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Criminal Justice Reform: A Culture Change
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Justice Reinvestment and HB 463

Kentucky had the fastest growing prison population in the U.S. in the 10-year period before 2009, with an increase of 45%, compared to an increase nationally of 13%. Kentucky's corrections spending increased 214% from 1990-2010. Greater spending on prisons did not translate into a better return for public safety or for recidivism. Despite a 214% increase in corrections spending between FY 1990 (\$140 million) and FY 2010 (\$440 million), the state's recidivism rate was still high and remained above the levels from the late 1990s. 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.

In 2010 the General Assembly created a bipartisan, multi-branch task force called the Task Force on the Penal Code and Controlled Substances Act to study the data, find the causes for the increases, and make recommended changes that would maintain public safety. The task force found:

- ▶ Increasing numbers of arrests and court cases, even though the crime rate remained the same as in 1974
- ▶ Rising incarceration rates for technical parole violators

- ▶ Sentencing of low-level offenders in KY: far more likely than those in other states to be sentenced to prison, especially drug offenders

In 2011, The GA passed HB 463, The Public Safety & Offender Accountability Act, the first criminal justice overhaul in over 30 years. Its goals were to enhance public safety and improve the return on our investment in the criminal justice system. The reforms are largely based on the idea of Justice Reinvestment in which the savings achieved in incarceration costs and recidivism can be reinvested in alternatives to incarceration and reentry programs that are proven to work, such as drug treatment, community supervision, and other programs that **improve outcomes for those reentering society**. Instead of devoting resources to lock up nonviolent, low-risk drug offenders for long periods, it makes more sense to use those resources to provide effective treatment options that allow people to address their substance abuse problems and become productive citizens.

A review of the changes created by the new law, HB 463, shows that Kentucky is seeing measurable benefits and providing a model for other states that want to get smart on crime.

The bill's provisions focused on **improving recidivism rates and increasing the and successful reentry of incarcerated adults into the community**, which in turn, will have a positive impact on public safety and corrections spending.

The bill's provisions require the use of scientifically validated risk and needs assessments to help determine a person's risks of reoffending and the risk factors that need to be addressed to reduce the likelihood of future criminal behavior. These reforms place an emphasis on improving outcomes through alternatives to incarceration, such as supervision and treatment, tailored to address the needs of each individual.

The risk and needs assessments are used throughout the criminal justice system. First, a defendant is assessed at the pretrial phase when a judge is making decisions about bail and pretrial release. The assessment rates the defendant according to his or her likelihood to reoffend while on pretrial release and the likelihood of reappearing for court. Low-risk defendants are generally required to be released, and as the risk increases, judges have more discretion regarding release decisions. Risk and needs assessments are also used in the presentence investigation. The judge must use the results of the assessment to consider the likely impact of a sentence on future behavior. The Department of Corrections also uses risk and needs assessments throughout the period of incarceration to provide programs and treatment tailored to address the needs of each inmate. The Parole Board also uses another version of an assessment during its decision-making process. Assessments are also used during probation and parole to customize supervision and treatment throughout a person's supervision. DOC has conducted over 62,000 risk and needs assessments since July, 2010.

The programs that are used to address those risks and needs are required to be evidence-based programs that are proven to be effective. Of the programs used by DOC, 94% are now evidence-based programs.

Reentry and recidivism reduction provisions

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 reentry into society will be successful. During this period, making resources available to these individuals based on their individual needs will drastically reduce their likelihood to reoffend. HB 463 requires six months of mandatory reentry supervision (MRS) in the community for those who did not

receive parole to help ensure their success. The provisions require DOC to release eligible inmates from custody 6 months before their minimum expiration date and place them under the supervision of the Division of Probation and Parole. MRS provides the coordination of resources for housing, employment, treatment and other programs for the released individuals and provides monitoring for their compliance with the conditions of their release. 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, creating a greater risk they will reoffend.

- Since Jan. 1, 2012, over 6300 offenders have participated in MRS. This has resulted in a savings of over \$21 million. The current return rate for the offenders is 20.7%.
- The effective date for MRS was delayed until January 2012 to give the DOC time to build the staff and resources of the Division of Probation and Parole, which is responsible for supervising those on MRS, and train employees on the risk and needs assessment tool.
- The Department of Corrections committed resources to increase the number of probation and parole officers to handle the increased number of supervisees. The department hired 73 additional probation and parole officers as well as 22 Probation and Parole Investigators, and the average caseload is currently 81.65 per officer, down from 93.8 in June 2011.
- HB 463 requires the DOC to report to the legislature after Feb. 1, 2015 to determine the efficacy of MRS.

