



KENTUCKY

JUSTICE & PUBLIC SAFETY CABINET

CRIMINAL JUSTICE COUNCIL

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2015

HB463

Implementation Report

October 2015





**Steven L. Beshear**  
Governor

## JUSTICE AND PUBLIC SAFETY CABINET

**J. Michael Brown**  
Secretary

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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

A handwritten signature in black ink, appearing to read "J. Michael Brown".

**DATE:** October 1, 2015

**RE:** Kentucky Criminal Justice Council's 2015 HB463 Implementation Report

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Attached you will find the Kentucky Criminal Justice Council's 2015 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 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.

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## EXECUTIVE SUMMARY

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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 (KCJC) 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 KCJC met on September 16, 2015 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 2015 report were made by the Department of Public Advocacy, Administrative Office of the Courts; Kentucky Association of Criminal Defense Lawyers; Department of Corrections; Kentucky Parole Board; and Kentucky Commonwealth's Attorneys Association.

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

- Arrests have dropped by more than 50,000 since 2011 while the public safety rate has remained high, at 90%.
- Kentucky crime rates continue to drop. Since 2007, cases have declined by more than 42,000. DUI cases have dropped by more than 7,900 since 2009.
- Kentucky Association of Criminal Defense Lawyers raised concerns about the use of bail credit, deferred prosecution and the need for felony expungement.
- The inmate population grew year over year but remains well below pre-HB 463 forecasts.
- MRS (Mandatory Reentry Supervision) has realized over \$55 million in savings, with over 12,000 offenders released.
- Use of jail beds for state inmates continued to increase and is up to 9,585 as of August 2015.
- SAP (Substance Abuse Program) beds are up to 5,381 and the PUC (Parole upon Completion) waiting list has been eliminated.

- The Parole Board held 15,069 eligibility hearings and 5,568 revocation hearings in FY 2015. The Board issued 5,862 warrants.
- Hearings for all categories increased, with the exceptions of parole eligibility and sex offender conditional discharge.
- Parole rates have fluctuated with changes to Board membership, and are now increasing. The current parole rate is 61%.

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**ADMINISTRATIVE OFFICE OF THE COURTS**

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Connie Payne and Tara Blair presented the following information for the Administrative Office of the Courts (AOC):

- 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, 218,439 in FY 2014, and is down to 211,967 for FY 2015.
- Of the 211,967 pretrial arrests in FY 2015, 67 percent obtained a pretrial release.
- The public safety rate declined to 90 percent in FY 2015, down from 91 percent in FY 2014.
- The number of Monitored Conditional Release (MCR) cases has increased significantly from 7,900 in FY2011 to 20,276 in FY2015. It takes more resources to supervise individuals than it does to monitor for re-arrest.
- Since inception to date as of September 2015, 601 defendants have entered deferred prosecution with 141 successful completions, and 261 terminations, with an active caseload of 199 as of August 27, 2015. Eighty-five defendants have entered drug court with 21 successful completions, 36 terminations and seven administratively discharged, with an active caseload of 21 as of August 31, 2015.
- SMART probation (Supervision, Monitoring, Accountability, Responsibility and Treatment), based on Hawaii's HOPE Probation, began on July 1, 2012, and is now in its fourth year of funding through a Community Corrections Grant. Data indicates the program is making a significant impact:
- SMART probation has seven sites in thirteen counties: Jefferson, Pike, Shelby/Spencer/Anderson, Allen/Simpson, Lincoln/Pulaski/Rockcastle, Campbell and Knott/Magoffin.

