



KENTUCKY CRIMINAL JUSTICE
COUNCIL

2016
HB463
Implementation Report

October 2016



JUSTICE AND PUBLIC SAFETY CABINET

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MEMORANDUM

TO: Senator Whitney Westerfield, Chair, Senate Judiciary Committee
Representative Darryl Owens, Chair, House Judiciary Committee

FROM: John C. Tilley, Secretary

DATE: October 6, 2016

RE: 2016 Report on HB463 Implementation

Attached you will find the Kentucky Criminal Justice Council's 2016 report on the implementation of HB463.

HB54 of the 2012 Regular session required that the 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.

The Council met on September 15th and heard from stakeholders including the Department of Corrections, Commonwealth's Attorneys Association, County Attorneys Association, Department of Public Advocacy and the Kentucky Association of Criminal Defense Lawyers.

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.

Background on HB463

In 2011, the General Assembly passed The Public Safety and Offender Accountability Act (House Bill 463) to overhaul Kentucky's criminal justice system and modernize drug policy. Among its many effects, the measure distinguished between drug peddlers and commercial traffickers and reduced penalties for certain low-level drug offenses. It also increased access to substance abuse treatment in correctional facilities and the community, and safely stabilized the prison population while reinvesting the savings into substance abuse treatment. In addition, HB 463 established a supervised release program to help inmates transition back into the community during the final months of their prison sentences. The legislation reformed probation and parole functions to improve risk assessments of offenders, and it gave officers new tools to impose immediate, graduated sanctions when offenders violate conditions of their release. The graduated sanctions component was designed to give probation and parole officers an additional tool to elicit compliance from offenders without immediately revoking their probation and parole, which in the past had resulted in an increase in the Commonwealth's prison population.

As a result of the enactment of HB463, the Commonwealth has become a national model for its unified pretrial detention system, which utilizes evidence-based risk and needs assessments to maximize public safety and efficient use of court resources in pretrial detention decisions. Other successes include focusing costly prison beds on the most serious offenders, reducing recidivism through improved probation and parole, and strengthening government performance.

Since the bill's passage in 2011, information to assess the success of HB463 has been gathered in several ways, and the bill's outcomes have been periodically reviewed. However, the overall impact was never fully analyzed from a larger perspective. As Kentucky once again takes a hard look at criminal justice reforms in the Commonwealth, the Justice and Public Safety Cabinet decided to peel back the layers of data on HB463 and look deeper into its effect. A summary of those results is included in this report.

Additionally, on September 15, the Cabinet convened an annual meeting of the Kentucky Criminal Justice Council to review the impact of HB463. In addition to a report on the Department of Corrections' latest data, the Department of Public Advocacy and the Kentucky Association of Criminal Defense Lawyers presented their ideas about the implementation of HB463 and suggestions for further reforms. Those presentations are also summarized in this report. Representatives from both the county attorneys and commonwealth's attorneys associations were also present and made remarks, which are summarized in this report.

Department of Corrections (DOC) findings on HB463

With a new mandate to revisit correctional data that has been collected on HB463 over the years, the DOC data analysts examined what effects the law had on past practices and examined data that illustrated the impact of those changes on the Commonwealth's correctional system. What their analysis provided was some clear examples of areas where HB463 worked as intended, areas where it could use some implementation improvement and areas where future reforms might provide more opportunities for a reduction in the prison population.

HB463 provided for Mandatory Reentry Supervision (MRS), which provides inmates who are nearing their end of their sentence a transitional period of supervision designed to reduce recidivism by easing inmates back into society with oversight and accountability. Those inmates would otherwise not have been placed under any supervision prior to their serve-out date. During the five years of implementation, the MRS program has resulted in cost savings of more than \$81 million, as of the end of June 2016. A review of those clients who were placed on MRS showed that those who were able to find employment were twice as likely to successfully complete their supervision period. In looking at recidivism since being on MRS, analysts determined that the increase in statewide recidivism can be attributed in part to MRS releases, as they would otherwise have avoided release revocations had they served out their sentences under the traditional system. The largest driver of prison admissions in 2015 was probation and parole violations which accounted for 65% of admissions with 90% of overall admissions having an underlying non-violent offense.

HB463 provided for graduated sanctions, providing a wide range of accountability measures, corrective actions and programs for supervised offenders to precede a revocation of supervision. Since HB463, there has been an increase in the use of graduated sanctions. Improvements are still necessary and could include reforming current probation and parole policies to expand the use of graduated sanctions to avoid automatic revocation in cases of absconding and relapsing into substance abuse.

HB463 also established an additional 1,400 community Substance Abuse Program (SAP) beds. Inmates now have an increased opportunity to complete SAP out of custody. This number gradually increased over the past six years.

HB463 required a shift toward evidence-based programs. Data shows that new commitment recidivism rates are lower when inmates participate in evidence-based programs, and the rate drops again if the inmate completes the program. That reduction in recidivism is not present for technical violations. This is mostly linked to an increase in community SAP and the higher violation rate for failure to complete programming. Additionally, the parole grant rate did not maintain the 60% rate that projections for the prison population were based on. In the last two years, the parole grant rate has continued to decline, which has exacerbated prison population growth.

The drafters of HB463 scrutinized existing laws for low-level drug offenses and restructured the sentencing on those lower crimes, putting a focus on keeping harsher penalties aimed at traffickers, rather than users. HB463 has resulted in drug convictions that have persistent felony offender sentence enhancements gradually decreasing, most significantly between 2014 and 2015. Also, the overall sentence length of drug convictions has decreased an average of about 400 days since HB463 was enacted.

One final cost avoidance measure reported by the Department of Corrections is related to the projected prison population. The Department of Corrections has determined that there has been nearly \$99 million in cost avoidance since HB463. The cost avoidance total is based on looking at what the population was projected to be prior to HB463 and what the population actually was. So, while we have

had more inmates than projections showed would occur following HB463, we still did not reach the projections of what could have happened without it.

Comments from Kentucky Association of Criminal Defense Lawyers (KACDL)

Rebecca DiLoreto presented thoughts compiled from her organization of defense lawyers across the Commonwealth.

According to DiLoreto, the organization believes that HB463 has had a positive impact on drug prosecution, with offenses being amended down. They have also seen an openness and enthusiasm for drug court.

KACDL contends that racial disparity among their clientele has increased, graduated sanctions are not being implemented uniformly across the Commonwealth, post-release supervision is resulting in persons serving longer than they would have prior to HB463, and presumptive probation has not been implemented. Additionally, the members of KACDL believe that deferred prosecution needs to be applied more uniformly. The members of KACDL contend that certain counties prosecutors are refusing to utilize deferred prosecution and judges do not demand justification for why it is not being utilized. DiLoreto also argued that decisions by the Parole Board are perceived to be made arbitrarily.

The KACDL offered several recommendations for future reforms. Their top suggestion is full-scale Penal Code reform. KACDL recommended using reviews that have already been conducted and forming a task force to undertake the effort. Additionally, they support 2016's HB412 to realign nonviolent offenses. They oppose the Marsy's Law movement to amend the Kentucky constitution to enshrine existing statutory victim notification and participation measures in the Commonwealth's constitution. KACDL supports refocusing the correctional system and sentencing structure to address the largest pool of offenders, who also have the greatest possibility for rehabilitation – the young adult offender. They support ending the practice of discretionless, automatic transfer of children into adult court for prosecution. They also propose addressing disproportionate minority contact within the juvenile justice system, refining the expungement bill, and the restoration of voting rights for ex-offenders.

Comments from the Department of Public Advocacy (DPA)

Damon Preston, Deputy Public Advocate, presented to the council.

From the DPA's perspective, HB463's changes to pretrial release bond practices have only been marginally successful, due to lack of proper implementation of the discretionary aspects of the law. DPA has pursued almost 90 bond appeals; however none of the appeals have resulted in any published opinions. The DPA believes that pretrial release bail credit changes have not been successful, as they are not being used much, if at all in some counties. The DPA also recognize that efforts to reduce prison population have seen some success, but overall have been unsuccessful as the prison population continues to rise, though not at projected levels.

The DPA made several recommendations for future reforms, including reforming persistent felony offender (PFO) laws by reserving the highest sentences for the most serious career criminals. They

believe that PFO laws should exempt Class D felons, require two prior separate felony convictions, require actual prior felony incarceration, eliminate the 10-year prohibition on parole, and give juries the discretion to decline to impose PFO charges.

The DPA also proposes earned parole so that Class D felony inmates would earn parole and be released without a hearing if they met the minimum service requirement for parole eligibility, had no institutional infractions pertaining to violence, had a risk assessment level score of I or II, and had not been convicted of a sex crime. The DPA also had several suggestions for a Gross Misdemeanor category of offenses and proposed a consistent pretrial release standard.

Additionally, the DPA recommends making additional investments into alternatives to incarceration that have been successful, such as the Alternative Sentencing Worker Program. The DPA also suggested exploring the possible adoption of Law Enforcement Assisted Diversion programs that have begun to be utilized around the nation.

Prosecutor comments

Commonwealth Attorney Courtney Baxter and County Attorney Rick Sparks attended the meeting on behalf of their respective associations. Neither had a prepared presentation to make but gave comments from their perspectives on the state of the Commonwealth's justice system since HB463 has been enacted.

County Attorney Sparks stated that a large number of offenses at the district court level are theft related. Sparks stated that education, training, and employment opportunities are needed in addition to substance abuse treatment. Economic disparity may be a predictor of those involved in substance abuse and/or criminal behavior.

Commonwealth's Attorney Baxter said that in her experience, low level drug offenders are not choosing treatment options due to the length of time required to complete substance abuse treatment programs being longer than any sentence in a plea negotiation. This is a result of the 1 to 3 year cap on possession charges. Indictments have nearly doubled for drug related crimes, in her jurisdiction. Courts are seeing the same offenders and are also seeing younger offenders. Restitution for victims is an issue due to noncompliance in regards to offenders on parole. The numbers of revocations and new cases have increased. Revocations are being recommended rather than seeking graduated sanctions on diversion, which was encouraged under HB463.