



KENTUCKY

JUSTICE & PUBLIC SAFETY CABINET

CRIMINAL JUSTICE COUNCIL

2014

HB463

Implementation Report

October 2014



Steven L. Beshear
Governor


JUSTICE AND PUBLIC SAFETY CABINET

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MEMORANDUM

TO: Rep. John Tilley, Chair, House Judiciary Committee
Sen. Whitney Westerfield, Chair, Senate Judiciary Committee

FROM: J. Michael Brown, Secretary


DATE: October 1, 2014

RE: Kentucky Criminal Justice Council's 2014 HB463 Implementation Report

Attached you will find the Kentucky Criminal Justice Council's 2014 HB463 Implementation Report.

Follow-up legislation (HB54 of the 2012 Regular session) required that the Criminal Justice Council prepare a report on the implementation of the Act's provisions within the various elements of the criminal justice system, and make recommendations to further advance the policies within that Act. HB54 established an October 1 deadline for the report.

This year the Council heard from stakeholders including the Administrative Office of the Courts; the Commonwealth's Attorneys Association; the Department of Public Advocacy; the Kentucky Association of Criminal Defense Lawyers; the Kentucky Jailer's Association; the Department of Corrections; and the Kentucky Parole Board.

The compiled report of their presentations is attached to this memo for your review. Please let me know if you have any questions or concerns related to the report.

EXECUTIVE SUMMARY

The Public Safety and Offender Accountability Act (HB463 of the 2011 Regular Session) implemented significant changes in Kentucky's criminal justice system. HB463 modernized Kentucky's drug laws by differentiating between casual possessors and traffickers; reduced prison time for low-risk, non-violent offenders who possess small amounts of illegal drugs; established a supervised release program to help inmates transition back to their communities; and called for a portion of the savings from reduced prison costs to be reinvested into drug treatment opportunities for offenders who need help, among other provisions.

The law also strengthened probation and parole functions by basing key decisions, such as level of oversight, on the risk posed by offenders. And it improved supervision by giving these officers tools to impose immediate, graduated sanctions for minor violations.

Follow-up legislation (HB54 of the 2012 Regular session) required that the Kentucky Criminal Justice Council (CJC) prepare a report on the implementation of the Act's provisions within the various elements of the criminal justice system, and make recommendations to further advance the policies within that Act. HB54 established an October 1 deadline for the report.

The CJC met on September 17, 2014 to hear reports from various stakeholders who were invited or requested to be part of the ongoing monitoring of the successes of and barriers to implementation of HB463, as well as recommendations for future changes related to justice and public safety.

Presentations for the 2014 report were made by the Administrative Office of the Courts; Kentucky Commonwealth's Attorneys Association; Department of Public Advocacy; Kentucky Association of Criminal Defense Lawyers; Department of Corrections; Kentucky Parole Board; and Kentucky Jailer's Association.

Those presentations, which are attached to this report, include the following highlights:

- Arrests have dropped by more than 40,000 since 2011 while the public safety rate has remained high, at 91%.
- SMART (Supervision, Monitoring, Accountability, Responsibility and Treatment) probation, modeled after the HOPE program, is off to a promising start.
- Commonwealth's attorneys recommended a review of parole eligibility with an increase to 50% for some offenses, and consideration of moving others to 15%.
- A review of the equity of the home incarceration credit was also recommended.
- Kentucky crime rates continue to drop. Since 2005, cases have declined by more than 34,000, with DUI cases dropping by more than 10,000.
- Kentucky Association of Criminal Defense Lawyers raised concerns about the parole rate, use of bail credit and deferred prosecution. The organization also expressed a need for felony expungement.
- The rate of county inmates has dropped due to bail and credits, and Jailers recommended a review of moving some offenses from arrest to citation.