SMART Probation Drug Screens:

	SMART (N = 591)	COMPARISON (N = 396)
Total number of tests administered	6,170	1,449
Average number of field tests***	10.23	2.75
Average number of lab tests***	.15	.36
% of positive tests (lab or field tests)***	35.7%	56.3%
Average number of positive drug screens (lab or field tests)***	.84	1.42
Marijuana***	11.8%	28.5%
Benzodiazepines	8.3%	9.3%
Oxycodone**	7.3%	3.5%
Cocaine**	6.8%	12.4%
Methamphetamine	5.4%	7.6%

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**KENTUCKY COMMONWEALTH’S ATTORNEYS ASSOCIATION**

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Rob Sanders, Commonwealth’s Attorney for the 16<sup>th</sup> Judicial Circuit, presented the following on behalf of the Kentucky Commonwealth’s Attorneys Association:

- In drug cases, prosecutors believe the arbitrary designation of certain amounts of drugs that differentiate between C and D felonies has no scientific basis, is not validated or evidence based in any way. Prosecutors feel it is an attempt to legislate away prosecutorial discretion.
- Risk assessment tool used for pretrial recommendations does not take into account the charged offense. Many do not understand it. When judges get someone in on a capital murder case and the risk assessment tool indicates a low risk, they do not understand that just indicates the person is a low flight risk. You cannot simply ignore the charged offense when it comes to setting bail. In those situations, the risk assessment is not understood and therefore ignored altogether.
- The designation of nonviolent offenses is one of the most frustrating terms for prosecutors when the legislature meets. Nonviolent does not mean nonviolent. Attempted murder, manslaughter, reckless homicide, robbery, arson, assault, and DUI 4<sup>th</sup> can all be offenses that are nonviolent under Kentucky law for parole eligibility purposes. The term is deceptive. Prosecutors would like to see a change in parole levels from violent and nonviolent to something such as low, medium and high or designate them by their percentages. Do away with the terms violent and nonviolent to eliminate confusion.
- Expungement is a topic that divides prosecutors down the middle. Some feel expungement would be good for reentry. There are those that are completely against it. Most would agree we cannot be talking about expunging felonies for someone while they are still PFO eligible. The cutoff for expungement should be at least beyond the five year window after their sentence is completed and the cost expungement cannot be ignored.

- Deferred prosecution in Kenton County was ended at the request of the circuit court judges. There was no meaningful supervision, no meaningful treatment. Deferred prosecutions have been brought back for individuals that are going thru the drug court program as that program provides the supervision and treatment.
- Jail credits on ankle monitoring deter prosecutors from agreeing to them because someone can drag out their case and actually serve out their sentence before they even come off the monitor.
- Mr. Sanders commented on the 249 incarcerated for flagrant nonsupport only. Rarely would someone get sent straight to prison on a flagrant nonsupport case where they did not have another felony charge along with it.

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**DEPARTMENT OF PUBLIC ADVOCACY**

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Ed Monahan, Public Advocate, presented the following 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 2016.
- 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 beyond adjusted projections..
  - 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 2007, an overall decline of 42,040 cases; DUI cases declined by 7,921 since 2009.
  - 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., 2015’s HB 305)
    - Reduction of minor non-violent offenses would save:

- County jail expenses by eliminating incarceration;
  - County and state prosecution expenses by removing cases from court;
  - State judicial branch expenses by reducing court dockets; and
  - State public defender expenses by eliminating the right to appointed counsel for these offenses.
- Offenders would still be held accountable with fines and convictions.
  - Offenses include Possession of Marijuana, Possession of Drugs in Improper Container, Possession of Drug Paraphernalia, Criminal Trespass in the Second and Third Degrees, Criminal Littering, Unlawful Assembly, and Disorderly Conduct in the Second Degree.
- Creating a "gross misdemeanor" classification for some serious non-violent offenses. (i.e., 2015's HB 286)
    - Gross Misdemeanors would carry sentences up to 24 months with presumptive probation. Sentences, if served, would for all purposes be treated as state sentences.
    - Offenders would be held accountable through penalties, supervision, and conviction, but would not face the lifelong consequences of a felony conviction.
    - Flagrant Non-support would be deemed a Gross misdemeanor. Delinquent parents could work on probation to support children without the employment limitations of being a convicted felon.
    - Gross Misdemeanors would save State Correctional costs by reducing some Class D sentences and presumptively requiring probation instead of incarceration.
  - Promoting employment/reducing recidivism by creating Class D felony expungement.
  - Reducing days in the county jail by creating "clear and convincing" standard for the pretrial release decision. (i.e., 2015's HB 284.)
    - HB 463 required pretrial release without bond for low and moderate risk defendants unless specific conditions are present (risk of flight or danger to others). In some courts, the exceptions have become more common than the rule;
    - A court decision denying pretrial release to a low-risk defendant would have to be supported by clear and convincing evidence that the defendant is a risk of flight or a danger to others. Appellate review would result in consistent practices statewide;



- Consistent pretrial release, as intended by HB 463, would save county expenses currently being spent housing low-risk defendants who are not a danger to the public.
  - Modifying violent offender and PFO statutes.
    - 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, 1<sup>st</sup> Degree Rape, 1<sup>st</sup> Degree Sodomy, 1<sup>st</sup> Degree Robbery with a Firearm, 1<sup>st</sup> Degree Burglary with a Firearm, and 1<sup>st</sup> Degree Assault
    - For PFOs, make PFO a discretionary rather than mandatory finding by a jury at sentencing.
    - PFO sentencing would be available if the offender:
      - Has twice previously been convicted of felony offenses or has a prior conviction for a crime against a minor (same as current requirements for PFO, 1<sup>st</sup> Degree); and
      - Is convicted of a violent offense.
    - The jury, considering the facts of an individual case and defendant, could elect not to use PFO to raise the defendant's sentence.
    - Prior felonies would be limited to those for which a sentence was completed within the past 15 years.
    - 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 – a recommendation of the 2008 KY Criminal Justice Council.
    - 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 – a recommendation of the 2008 KY Criminal Justice Council.
    - Eliminate PFO 2d – a recommendation of the 2008 KY Criminal Justice Council.

- 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.
  - Felony Flagrant Nonsupport offenders incarcerated in FY 2015 – 678.
  - Felony offenders incarcerated on Flagrant Nonsupport *only* in FY 2015 – 249.
  - Average sentence length for FY 2015 Flagrant Nonsupport only offenders – 1,662 days (4.55 years).
  - Total Time served in FY 2015 by Flagrant Nonsupport only offenders – 54,989 days.
  - A *minimum* of \$3.8 million per year is spent incarcerating the 249 persons only there on a Nonsupport sentence.
- Creating alternatives to incarceration.
- Increasing the felony theft limit from \$500 to \$2,000.
  - Reasons to Support an Increase in the Felony Theft Threshold
    - Recognizes effect of rising prices – An item worth \$500 is not as valuable as it once was.
    - Reduces corrections costs for non-violent property crimes – Changing the threshold would not change burglary or robbery law, but only affect sentences for non-violent theft. Someone stealing a \$500 iPad deserves punishment, but not up to 5 years in prison.
    - Speeds resolution of theft cases – More cases would be handled in District Court rather than going through lengthy Grand Jury and Circuit Court process; restitution can be ordered quicker.
    - Reduces crippling felony convictions – A felony conviction devastates a person’s ability to get a job and meet their obligations; low-level theft should not carry this life sentence.
- Reducing waste by limiting capital prosecutions.

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**KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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Bill Deatherage, President of the Kentucky Association of Criminal Defense Lawyers, presented the following:

- There is less discretion to revoke a person on probation. Many believe the sanctions being imposed are a better alternative to revoking someone and locking them up. However, there are still a great number of motions to revoke when it should be handled pre-motion with sanctions.
- There is no substantial reduction in the jail population. The treatment programs are far less costly than incarceration.
- There is still a problem with pretrial release in the minds of some of the judges. Too many people are having bail set on them before it gets to the judge on a motion to reduce or change the conditions of release that the accused simply cannot make. A fundamental principle of our criminal justice system that a person accused of a crime, except under certain narrow circumstances, is entitled to an amount of bail that that person can meet.
- Paraphernalia law does not serve much of a purpose, just an add-on.
- Deferred prosecutions are fewer than should be. Cash bonds are preventing the release of people who should be released. Bail credit is reluctantly given. Huge amounts of money are wasted on pretrial detention.
- Courts are releasing a few more but taking on needless conditions creating an opportunity for someone to have the release revoked and brought back into county jails. Some conditions seem to be automatic and serve no purpose. Even for a minor offense, a defendant has to stay at home, work, etc., and cannot go to grocery store. This does not serve the purpose of pretrial release which is to assure the appearance of the accused. Instead it sets them up for some type of a violation.
- Judges are favoring ankle monitoring for pretrial release for offenses that do not seem worthy of it and situations that do not justify it. On one hand, the person gets credit while wearing it but the cost is significant. The system is generating more obligations to pay money thru costs, fines, and fees. An ankle monitor creates another expense.
- Moving low level convicted felons to county jails is counterproductive in that the jails are significantly overcrowded and jails do not provide services for those people. This is still costing a lot of money. We need to reconsider the punishment for nonviolent low level offenders who need rehabilitation.
- Even a low level nonviolent felony conviction constitutes a life sentence of unemployment or underemployment for that person. The only way to find meaningful employment is to be self-employed and many of the ideas of self-employment go back to the problems that got them into the criminal justice system in the first place. Expungement is needed in the commonwealth for low level non-violent felony offenses to give people a way back into society to find employment and keep themselves out of the system.

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**DEPARTMENT OF CORRECTIONS**

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

- The state felon population was 22,437 as of August 30, 2015, nearly 800 inmates higher than the same date on 2014, when the population numbered 21,650. 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 2,400 fewer inmates than were projected prior to HB 463.
- Due to a drop in the female felon population, Western Kentucky Correctional Complex (WKCC) is being converted into two distinct prisons: A 470-bed secure-custody facility for male offenders, which will retain the WKCC name, and a 200-bed minimum-custody facility for females, to be named the Ross-Cash Center. The conversion is expected to save more than \$700,000 annually.
- Mandatory Reentry Supervision (MRS) has posted significant results. Total savings under the program, from its inception through Sept. 1, 2015, is \$55.7 million.
- Over 12,500 offenders have been released under the program, as of Sept. 1, 2015.
- The number of state inmates housed in county jails has increased. In August 2015 there were 9,585 state inmates housed in county jails, compared to 8,811 in August 2014.
- 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. The total DOC treatment capacity is 5,381. PUC waiting list has been eliminated.
- The Local Corrections Assistance Fund distributed \$4,715,600 in FY 15, up from \$4,637,600 in FY14. The first \$2.4 million was equally distributed among all 120 counties, with the remaining funds distributed by statutory formula.

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**PAROLE BOARD**

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Lee VanHoose, Kentucky Parole Board, presented the following:

- In FY 2015, the Parole Board held 15,069 parole eligibility hearings, broken down as follows:

- Parole – 61%
  - Defer – 30%
  - Serve Out – 9%
- In FY 2015, the Parole Board held 5,568 final revocation hearings, broken down as follows:
    - Parole – 4%
    - Defer – 34%
    - Serve Out – 61%
  - The Parole Board issued 5,862 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>FY 14-15</u>	<u>Increase from FY11-12 to FY14-15</u>
Parole Eligibility	15331	15548	15773	15069	<b>-262</b>
Revocation	3971	4881	5641	5,568	<b>1597</b>
Parole Violators	3602	3880	4663	4,440	<b>838</b>
Sex Offender Conditional Discharge	146	160	118	108	<b>-38</b>
Mandatory Reentry Supervision	223	831	851	996	<b>773</b>
Post-Incarceration Supervision	0	10	9	24	<b>24</b>
Revocation Warrants Issued	4595	5088	6203	5862	<b>1267</b>

- Parole rates January 2013 – August 2015:

