant change to prior law in the HB 463 provisions pertains to the application of the persistent felony offender statute. The new provisions prohibit felony possession of controlled substances from triggering the application of the PFO statute; however these offenses may still be counted as a prior offense if there is a different offense to trigger the application of the PFO statute. Another revision to the PFO statute requires prosecutors to elect whether to charge a defendant with the PFO statute or the enhanced penalty associated with an offense, but not both.

- F. Revises possession offenses.** HB 463 maintained possession in the first degree as a Class D felony but reduced the maximum sentence to 3 years. The maximum amount of time associated with the penalties for many misdemeanor possession offenses were also reduced.

- G. Reinvests savings in drug treatment.** HB 463 requires DOC to calculate the fiscal savings resulting from changes to controlled substances laws and sets forth the method of calculation for an annual analysis. The provisions specify that fiscal savings from the controlled substances modifications shall be used solely for expanding and enhancing evidence-based treatment programs.

New Substance Abuse Program reinvestment:

The total number of beds added since July 2011 is 629. This number includes 348 in the community and jails and 281 in the state prisons. In 2004, there were only 475 treatment beds in the state.

Today, the Department of Corrections has 3,404 beds distributed as follows:

- Institutions 1, 056
- Jails 832
- Community 916
- Recovery Kentucky 600

Supporting and Respecting Victims

Too often in the criminal justice system, victims of crimes do not have the information they need about offenders, including how long they may serve in prison and when they may be returning to their communities.

VI. Improves the Criminal Justice System To Support Victims

Develops and provide a web-based system for courts. The Department of Corrections is required to develop and provide a web-based system that provides to courts, attorneys, probation and parole officers, and victims, the following information for use in sentencing: (Effective July 1, 2013)

- The offender’s risk and needs information
- The offender’s expected time served, including parole eligibility date, good time release date, maximum date, and the historic percent of time served for similar offenders
- The costs for sentencing options and alternatives to incarceration
- The offender’s likelihood of being reincarcerated within two years under the different sentencing options and alternatives

Improving Government Performance

Kentucky faces tough economic challenges, and the state continues to face significant budget shortfalls. In fact, in fiscal years 2009 and 2010, general fund receipts declined for two consecutive years for the first time since World War II. In addition, since 1945, general fund receipts have only declined four times.

During these tough fiscal times, it is more important than ever to create an effective and efficient system that achieves the best return on investment by improving public safety, by holding offenders accountable, and by controlling costs. The following policy options will help ensure that the Commonwealth’s criminal justice programs and policies achieve the results that citizens desire.

VII. Defines success in corrections and sentencing as recidivism reduction and reduction of criminal behavior

HB 463 adopts statutory corrections and sentencing policy that incorporates within its main objectives reducing recidivism, maintaining public safety, and holding offenders accountable. Supervision and treatment programs are required to use evidence-based practices. Supervision and treatment programs are to be evaluated at regular intervals to measure the reduction of criminal behavior.

VIII. Establishes mechanisms to measure, incentivize, and ensure results

- A. Use of evidence-based practices.** The bill’s provisions require the Department of Corrections to use evidence-based practices in supervision, treatment and intervention programs for inmates and for those on probation and parole. The DOC is required to measure the effectiveness of the programs and eliminate policies, procedures, programs, and practices that do not reduce recidivism. The DOC is required to report its efforts to implement evidence-based practices to the GA, the Court of Justice, and the governor. In addition, DOC is required to provide initial and ongoing training of employees regarding evidence-based practices.
- B. Establishes measures for system accountability and cost effectiveness.** The Department of Corrections is required to produce an annual report for the General Assembly that provides

information on state-funded crime reduction and recidivism reduction efforts, including participation in intervention programming, public safety outcomes, and cost effectiveness.

In addition, the Administrative Office of the Courts is required to produce an annual report for the General Assembly that provides information on state-funded recidivism reduction efforts, intervention efforts, and public safety outcomes and cost effectiveness.

C. Establishes performance incentive funding pilot projects. The Kentucky State Corrections Commission is authorized to develop up to 10 pilot projects that offer incentives to reduce the number of offenders sent to prison at sentencing or on a revocation: up to five pilot projects to incentivize community corrections programs to reduce the number of offenders sent to prison and up to five pilot projects to incentivize community corrections programs to reduce the number of offenders that are revoked to prison.

IX. Implementation of a revised legislative fiscal impact statement for any bill that proposes to increase, decrease or otherwise impact incarceration

The Legislative Research Commission (LRC) is required to prepare a more detailed corrections impact statement reflecting the costs attributable to and necessary appropriations for any bill that would create a new crime; increase or decrease the penalty for an existing crime; change the elements of an offense; or propose to increase, decrease, or otherwise impact incarceration. All organizations deemed necessary by LRC are required to cooperate and provide the data necessary to complete the corrections impact statement, including the Department of Corrections, the Administrative Office of the Courts, the Parole Board, and the Kentucky State Police. The new requirements for the corrections impact statement include detailed examples for what is to be included in the calculations.

X. Requiring a certificate of need for new or expanded jail cells

Prior to constructing new or expanded jails that will house state inmates, counties will be required to secure a certificate of need from the state. The provisions prohibit new local correctional facilities or additions to local correctional facilities unless approved by the construction authority based on need and financial feasibility.

The Impact of HB 463

The initial projections for the savings produced by HB 463 estimate a reduction of over 3,000 inmates over the next 10 years and a savings of an estimated \$422 million over that period. A portion of these savings will be reinvested in programs that reduce recidivism, including treatment programs for substance abuse and mental health.

Recent information from the Department of Corrections for fiscal year 2012 indicates that inmate admissions amounted to 14,628, slightly less than the forecasted number of 14,744. Length of stay for all crimes was 17.3 months, slightly above the forecasted amount of 16.8 months. Sentence lengths for all crimes averaged 63.2 months, a reduction of 2 years from fiscal year

2011. Mandatory Release Supervision releases were 2,322, 265 more than the forecasted amount of 2,057.

Also, the Administrative Office of the Courts reported for fiscal year 2012 that 12,249 fewer defendants were arrested with 22,130 less cases than fiscal year 2011. Also, pretrial release increased by 5%, the appearance rate remained at 89%, and the public safety rate increased from 90% to 92%.

Continued efforts to sustain the reforms

Under an additional provision in HB 463, the task force was extended another year. The task force met with stakeholders to make minor revisions to the original provisions, many of which have been reflected in the commentary above. The Department of Corrections and the Court of Justice will be submitting the required reports as indicated above to the Interim Joint Committee of the Judiciary for future review and status of implementation. In addition, the revisions to HB 463 passed in 2012 contained a provision that requires the Criminal Justice Council to provide oversight for the implementation of the HB 463 provisions.

Prison Population

Although the reforms in HB 463 have significantly reduced the growth in the prison population, the average daily inmate count for fiscal year 2012 did increase from FY 2011, and is higher than the number that was forecasted for 2012. However, without the mandatory reentry program and other provisions specified in HB 463, the population for fiscal year 2012 would have been in excess of the actual amount by over 1,000 inmates.

FY 2011 Actual – 20,793 average daily population
FY 2012 Actual – 21,472 average daily population
FY 2012 Forecast – 20,966 average daily population

July 2012 Forecast – 20,063
July 2012 Actual – 21,794

The primary reason for the increase is that the Parole Board granted parole at a rate of 46.1% in fiscal year 2012 compared to a rate of 51.6% in fiscal year 2011. This meant that 1,326 fewer inmates were paroled in fiscal year 2012 than were paroled in fiscal year 2011. The forecast rate was also 51.6%