- The inmate population grew year over year but remains well below pre-HB 463 forecasts.
- MRS (Mandatory Reentry Supervision) has realized almost \$37 million in savings, with nearly 9,300 offenders released.
- Use of jail beds us up by more than 1,800, up to 8,741 as of June 2014.
- SAP (Substance Abuse Program) beds are up to 5,677, with no PUC (Parole Upon Completion) waiting list.
- The Local Corrections Assistance Fund increased by more than \$2 million over the past fiscal year, to \$4,637,600.
- The Parole Board held 15,773 eligibility hearings and 5,641 revocation hearings in FY 2014. The Board issued 6,203 warrants.
- Hearings for all categories increased, with the exception of sex offender conditional discharge.
- Parole rates have fluctuated with changes to Board membership, and is now increasing.

ADMINISTRATIVE OFFICE OF THE COURTS

Laurie Dudgeon, Director for the Administrative Office of the Court (AOC), presented.

Ms. Dudgeon shared the following information:

- Pretrial arrests continue to decline:
In FY 2011, there were 262,710 arrests. That dropped to 246,348 in FY 2012, 234,881 in FY 2013, and 218,439 in FY 2014.
- Of the 218,439 pretrial arrests in FY 2014, 68 percent obtained a pretrial release.
- The public safety rate declined to 91 percent in FY 2014, down from 92 percent in FY 2013.
- AOC saw a slight decline in pretrial release trends, due to the ‘elevated risk of violence’ flag the agency now uses, and the fact that more defendants are classified as high risk and the upper side of moderate, due to changes with its risk assessment. This has resulted in a significant savings for pretrial officers.
- SMART probation (Supervision, Monitoring, Accountability, Responsibility and Treatment), based on Hawaii’s HOPE Probation, began on July 1, 2012, and is now in its third year of funding through a Community Corrections Grant. Data indicates the program is making a significant impact:

Drug Screening:

	SMART (n = 307)	COMPARISON (n = 300)
Average number of tests administered	2529	1149
Total number of positive drug tests	218	338
% of positive drug tests	8.6%	29.3%
Marijuana	29.0%	48.7%
Benzodiazepines	20.0%	18.5%
Cocaine	14.0%	17.6%
Oxycodone	14.0%	4.2%
Methamphetamine	10.0%	10.1%
Alcohol	7.0%	10.9%
Amphetamine	3.0%	5.9%
Methodone	3.0%	1.7%

- In general, the comparison group had a significantly higher average number of violations (2.3) compared to the SMART probationers (1.2):

	SMART VIOLATIONS	PROBATION VIOLATIONS
Substance Use (includes testing positive for alcohol and/or any illegal/illicit substance and/or drug possession charges)	24%	32.7%
New Charges (includes new felony arrest, misdemeanor, and receiving a misdemeanor conviction for carrying a concealed deadly weapon)	10.6%	33%
Fees/Services (includes failure to: complete community service, make restitution as directed, and /or pay supervision fee as directed)	3.5%	8.7%

- A preliminary cost examination indicates a significant savings in terms of total incarceration costs under the SMART program:

	SMART (N = 307)	COMPARISON (N = 300)
Total Incarceration Costs	\$40,334.60	\$84,586.70
Average Cost Per Person	\$858.18	\$3,020.95

- Participation in Drug Court has rebounded and is stabilizing, after a significant drop in 2012 due to budget considerations. As of September 2014, 2,381 individuals had participated in Drug Court, up from 2,152 as of September 2013.

KENTUCKY COMMONWEALTH’S ATTORNEYS ASSOCIATION

Jackie Steele, Commonwealth’s Attorney for the 27th Judicial Circuit, presented on behalf of the Kentucky Commonwealth’s Attorneys Association.