Post-incarceration supervision. A separate provision in HB 463 requires certain classes of inmates 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.

Changes in the controlled substances laws.

The following changes to the controlled substances statutes will result in millions of dollars of savings which HB 463 requires to be used to expand treatment programs.

Presumptive probation for simple possession of drugs. HB 463 established presumptive probation for simple possession of drugs and a minor trafficking offense. The new provision also requires 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.

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 if person violates terms 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 monitored conditional release supervision.

Distinguishing 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. Trafficking a small one-use amount of a substance carried the same penalty as trafficking 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 acts as a threshold amount for the larger trafficking penalty. Trafficking in higher quantities of controlled substances results 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 by quantities in HB 463.)

Reinvesting savings from changes in controlled substances laws into drug treatment. HB 463 requires DOC to calculate the fiscal savings resulting from changes to controlled substances laws. Fiscal savings are required to be used solely for expanding and enhancing evidence-based SAP treatment programs.

- Since the implementation of HB 463, there has been a significant increase of Substance Abuse Program (SAP) slots (slots is used instead of beds, to note that some of the additional programs are community-based treatment and not residential programs.)
- At the end of 2007, there were 1430 prison and jail treatment beds. As of September 2013, there are 5987 total SAP slots, including 3987 in-patient treatment beds located in jails, prisons, and the community, and 2000 treatment slots through contracts with Community Health Treatment Centers and other community programs.
- Another potential benefit to the alternative sentencing for drug offenders is that fewer low-level offenders are in Drug Court. This has created more spaces in Drug Court to be available to higher-risk drug offenders.

Allowing parolees 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 (over 2700 inmates) 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 to appropriate community housing in order to complete a nonresidential intervention program.

Expanding 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).

DOC to supervise probationers and parolees according to evidence-based practices.

Requiring state funding to 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.

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

Requiring 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.

Authorizing earned-time credits for parolees. The Department of Corrections is required to extend earned-time credit to parolees in the community using criteria similar to those that currently apply to inmates.

Authorizing 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 (for example, a missed appointment with probation and parole officer, missing curfew, etc.). Penalties are determined according to a sanctions grid established through administrative policy. Graduated sanctions were also permitted for use with probationers with the consent of the judge who granted probation.

Other provisions of HB 463 are already showing great success. Arrests for minor offenses are down, and the pretrial release of defendants has increased by 5%. Meanwhile, the public safety rate, which is the percentage of defendants who do not commit an offense while on pretrial release, increased from 90% to 92%. The rate at which they reappear on their court date has also increased. These pretrial changes have resulted in savings to the counties of approximately \$25 million in jail costs.

Since August 2012, our state inmate population has decreased from 22,503 to 20,011 as of September 5, 2013. That is a decrease of over 2200 inmates, or almost 10%. This reduction led to the decision not to renew the final private prison contract in KY. As of October 1, 2013, the entire state felon population will be housed in state facilities, community service centers, or local jails.

Over the next 10 years, Kentucky's reforms are estimated to reduce the prison population **by 3,000 to 4,000 inmates and bring a gross savings of approximately \$422 million** in corrections spending. The goal is to achieve these reductions while maintaining public safety and preserving state resources so we can dedicate expensive prison beds for serious offenders.

One thing is clear. We cannot continue to incarcerate our way out of any problem. We have tried that, and it does not work. Had the General Assembly not acted to control the constantly expanding prison population, we would have been forced to

increase the state’s spending on corrections by at least an additional \$161 million by 2020 to cover the predicted growth.

We are confident, however, that the reforms were based on sound policymaking and will continue to make positive changes for Kentucky’s future.

2012 and 2013 Legislation affecting reentry
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HB 1 and HB 217: Pain Management Facilities, KASPER, etc.

- “Pain Management Facilities” must be owned by a physician holding an active Kentucky medical license.
- Pain Management Facilities must accept private health insurance as an allowable form of payment.
- CHFS and KBML share enforcement authority.
- Kentucky State Police, Office of the Attorney General, CHFS, and Licensing Boards to share reports of improper prescribing
- Commonwealth’s and County Attorneys to report indictments of a medical professional for a felony drug offense to the Attorney General within 3 days
- Licensing Boards are required to issue regulations to protect patients, including:
 1. Mandatory prescribing and dispensing standards adopted by the medical community itself;
 2. Limitations on “in office” dispensing (to combat Florida style “pill mills”);
 3. Emergency license suspension procedures when public health is endangered;
 4. Commencement of complaint investigation within 7 days, production of a charging decision within 120 days;