- For home incarceration cases, in which individuals receive a day-for-day service credit, prosecutors are seeing private counsel more than DPA requesting home incarceration as a condition of bond for a delay tactic (the defendant earns credit while the case is delayed.) Meanwhile, a public defender’s clients often can’t afford home incarceration, so they don’t get it.
- He recommended some modification of the law to level the playing field, regardless of how much money a defendant has at his or her disposal.
- Offering drug court to high risk offenders puts others at risk. It gives prosecutors “heart burn” that the individual may hurt someone with they’re on probation.
- Expand district drug courts throughout the state. There’s no better time to get an offender’s attention than when they are in district court, when they’re first entering the criminal justice system.
- Review and increase the number of 50% parole eligibility offenses. At the same time, move other crimes to a 15% eligibility. He said these changes would help offer “truth in sentencing,” because there are so many jail credit provisions that it’s almost impossible to tell a family how much time an offender will spend incarcerated.

DEPARTMENT OF PUBLIC ADVOCACY

Ed Monahan, Public Advocate, presented on behalf of the Department of Public Advocacy (DPA).

- Costs have been safely reduced a result of HB 463.
- Incarceration costs to counties and the state continue to drain local and state resources beyond what is necessary to ensure public safety.
- There are commonsense ways to reduce costs and maintain public safety, and additional reductions are achievable in 2015
- He presented six Kentucky criminal justice facts:
 - U.S. and Kentucky crime and violent crime rates continue to decline.
 - HB 463 is saving taxpayers much money but more reform is needed for further savings.
 - Kentucky inmate population is increasing.
 - Many low risk inmates, more than 30%, are not being paroled at great cost to taxpayers.
 - Cases in the Kentucky criminal justice system continue to decline: since 2005, an overall decline of 34,342 cases; DUI cases declined by 10,259.
 - Pretrial release is up 3% statewide, saving counties significant money, yet many low and moderate risk persons are in jail awaiting trial at significant cost to counties.
- He also offered 10 “commonsense ways to reduce waste in Kentucky’s criminal justice system and reduce costs for counties and the state,” including:
 - Reclassifying minor misdemeanors to violations (i.e., 2013’s HB 395)
 - Prepayment of a fine is a guilty plea under KRS 431.452 and results in a conviction so offenders are held accountable for their behavior.
 - Under circumstances where public safety is implicated, a peace officer is still authorized to make an arrest under KRS 431.452.
 - Court and prosecutor resources would be saved as many defendants charged with these offenses will elect to prepay the fines and avoid court.
 - Caseloads for public defenders would be reduced as offenders charged only with violations would not have a right to appointment of counsel.
 - Many offenders currently come to court and simply want to plead guilty so they can return to work or other responsibilities instead of waiting for their

court hearing. This will allow them to avoid court altogether if they are willing to admit guilt and pay the fine.

- Many defendants charged with these minor offenses have charges dismissed when they come to court. Allowing prepayment of fines could result in an increase of fines and court costs as more convictions result and payments are made in advance rather than on a delayed payment schedule.
- Creating a "gross misdemeanor" classification for low level felonies.
 - Penalty range - 6 months to 2 years.
 - Prosecuted in Circuit Court.
 - State prisoners authorized to be housed in county jails.
 - Conviction would not lead to collateral penalties relating to felonies.
 - Automatic or highly presumptive probation.
 - 2-year probationary period.
 - Expungeable.
- Promoting employment/reducing recidivism by creating Class D felony expungement.
 - Kentuckians who would be eligible for class D felony expungement: 94,645.
- Reducing days in the county jail by creating "clear and convincing" standard for the pretrial release decision. (i.e., 2012's HB 296.)
 - Writing the standard into the law would ensure that the goals of HB 463 as related to increased pretrial release are met and lead to greater consistency for defendants across the state
- Modifying violent offender and PFO statutes.
 - For PFOs, make PFO a discretionary rather than mandatory finding by a jury at sentencing.
 - Eliminate PFO enhancements for non-violent felonies.
 - Repeal 10-year parole eligibility requirement for PFO, First-Degree.
 - Establish "trigger" offenses that are required for PFO to apply.
 - Limit PFO application to those who have not had a substantial break in criminal activity.
 - Eliminate use of prior felonies that have not resulted in imprisonment from PFO.

- Eliminate PFO 2nd.
 - For violent offender statute, reinstate 50% parole eligibility for violent offenders, as originally passed in 1986 and maintained until 1998 when Congress conditioned federal funds on passage of 85% parole eligibility. (No federal funds would now be lost by reverting to the prior law.)
 - Limit the category of violent offenders to those convicted of murder; first-degree rape; first-degree sodomy; first-degree robbery with a firearm; first-degree burglary with a firearm; and first-degree assault.
- Presuming parole for eligible low-risk offenders.
 - Amend Kentucky's parole statute to include a presumption of parole for eligible low-risk offenders (i.e., 2013's SB 82).
 - Providing alternative sentencing plans for flagrant non-support instead of imprisonment for felony.
 - Creating alternatives to incarceration.
 - Increasing the felony theft limit from \$500 to \$2,000.
 - Reducing waste by limiting capital prosecutions.

KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Guthrie True, President of the Kentucky Association of Criminal Defense Lawyers, presented.

- Overall, HB 463 is working: crime rates are not rising, and the treatment of possessory offenses are working.
- He said there are some lingering issues, however:
- According to the Kentucky Parole Board data for FY 2013/14, of the 2,334 offenders who were assessed at the lowest risk level, 577 were deferred and 269 were given a serve out. If these individuals are truly Level 1 offenders, it doesn't make sense from a public safety standpoint to be paroling fewer than 64% of them.
- Bail credit is being subverted. Judges know offenders are getting \$100 a day credit toward their bail, so they set bail artificially high. He suggested the council recommend modifying HB 463 to adopt a clear and convincing standard, so that if a judge were to elevate bail to a level that an offender is never going to earn enough credit for pretrial release, the judge would have to articulate those reasons to stand up on appeal for clear and convincing reasons.
- Deferred prosecution is not being recommended by prosecutors, so it's not being considered by courts. As a remedy, he suggested removing that discretion from prosecutorial

recommendations for certain offenses and require courts to give prosecutions more of a presumptive deferment.

- Other issues of interest include heroin legislation. His group would like to see a bill that identifies high quantity traffickers and treats them appropriately in the criminal justice system.
- Secretary Brown asked how he would define a high quantity trafficker. Mr. True said he didn't have a suggestion but that it wouldn't be critical to specify a quantity; instead, we should be looking at people at the "front end of the pipeline. Secretary Brown said there were no metrics in Kentucky's drug laws before HB 463; as a result, we often encountered the "residue effect" of treating peddlers and causal possessors as dealers and traffickers.
- Felony expungement will also be a high priority for the organization. Too many people continue to be handicapped because of a conviction years ago which is of no consequence in their current life.
- KSP doesn't object to felony expungement, according to Morgain Sprague, an attorney for the agency, but it would have to be involved in the cost to the agency.

KENTUCKY JAILERS' ASSOCIATION

Joe Blue, Vice President of the Kentucky Jailers' Association (KJA) and Hopkins County Jailer, presented.

- HB 463 continues to allow for bail and bond credits to low risk offenders in county jails. Due to these credits jails are able to release some non-violent offenders who are simply awaiting trial. This has helped to slow down rising number of county inmates in county jails.
- The Local Corrections Assistance Fund continues to be a vital part of the county jailer budgeting process. Quarterly savings from HB 463 that are filtered back to county budgets help offset costs of incarcerating county inmates. The Local Corrections Assistance Fund helped offset some of the cuts in the jail bed allotment and other areas of the state budget. .
- The Kentucky Jailers Association recommends some of the savings be used for evidence based programming in county jails. If DOC were able to incentivize county jails that wish to implement and run programs such as SAP and offender reentry programs, jails could continue to help reduce the state inmate population and recidivism rates.
- The Kentucky Jailers' Association also recommends forming a committee to study the misdemeanor population in county jails, focusing on the penal code as it relates to misdemeanors. Recommended the committee look at some of the low-level crimes that could be citable offenses in lieu of arrest., and extending good time and other credits to misdemeanants.
- The Affordable Care Act brought some changes for county and state inmates housed in county jails. Jailers and their staff have been trained to apply for Medicaid on behalf of those individuals in order to recoup the costs of those expensive extended hospital stays.