5. No licensing of practitioners convicted of drug felonies;
 6. Mirroring of sanctions imposed by other states;
 7. Mandatory reporting of criminal or disciplinary actions by medical professionals;
 8. Participation in the National Practitioner Data Bank;
 9. Continuing medical education on addiction and pain management.
- Addiction and pain specialists required to consult with licensing boards.
 - Boards to accept unsworn complaints.
 - Doctors and nurses must check KASPER prior to prescribing Schedule II or III drugs as well as conduct a physical exam and discuss the risk of drug tolerance. Exceptions are made for emergency services
 - CHFS may contract for the design, upgrade or operation of KASPER.
 - Commonwealth's and County Attorneys authorized to request KASPER reports.
 - Medical professionals may direct employees to access KASPER
 - Medical professionals may access KASPER reports showing their own prescribing practices.
 - Medicaid Services to monitor and report improper prescribing practices.
 - Practitioners protected in good faith use of KASPER.
 - Medical professionals may place KASPER reports in patient's records.
 - Real Time Reporting funding requests authorized.
 - Error correction to be permitted.
 - CHFS to "proactively" use KASPER data.
 - CHFS, Licensing Boards, and ODCP to generate public Trend Reports.
- CHFS
- Hospitals may request KASPER reports on employees.

- CHFS may join other states in sharing prescription data.
- Coroners to test for drugs and report; Name and address of decedent not reported.
- ODCP and the State Medical Examiner shall publish findings relating to drug overdoses for a more accurate count of the deaths caused b prescription drug abuse. Personal identifying information will be kept confidential.
- Governor shall select Licensing Board members to ensure broad range of knowledge and talent.
- Pharmacies discovering robbery or theft must report.
- Model Interstate Compact on Prescription Monitoring Programs is adopted.
- Legislative oversight is provided for. A House Bill 1 Implementation Oversight Committee monitored the roll out of HB 1 provisions and agency regulations during 2012.

SB 78: Non-felony expungement clarification

- This Senate bill was amended to add HB 57 (Rep. Yonts), which clarifies the effect of traffic tickets on non-felony expungement requests and requires that a certificate of eligibility completed by the State Police and the Administrative Office of the Courts be submitted with all expungement petitions.

<h4>Current and future reentry initiatives</h4>
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- In 2012, pursuant to HB 54, the General Assembly gave the Criminal Justice Council the responsibility for oversight of the continued implementation of the HB 463 provisions. The Council has met twice since August 2012 to continue to monitor the progress being made.

- The General Assembly will continue to find ways to address challenges facing those who are being released from prison and seeking to reenter society as productive citizens. Of particular concern are **gaps in housing, employment and treatment services**.
- **Housing.** We need to find ways, thorough tax credits or otherwise, to incentivize housing for ex-offenders to increase the availability of affordable housing. Having a place to live is a very basic necessity and is the foundation upon which everything else necessary for a successful reentry is built. Without housing, it is difficult to hold a job and provide for your family. Seeking treatment and other services essential for successful reentry becomes secondary without proper housing.
- **Employment.** We are looking for ways to remove barriers to employment for ex-felons. We can start by determining what modifications can be made in statutes that prohibit convicted felons from obtaining **occupational and professional licenses** in many fields. For example, convicted felons lose or are restricted from receiving a license for cosmetology, waste site operator, chiropractic care, emergency medical technician, paramedic, and motorcycle safety instructor. Currently there is no requirement that a felony conviction have a nexus to the professional or occupational license being sought. There is also no statutory time limitation that would bar consideration of an old felony when a person seeks an occupational license. These are common sense changes that would make it easier for people to reenter society and to support themselves and their families.
- We also need to give serious consideration to authorizing **felony expungement** in certain circumstances. A felony conviction has been appropriately termed an “economic death sentence.”

- **Treatment.** The General Assembly will continue to work with DOC to find ways to increase the availability of programs in local jails and community agencies. We need to find ways to increase funding for these programs so that those in rural areas can also receive the services they need to have a successful reentry.
- One area that has not been explored fully is how to deal with mental health issues in our society. We need to find ways to address these needs both in terms of reentry and in terms of preventing someone from ever entering the criminal justice system.
- DOC, in partnership with reentry councils across the state, have implemented Family Engagement Sessions to work with offender families to prepare them for loved ones entering the criminal justice system and for those nearing release from the criminal justice system. The feedback has been tremendous and families know feel empowered in the knowledge of how the processes work. Family relationships are a key factor in the success of an offender's reentry process.
- DOC has pledged to continue monitoring recidivism rates to see if program participation is working and to make improvements if necessary.