While this will help with some larger medical expenses, it is crucial that the state continue to fund the catastrophic medical fund at the Department of Corrections.

DEPARTMENT OF CORRECTIONS

LaDonna Thompson, Commissioner for the Department of Corrections (DOC), presented.

- The state felon population was 21,439 as of Sept. 11, 2014, nearly 1,300 inmates higher than the same date on 2013, when the population numbered 20,172. The highest population recorded since HB 463 occurred on Aug. 20, 2012, at 22,503.
- Although the population has steadily increased over the past year, there are 1,000 fewer inmates than were projected prior to HB 463.
- Population is trending on target for the FY 2014-2016 Consensus Forecast, which predicted an inmate population of 21,219 by mid-August 2014.
- Mandatory Reentry Supervision (MRS) has posted significant results. Total savings under the program, from its inception through Sept. 1, 2013, are \$36.9 million.
- Nearly 9,300 offenders have been released under the program, as of Sept. 10, 2014, with 2,113 returned. The success rate for these offenders is 77.28 percent.
- The number of state inmates housed in county jails has risen dramatically. In June 2014 there were 8,741 state inmates housed in county jails, compared to 6,950 in June 2013.
- DOC has continued to increase availability of Substance Abuse Programming (SAP) beds. At the time HB 463 was passed, the waiting list for substance abuse treatment was more than 2,700 inmates. This included inmates “Parole Upon Completion (PUC), as well as those awaiting treatment.
- Today the number of in-patient treatment beds (in jails, prisons and the community) has grown to 3,752, and new Community Mental Health Care (CMHC) and community treatment slots total 1,400, for a total DOC treatment capacity of 5,677.
- PUC waiting list has been eliminated.
- The enhanced Kentucky Online Offender Lookup (KOOL) system , which was mandated by HB 463, went live July 2013. The system provides an estimate of time to serve, parole eligibility date, expiration dates and the average time served for similar offenders, as well as an estimate of future costs incurred by the commonwealth for possible sentencing, probation and diversion options
- The Local Corrections Assistance Fund distributed \$4,637,600 in FY14, up from \$2,564,500 in FY 2013. The first \$2.4 million was equally distributed among all 120 counties, with the remaining funds distributed by statutory formula.

PAROLE BOARD

Shannon Jones, Chairwoman for the Parole Board, presented.

- In FY 2014, the Parole Board held 15,773 parole eligibility hearings and 5,641 revocation hearings, broken down as follows:
 - Parole Violators: 4,663
 - MRS: 851
 - Sex Offender PI: 118
 - 12 Month PI: 9

- The Parole Board issued 6,203 warrants.

- The number of hearings for all categories, with the exception of sex offender conditional discharge cases, has steadily increased over the past three fiscal years:

<u>Hearing Type</u>	<u>FY11-12</u>	<u>FY12-13</u>	<u>FY13-14</u>	<u>Increase from FY11-12 to FY13-14</u>
Parole Eligibility	15331	15548	15773	442 (3%)
Revocation	3971	4881	5641	1670 (53%)
Parole Violators	3602	3880	4663	1061(30%)
Sex Offender Conditional Discharge	146	160	118	-28(-20%)
Mandatory Reentry Supervision	223	831	851	628(74%)
Post-Incarceration Supervision	0	10	9	9(90%)
Revocation Warrants Issued	4595	5088	6203	1608(35%)

- Parole rates among those being seen for parole eligibility hearings increased in FY 2014, while parole rates for persons being seen for revocation hearings decreased:

