CRIMINAL JUSTICE REFORM AT THE FEDERAL AND STATE LEVELS

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Friday, June 14, 2019
12:30 – 1:30 p.m.
Grand Ballroom
Galt House Hotel
Louisville, Kentucky

A NOTE CONCERNING THE PROGRAM MATERIALS

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Kentucky Bar Association

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THE PRESENTERS

Senator Rand Paul, M.D.
Washington, D.C.

U.S. SENATOR RAND PAUL, M.D., is one of the nation's leading advocates for liberty. Elected to the United States Senate in 2010, Dr. Paul has proven to be an outspoken champion for constitutional liberties and fiscal responsibility. As a fierce advocate against government overreach, Dr. Paul has fought tirelessly to return government to its limited, constitutional scope. As a hard-working and dedicated physician – not a career politician – Dr. Paul came to Washington to shake things up and to make a difference. Dr. Paul is a devoted husband and father of three who is currently living with his family in Bowling Green, Ky., where Dr. Paul owned his own ophthalmology practice and performed eye surgery for 18 years. Dr. Paul has been married for 25 years to Kelley Ashby Paul of Russellville, Ky., and they have three sons together: William, Duncan, and Robert. He regularly volunteered to coach teams for each of his three sons in Little League baseball, soccer, and basketball. Dr. Paul and Kelley are both devout Christians and are active in their local church. Dr. Paul is the third of five children born to Carol and Ron Paul. He grew up in Lake Jackson, Tex., and attended Baylor University. He graduated from Duke Medical School in 1988. Dr. Paul completed a general surgery internship at Georgia Baptist Medical Center in Atlanta, Ga., and completed his residency in ophthalmology at Duke University Medical Center. Upon completion of his training in 1993, Dr. Paul and Kelley moved to Bowling Green to start their family and begin his ophthalmology practice. In 1995, Dr. Paul founded the Southern Kentucky Lions Eye Clinic, an organization that provides eye exams and surgery to needy families and individuals. He is a former president and 17-year member of Lions Clubs International, which is dedicated to preserving sight by providing eyeglasses and surgery to the less fortunate around the world. In recognition of his outstanding and sustained efforts to provide vision care to Kentuckians in need, Lions Clubs International has awarded Dr. Paul many of its highest commendations. A large part of Dr. Paul's daily work as an ophthalmologist was dedicated to preserving the vision of our seniors. In 2002, The Twilight Wish Foundation recognized Dr. Paul for Outstanding Service and Commitment to Seniors. During his free time, Dr. Paul currently performs pro bono eye surgeries for patients across Kentucky. Additionally, he provides free eye surgery to children from around the world through his participation in the Children of the Americas Program. Most recently, he traveled to Guatemala and Haiti on a medical mission trip with the University of Utah's Moran Eye Center. During his time in Guatemala and Haiti, over 200 patients, many of them blind with cataracts, had their vision restored. Dr. Paul's entrance into politics is indicative of his life's work as a surgeon: a desire to diagnose problems and provide practical solutions, whether it be in Bowling Green, Ky., or Washington, D.C.

Holly Harris
Justice Action Network
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HOLLY HARRIS is a veteran litigator, conservative communicator and campaign strategist. In just three years as Executive Director of Justice Action Network, Ms. Harris managed campaigns that passed significant criminal justice reform legislation in more than a dozen states and unprecedented bipartisan prison and sentencing reforms at the federal level. She helped raise the national dialogue on the need to fix our broken justice system, developing high profile events with governors, members of Congress, and state legislators on both sides of the aisle. She testified before Congress and at state legislatures across the country, and authored op-eds in national publications like the *Washington Post* and the *Wall Street Journal*, as well as in-depth pieces in well-respected journals such as *Foreign Affairs*. Ms. Harris served as a featured speaker at state events for organizations such as the Pennsylvania Prison Society and national events such as the Politico panel on justice reform at the Republican National Convention. Ms. Harris is also frequently quoted in national news publications and television outlets, including the *New York Times*, Buzzfeed, the Hill, *Vogue*, C-SPAN, CBS, and frequently appears on MSNBC. Ms. Harris began her career as a television news reporter, and later graduated from the University of Kentucky College of Law. She handled high-profile whistleblower and civil rights litigation at the Justice Cabinet and went on to serve as chief of staff and in other senior leadership roles for numerous Kentucky elected officials. She was appointed General Counsel to the Republican Party of Kentucky and also held communications and fundraising positions. Ms. Harris splits time between Washington, D.C. and her home state of Kentucky, where she raises her young son, Harris.

Representative Jason M. Nemes
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REPRESENTATIVE JASON M. NEMES practices at the law firm of Nemes Eade, PLLC in Louisville. He is also a member of the Kentucky House of Representatives, where he represents portions of eastern Jefferson County and southern Oldham County. In the General Assembly, Mr. Nemes oversees the Court of Justice's and Justice Cabinet's budgets as chair of the House Budget Review Subcommittee on Justice, Public Safety, & Judiciary. He also serves as a member of the Appropriations & Revenue; Judiciary; Elections, Constitutional Amendments & Intergovernmental Affairs; and, State Government committees. Prior to practicing law, Mr. Nemes served as the chief of staff to the Office of the Chief Justice of the Commonwealth of Kentucky and the director of the Administrative Office of the Courts. He graduated from Western Kentucky University and the University of Louisville School of Law, where he has served periodically as an adjunct professor.

This information is available online at: http://www.nlada.org/node/21906.

SEN. RAND PAUL APPLAUDS HISTORIC PASSAGE OF FIRST STEP ACT

December 18, 2018

Reprinted with permission from Rand Paul U.S. Senator for Kentucky.

https://www.paul.senate.gov/news/sen-rand-paul-applauds-historic-senate-passage-first-step-act

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WASHINGTON, D.C. – Tonight, U.S. Senator Rand Paul (R-KY) applauded the U.S. Senate's passage of the First Step Act (S. 756), a bipartisan sentencing and prison reform bill. The bill passed by a vote of 87-12 and is headed to the U.S. House for passage before being sent to President Trump's desk, where he is expected to sign this important legislation into law.

Since arriving in the U.S. Senate in 2011, Senator Paul has been passionate about reforming a broken criminal justice system. Having introduced countless bipartisan bills in previous Congresses and once again in this Congress, Senator Paul will continue to advocate for more change on this matter across the political aisle.

"As a leading voice for criminal justice reform who has introduced and cosponsored nearly a dozen bipartisan bills to fix the problems that still plague our justice system, and someone who has loudly and successfully pushed for getting this important piece of legislation to the Senate floor for a vote, I am absolutely thrilled with tonight's passage of the First Step Act," **said Sen. Paul**. "True to its name, this prison and sentencing reform bill is a much-needed first step toward shifting our focus to rehabilitation and reentry of offenders, rather than taking every person who ever made a mistake with drugs, locking them up, and throwing away the key."

United States Sentencing Commission | Office of Education & Sentencing Practice

ESP INSIDER EXPRESS

SPECIAL EDITION

February 2019

First Step Act

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First Step Act

Signed Into Law on December 21st, 2018

The First Step Act (P.L. 115-391) was signed into law by the President on December 21, 2018. The Act deals mostly with reentry of the incarcerated, directing the Federal Bureau of Prisons to take specific actions regarding programming, good-time credit, and compassionate release, among other issues. The Act does not contain any directives to the Commission.

Related to its sentencing reform provisions (**Title IV**), the Act makes important changes to mandatory minimum penalties and to the safety valve provision (a provision that allows courts to sentence a defendant without regard to the mandatory minimum). Specifically, in relation to Title IV, the Act:

- **reduces certain enhanced mandatory minimum penalties for some drug offenders (Section 401);**
- **broadens the existing safety valve at 18 U.S.C. § 3553(f), increasing the number of offenders eligible for relief from mandatory minimum penalties (Section 402);**
- **reduces the severity of the "stacking" of multiple § 924(c) offenses (Section 403); and**
- **applies retroactively the Fair Sentencing Act of 2010 which reduced mandatory minimum penalties for crack cocaine offenses (Section 404).**

First Step Act Provisions	
Title I	Recidivism Reduction
Title II	Lieutenant Osvaldo Albarati Correctional Officer Self-Protection Act of 2018
Title III	Restraints on Pregnant Prisoners Prohibited
Title IV	Sentencing Reform
Title V	Second Chance Act of 2007 Reauthorized
Title VI	Miscellaneous (includes recidivism reduction, reentry programming, prison conditions, treatment for opioid and heroin abuse, and more)

Featured:

Changes to Drug Mandatory Minimum Penalties

Section 401

DRUG OFFENSES
The First Step Act made changes to both the length of certain mandatory minimum penalties and the types of prior offenses that can trigger enhanced penalties.

Statutory Provision	Statutory Penalty	Enhanced Penalty BEFORE First Step Act	Enhanced Penalty AFTER First Step Act
21 U.S.C. § 841(b)(1)(A)	10-year Mandatory Minimum	**20-year** Mandatory Minimum (after one prior conviction for a felony drug offense) **Life** (after two or more prior convictions for a **felony drug offense**)	**15-year** Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony) **25-year** Mandatory Minimum (after two or more prior convictions for a **serious drug felony or serious violent felony**)
21 U.S.C. § 841(b)(1)(B)	5-year Mandatory Minimum	**10-year** Mandatory Minimum (after one prior conviction for a **felony drug offense**)	**10-year** Mandatory Minimum (after one prior conviction for a **serious drug felony or serious violent felony**)
21 U.S.C. § 960(b)(1)	10-year Mandatory Minimum	**20-year** Mandatory Minimum (after one prior conviction for a **felony drug offense**)	**15-year** Mandatory Minimum (after one prior conviction for a **serious drug felony or serious violent felony**)
21 U.S.C. § 960(b)(2)	5-year Mandatory Minimum	**10-year Mandatory Minimum** (after one prior conviction for a **felony drug offense**)	**10-year** Mandatory Minimum (after one prior conviction for a **serious drug felony or serious violent felony**)

Note that §§841(b)(1)(C) and (D) were NOT amended.

Mandatory Minimum Penalties

Changes to § 851 Enhancements for Repeat Offenders

The First Step Act not only reduced the mandatory minimum penalties, but also changed the conditions under which they apply.

Higher mandatory minimum penalties apply if the defendant has a prior conviction for a "serious drug felony" or for a "serious violent felony" and the prosecution files a notice of enhancement under 21 U.S.C. § 851. The First Step Act not only reduced the mandatory minimum penalties, but also changed the conditions under which they apply. The defendant's prior convictions must meet the new definitions of "serious drug felony" or "serious violent felony." The defendant must have served a term of imprisonment of more than 12 months on the prior offense and must have been released within 15 years of the current federal offense. In addition, for any "serious drug felony" or a "serious violent felony" based on 18 U.S.C. § 3559(c)(2), the offense must have been punishable by a term of imprisonment of 10 years or more.

"Serious Drug Felony" & "Serious Violent Felony"

An offense prohibited by 18 U.S.C. § 924(e)(2)(A) for which the defendant served a term of imprisonment of more than 12 months and was released from any term of imprisonment within 15 years of the instant offense. Section 924(e)(2)(A) defines "serious drug felony" as an offense under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), Chapter 705 of Title 46 (Maritime Law Enforcement) or under state law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment is ten years or more.

An offense for which the defendant served a term of imprisonment of more than 12 months that is either a violation of 18 U.S.C. § 3559(c)(2) or 18 U.S.C. § 113 (assaults within maritime or territorial jurisdiction), if the offense was committed in the maritime or territorial jurisdiction of the United States. Section 3559(c)(2)(F) defines "serious violent felony" as enumerated offenses such as murder, certain sex offenses, kidnapping, extortion, arson, and certain firearms offenses, among others, or as any offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense" and is punishable by a maximum term of imprisonment of ten years or more.

Effective date of these changes: The Act provides that these changes shall apply to any offense that was committed before the date of enactment of the Act if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018].

Safety Valve

Section 402

NOTE

The new statutory safety valve provision applies to crimes under Title 46 (Maritime Offenses).

Old Limitation

(1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History category);

. . .

Note that this limitation still exists in §5C1.2.

New Limitation

(1) The defendant does not have:
- (A) more than four criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
- (B) a prior 3-point offense, as determined under the sentencing guidelines; and
- (C) a prior 2-point violent offense, as determined under the sentencing guidelines;

Definition of Violent Offense: As used in this section, the term "violent offense" means a crime of violence, as defined in [18 U.S.C.] section 16, that is punishable by imprisonment.

Effective date of these changes: The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.

Clarification of 924(c) Penalty Provisions

Section 403

Before the Act, a second or subsequent count of conviction under section 924(c) triggered a higher mandatory minimum penalty, as well as mandatory "stacking" of these sentences for each count of conviction. This was so because, in *Deal v. United States*, 508 U.S. 129 (1993), the Supreme Court held that, even when multiple counts under section 924(c) were in the same indictment, the conviction on the first count did not have to be final before the mandatory increases and stacking provisions were triggered. Thus, a defendant with two or more counts in one indictment was subject to a mandatory minimum of five years on the first count, and 25 years on each additional count.

The First Step Act revised section 924(c)(1)(C) by providing that the higher penalty for a "second or subsequent count of conviction" under section 924(c) is triggered only if the defendant has a prior section 924(c) conviction that has become final.

Example: Contemplates five-year mandatory minimum terms for using, carrying, or possessing a firearm in furtherance of a crime of violence or drug trafficking offense. Higher mandatory minimums apply depending on other factors such as whether the firearm was brandished (seven years) and whether the firearm was a machine gun (30 years) among others.

924(c) Counts of Conviction in the Same Indictment	BEFORE the First Step Act	AFTER the First Step Act
1 Count	Mandatory minimum of 5 years	Mandatory minimum of 5 years
2 Counts	Mandatory minimum of 5 + 25 = 30 years	Mandatory minimum of 5 + 5 = 10 years
3 Counts	Mandatory minimum of 5 + 25 + 25 = 55 years	Mandatory minimum of 5 + 5 + 5 = 15 years

Effective date of these changes: The Act provides that the amendments to section 924(c) shall apply to any offense that was committed before the date of enactment of this Act if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018].

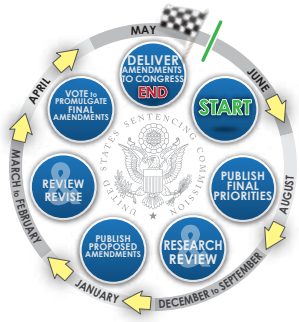
Retroactive Application of the Fair Sentencing Act of 2010

Section 404

Any defendant sentenced before the effective date of the Fair Sentencing Act (August 3, 2010) who did not receive the benefit of the statutory penalty changes made by that Act is eligible for a sentence reduction under the First Step Act. Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggered mandatory minimum penalties. Section 3 of the Fair Sentencing Act eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine. The First Step Act authorizes the defendant, the Director of the Bureau of Prisons, the attorney for the government, or the court to make the motion.

BEFORE	The Fair Sentencing Act	AFTER
5 g 50 g	21 U.S.C. § 841 5-yr min - 40-yr max 10-yr min - life max	28 g 280 g
5 g 50 g	21 U.S.C. § 960 5-yr min - 40-yr max 10-yr min - life max	28 g 280 g

Frequently Asked Questions



Question 1

Is the Commission making any changes to the Guidelines in response to the Act?

The Act does not contain any directives to the Commission requiring action. As it does with all new crime legislation, the Commission will review the Act to determine whether guideline changes might be necessary or appropriate. Because the Act did not include "emergency amendment authority," any changes to the guidelines in response to the Act may only be made during the Commission's annual amendment cycle. *See* 28 U.S.C. § 994.

During the annual amendment cycle, the Commission must publish proposed guideline amendments and solicit public comment. *See* 28 U.S.C. § 994(x). In order for an amendment to move forward after that, at least four Commissioners must vote in favor of promulgating the amendment. *See* 28 U.S.C. § 994(a). Once at least four Commissioners have voted in favor, the Commission must deliver the promulgated amendment to Congress no later than May 1 for the 180-day congressional review period. *See* 28 U.S.C. § 994(p). If Congress takes no action, the amendment can take effect on November 1 of that year.

The Commission has not yet published any proposed amendments responding to the Act. The Commission currently has two voting members and thus lacks a statutory quorum to promulgate amendments.

Changes to Mandatory Minimums

Question 2

For defendants facing an enhanced drug mandatory minimum penalty, the Act now requires that the defendant was convicted of a "serious drug felony" or a "serious violent felony" and that the defendant served a term of imprisonment of more than 12 months. How is time "served" determined?

The court will have to determine the amount of time a defendant served on a prior offense. The *Guidelines Manual* does not define time "served." Note that time "served" is not the same as the guidelines' definition of "sentence imposed," the term used in the criminal history provisions.

Broadening of the Safety Valve

Question 3

The First Step Act states that the new safety valve provision applies to any defendant whose conviction was "entered" on or after the date of the enactment of the Act. What does that mean?

Courts will have to interpret the meaning of "conviction entered." The statute does not define "conviction entered," nor does the *Guidelines Manual*.

Question 4

The safety valve provision at §5C1.2 of the *Guidelines Manual* is different from the statutory provision at 18 U.S.C. § 3553(f). Which one do I follow?

Both. The changes made by the First Step Act were statutory and did not make any changes to the current text of the guidelines. Therefore, courts must use the new statutory safety valve criteria in determining whether the offender qualifies for statutory relief at 18 U.S.C. § 3553(f). One key difference between the two provisions is the number of criminal history points an offender can have. If so, the Court may impose a sentence "without regard to the mandatory minimum" that would otherwise be applicable.

USSG §2D1.1(b)(18) provides for a 2-level reduction for offenders who meet the safety valve criteria set forth in subdivisions (1)-(5) of §5C1.2. Section 5C1.2 still reflects the original statutory criteria and provides the defendant cannot have more than one criminal history point as determined under §4A1.1. Thus, as a matter of proper guideline application, the court should award the 2-level safety valve reduction at §2D1.1 only if the offender is eligible for safety valve relief according to the guideline provi-

sion. Of course, the court has authority under 18 U.S.C. § 3553(a) to grant a similar 2-level reduction to the newly eligible safety valve offenders not meeting the guideline criteria. If the court should do so, it will be considered a variance from the guidelines.

Question 5

The new safety valve statute at 18 U.S.C. § 3553(f) says that a defendant with any "2-point violent offense" is ineligible for the safety valve. How should the court determine if the prior offense is a violent offense?

The statute defines "violent offense" as a "crime of violence as defined by 18 U.S.C. § 16, that is punishable by imprisonment." The Act does not provide any guidance as to how to determine if the prior offense is a crime of violence. Supreme Court precedent directs the use of the categorical approach to make such determinations. Notably, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court held that the "residual clause" of section 16 is unconstitutionally vague as applied to the immigration statute in that case. That part reads that a crime of violence is "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Courts may have to decide whether *Dimaya* applies in these circumstances.

SAFETY VALVE

The analysis required by the new safety valve provision differs greatly from the analysis under the guidelines.

Safety Valve Application Examples:

A) Is there any way that a defendant with a prior violent offense can receive relief from a mandatory minimum penalty?

Yes, if the violent offense receives only one criminal history point under the guidelines, and the defendant's prior record does not otherwise exclude him from eligibility under 18 U.S.C. § 3553(f). For example, a defendant's only prior conviction is for armed robbery, and he received a sentence of five years' probation resulting in one criminal history point. This defendant would not be excluded from receiving relief from the mandatory minimum penalty under the newly amended safety valve.

B) Defendant has four 1-point convictions and two 2-point convictions for possession of cocaine, for a total of eight criminal history points (Criminal History Category IV). Is this defendant eligible for relief from a mandatory minimum under 18 U.S.C. § 3553(f)?

Yes. He has no more than four criminal history points excluding the 1-point convictions, no prior 3-point offenses, and no prior 2-point violent offenses. However, the defendant would not meet the criteria for the 2-level reduction at §2D1.1(b)(18), which only allows for reduction where the defendant has no more than one criminal history point.

C) Defendant's instant offense is Possession with Intent to Distribute Cocaine. The defendant is a Career Offender under §4B1.1 because he has a prior conviction for sale of a controlled substance and another separate prior conviction for distribution of crack. The defendant received a sentence of three years' probation on the first conviction and 30 days imprisonment on the second conviction for a total of two criminal history points. However, the defendant is a Career Offender and his Criminal History Category is VI. Is this defendant eligible for relief under 18 U.S.C. § 3553(f)?

Yes. Although the defendant is a Career Offender, this defendant's prior record does not disqualify him from being eligible for relief under the revised statutory safety valve.

D) Defendant's instant offense is Possession with Intent to Distribute Methamphetamine. The defendant is a Career Offender under §4B1.1 because he has a prior conviction for aggravated assault and a prior conviction for distribution of methamphetamine. The defendant received a

sentence of two years' probation on the first conviction and six months' imprisonment on the second conviction for a total of three criminal history points. However, the defendant is a Career Offender and his Criminal History Category is VI. Is this defendant eligible for relief under 18 U.S.C. § 3553(f)?

Yes. Although the defendant is a Career Offender, this defendant's prior record does not disqualify his from being eligible for relief under the revised statutory safety valve.

E) A defendant has a total of six criminal history points. The defendant has two prior 2-point convictions (for non-violent offenses) and he also received two criminal history points for "status" under §4A1.1(d) for being under a criminal justice sentence for one of the prior 2-point convictions. Is this defendant eligible for relief from a mandatory minimum penalty under 18 U.S.C § 3553(f)?

No. This defendant has more than four criminal history points (excluding any criminal history points resulting from a 1-point offense), and is therefore not eligible for the statutory safety valve.

Clarification of Section 924(c)

SECTION 924(c)
The clarification of Section 924(c) penalties could greatly reduce sentences for those convicted of multiple counts in the same indictment.

Question 6

If a defendant is convicted of more than one count of 18 U.S.C. § 924(c), how should the court sentence the defendant?

The First Step Act revised section 924(c)(1)(C) by providing that the higher penalty for a "second or subsequent count of conviction" under section 924(c) is triggered only if the defendant has a prior section 924(c) conviction that has become final. The Act did not change any other subsections of the statute. So, if a defendant has two or more counts of conviction for section 924(c) in the same indictment, the court should impose the mandatory minimum penalty for each count. *See* section 924(c)(1)(A), (B). Section 924(c)(1)(D) remains in effect, requiring that the court impose consecutive sentences. The guideline for this statute is found at USSG §2K2.4.

Application of the Fair Sentencing Act

Question 7

Who is eligible for a sentence reduction based on the retroactive application of the Fair Sentencing Act of 2010?

Any defendant sentenced for a crack cocaine offense before the effective date of the Fair Sentencing Act of 2010 who did not receive the benefit of the statutory penalty changes made by that Act is eligible for a sentence reduction under the First Step Act. Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggered mandatory minimum penalties. Section 3 of the Fair Sentencing Act eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine. For certain defendants, these changes may have reduced or eliminated the mandatory minimum penalty, while also reducing the statutory maximum penalty.

Question 8

Are there any limitations on who is eligible for a sentence reduction based on the retroactive application of the Fair Sentencing Act of 2010?

Yes. A defendant is not eligible for a sentence reduction if 1) a defendant's sentence was previously imposed or reduced in accordance with Sections 2 and 3 of the Fair Sentencing Act; or 2) the defendant previously filed a motion under section 404 of the First Step Act, and the court denied the motion after complete review on the merits. Courts also retain their discretion to deny motions of otherwise eligible offenders, since "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." *See* First Step Act, Section 404(c).

Question 9

Can a defendant sentenced as a Career Offender under USSG §4B1.1 receive a sentence reduction under the First Step Act?

Yes, provided that the statutory maximum penalty applicable to the defendant under the Fair Sentencing Act is lower than the statutory maximum penalty in effect on the date of the original sentencing.

Question 10

What role do the guidelines play in a resentencing authorized by the First Step Act?

Section 404 of the First Step Act provides that "[a] court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if section 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat 2372) were in effect at the time the covered offense was committed." *See* First Step Act, Section 404(b). Thus, the First Step Act provides statutory authorization to the sentencing court to modify a previ-ously imposed term of imprisonment. *See* 18 U.S.C. § 3582(c)(1)(B). Courts will have to decide whether a resentencing under the Act is a plenary resentencing proceeding or a more limited resentencing. In either instance, the Act made no changes to 18 U.S.C. § 3553(a), so the courts should consider the guidelines and policy statements, along with the other 3553(a) factors, during the resentencing.

Question 11

Is the Commission able to compile a list of defendants who might benefit from the retroactive application of the Fair Sentencing Act?

The Commission has provided an overall analysis of the estimated sentencing and imprisonment, impact of the Act, and has posted on its website here:

https://go.usa.gov/xEUTG

The Commission will compile and send a specific list of offenders who may be eligible for a sentence reduction under the Act's provisions ***only upon request by the Chief Judge of each district***. Unlike a sentence reduction under §3582(c), where a party must petition the Court, the Act allows judges, on their own motion, to reduce sentences for eligible offenders. If you are a Chief Judge and would like to receive a list of possible eligible offenders, please contact Glenn Schmitt, the Director of the Commission's Office of Research and Data, at 202-502-4531 or gschmitt@ussc.gov.

This information is available online at:
http://www.ncsl.org/documents/statefed/First_Step_Act_Summary_Dec2018.pdf.

Kentucky CJPAC Justice Reinvestment Work Group

Final Report

December 2017

Acknowledgements

The Kentucky CJPAC Justice Reinvestment Work Group would like to thank the following agencies, associations and individuals for their assistance throughout the Work Group process:

Office of the Governor
Scott Brinkman
Bryan Sunderland
Adam Meier

Kentucky Department of Corrections
Commissioner James Erwin
Beth E. Moore
Cyndi Heddleston
Kevin Pangburn
Kieryn Fannin
Kirstie Willard
Cookie Crews
Hilarye Dailey
Barry Cochran
Evan Roach
Todd Guance
Kristin Harrod
Bridget Gillilland

Kentucky Justice & Public Safety Cabinet
Dallas Hurley
Davis Paine
Brad Holajter
Mike Wynn

Kentucky State Legislature
Anne-Tyler Morgan
Chris Lilly

Kentucky Administrative Office of the Courts
Laurie Dudgeon
Marc Theriault
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Elizabeth Nichols
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Autumn Lancaster

Circuit Court
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The Honorable David Tapp

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Tammy Wright

Kentucky Office of Drug Control Policy
Van Ingram

The Kentucky Jailers Association
Renee Craddock

The Pegasus Institute
Josh Crawford

District Court
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The Honorable Karen Thomas
The Honorable Amy Anderson
The Honorable John McCarty
The Honorable Vanessa Dickson

Victim / Survivor / Advocate Roundtables
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Jenessa Bryan
Marissa Castellanos
Lana Grandon
Prentice Harvey
Gretchen Hunt
Dallas Hurley
Pam Hurt
Laela Kashan
Michelle Kuiper
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Louisville Metro Police Department
Jessie Halladay
Colonel Michael Sullivan

US Justice Action Network
Holly Harris
Jenna Moll

Commonwealth's Attorneys
Rob Sanders
Tom Wine

American Civil Liberties Union
Kate Miller
Amanda Hall

Kentucky Smart on Crime Coalition
Tyler Glick

The Crime and Justice Institute
Alison Silveira
Colby Dawley
Felicity Rose
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Amy Hannah	Kentucky Association of Criminal Defense Lawyers, President
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Judge Kevin Holbrook	24th District Court (Johnson, Lawrence, Martin)
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Executive Summary

Since 2010, 31 states across the country have decreased imprisonment rates while reducing crime rates. Yet Kentucky's prison population has grown by eight percent in the last five years, reaching more than 23,500 by the end of 2016. As of 2015, Kentucky had the tenth highest imprisonment rate in the country. Still more striking, Kentucky had the fifth highest female imprisonment rate in the country, at almost twice the national average. These trends have burdened taxpayers with extraordinary costs, with Kentucky spending $570.5 million dollars on state corrections in FY2017, a $65 million dollar increase from FY2014. Despite these high costs, Kentucky taxpayers are not getting a sufficient return on their public safety dollars, as the rate of recidivism remains high. As of 2016, 41 percent of offenders return to state custody within two years of release.

Without significant legislative and administrative solutions, Kentucky's prison population is projected to grow 19 percent, or a little over 4,400 beds, by 2027. The projected growth in the prison population is estimated to cost the state more than $600 million over ten years.

Seeking a better public safety return on corrections spending, state leaders from all three branches of government joined together in July of 2017 to request technical assistance through the Justice Reinvestment Initiative, a public-private partnership between the U.S. Department of Justice, Bureau of Justice Assistance (BJA) and The Pew Charitable Trusts. In August of 2017, Governor Matt Bevin established the inter-branch Justice Reinvestment Work Group (Work Group), a subset of the Criminal Justice Policy Assessment Council (CJPAC), and charged the Work Group with "develop[ing] fiscally-sound, data driven criminal justice policies that protect public safety, hold offenders accountable, reduce corrections populations, and safely reintegrate offenders back into a productive role in society."

Over a five-month period, the Work Group analyzed the Commonwealth's sentencing, pretrial, and community supervision policies, practices, and data, and reviewed the latest research on effective recidivism reduction strategies. The Work Group found that:

- Prison admissions have grown 32 percent in just five years, driven by increases in Class D felonies, Kentucky's lowest felony class, and failures on supervision;
- Kentucky's female prison population has grown at a substantially higher rate than the overall prison population, driven by low-level, nonviolent offenses; and
- Despite progress towards a risk-based pretrial system, many low-risk defendants are still detained awaiting trial.

Based on this analysis and the directive from Governor Bevin, the Work Group developed a comprehensive package of 22 data-driven policy recommendations aimed at improving public safety by holding offenders accountable and reducing recidivism. These policies, if signed into law, would **avert 79 percent of the projected prison population growth, and save nearly $340 million in projected prison costs over the next ten years**.

Kentucky's Work Group Process

In 2016, Governor Matt Bevin established the Criminal Justice Policy Assessment Council (CJPAC) to improve public safety and reduce recidivism through policy development. CJPAC's work resulted in Senate Bill 120, which improved reentry practices in the Commonwealth.

In August of 2017, Governor Bevin, with support from judicial and legislative leadership, established the inter-branch Work Group, formed as part of the CJPAC. Governor Bevin charged the Work Group with "develop[ing] fiscally-sound, data driven criminal justice policies that protect public safety, hold offenders accountable, reduce corrections populations, and safely reintegrate offenders back into a productive role in society."

The Work Group was comprised of 19 stakeholders, including legislators, judges, prosecutors, public defenders, a law enforcement representative, a jailer, a county judge executive, the Director of the Department of Corrections (DOC) Probation and Parole Division, a victims' advocate, and a business leader. The Work Group conducted a comprehensive analysis of Kentucky's criminal justice system, reviewed the latest research on the most effective strategies to reduce recidivism and improve public safety, and developed recommendations to meet the Work Group charge.

Beginning in the summer of 2017, the full Work Group met five times. To provide an opportunity for further analysis and discussion of specific policy areas, Work Group members split up into three subgroups:

- **Sentencing**, chaired by Representative Jason Nemes;
- **Release and Pretrial**, chaired by County Judge Executive Tommy Turner; and
- **Supervision**, chaired by Johnathan Hall, Director of DOC Probation and Parole.

Each subgroup crafted specific policy options designed to meet the leadership's charge to the Work Group. The subgroups reported their policy recommendations to the full Work Group for consideration.

In addition to receiving input and advice from prosecutors, defense attorneys, circuit and district court judges, law enforcement, and other criminal justice stakeholders, the Work Group also held a roundtable discussion with victims, survivors, and victim advocates to identify a comprehensive set of priorities.

The Work Group received technical assistance from the Crime and Justice Institute at CRJ. This assistance was provided as part of the Justice Reinvestment Initiative of the U.S. Department of Justice, a public-private partnership between The Pew Charitable Trusts and the BJA.

National Picture

Kentucky's challenges with long-term prison growth are not unique. Across the country, state prison populations expanded rapidly starting in the early 1970s, and state officials have spent an increasing share of taxpayer dollars to keep pace with soaring prison costs. From the mid-1980s to the mid-2000s, spending on corrections was the second-fastest growing state budget category, behind only Medicaid.[1] Nationally, in 2015, 1 in 15 state general fund dollars went to corrections.[2]

However, in recent years, many states have successfully taken steps to curb their prison population growth while still holding public safety paramount. After 38 years of uninterrupted growth, the national prison population declined 5.5 percent between 2009 and 2015.[3]

The national crime rate has been falling since the early 1990s and is now at its lowest level since 1966.[4] However, the strongest research credits prison growth with at most one-quarter to one-third of the crime drop since its peak in the early 1990s. Other major factors behind the crime decline include better policing, changing demographics, increased private security, and improved theft prevention technologies.[5] In short, the increased use of incarceration had an important but minor role in improved public safety. Additionally, there is general consensus among experts that, as states have incarcerated higher numbers of lower-level offenders and held them for longer periods of time, the country has passed the point of diminishing returns, meaning that today the additional use of prison has little if any crime reduction effect.[6]

Instead, states are recognizing the value of using research and implementing best practices to address crime and reduce recidivism. Since 2010, 31 states have reduced both their imprisonment and crime rates.[7]

Reasonable reforms in law-and-order states like South Carolina, Georgia, and Louisiana, and an increasingly supportive public,[8] combined with state budget pressures, have resulted in a growing national conversation that puts prison spending under greater scrutiny than ever before. For the better part of the past four decades, the most common question that policymakers have asked about their state corrections budgets was, "How many more prisons do we need?" Today, state leaders from both parties are asking a more evolved but complicated question: "How do we get taxpayers a better public safety return on their corrections dollars?"

Many states have adopted policies to rein in the size and cost of their corrections systems through a "justice reinvestment" strategy. Louisiana, Alaska, Georgia, Mississippi, North Carolina, Oregon, Texas, Utah, and many others have implemented reforms to protect public safety and control corrections costs. These states revised their sentencing and corrections policies to focus state prison beds on violent and career offenders and then invested in more effective and less costly strategies to reduce recidivism and improve public safety.

In 2011, for example, policymakers in Georgia faced a projected eight percent increase in the prison population over the next five years, at a cost of $264 million dollars. Rather than spend additional taxpayer dollars on prisons, Georgia's leaders looked for more cost-effective solutions. In 2012, the state legislature unanimously passed a set of reforms that controlled prison growth through changes to drug and property offense statutes, and improved public safety by investing in drug and mental health courts and treatment.[9] Between 2012 and 2015, Georgia's crime rate fell 10 percent and the prison population declined 5.9 percent, giving taxpayers better public safety at a lower cost.[10]

In these and other states, working groups have focused research on improving public safety, integrating the perspectives of the three branches of government and key system stakeholders. This data-driven, inclusive process has resulted in wide-ranging innovations to the laws and policies that govern who goes to prison, how long they stay, and how they return to their communities.

Key Findings of the Work Group

To evaluate Kentucky's criminal justice system, the Work Group analyzed the Commonwealth's sentencing, community supervision, and pretrial data; conducted a review of the policies and practices at key decision points; and reviewed the latest research on what works to reduce recidivism.

Prison Trends

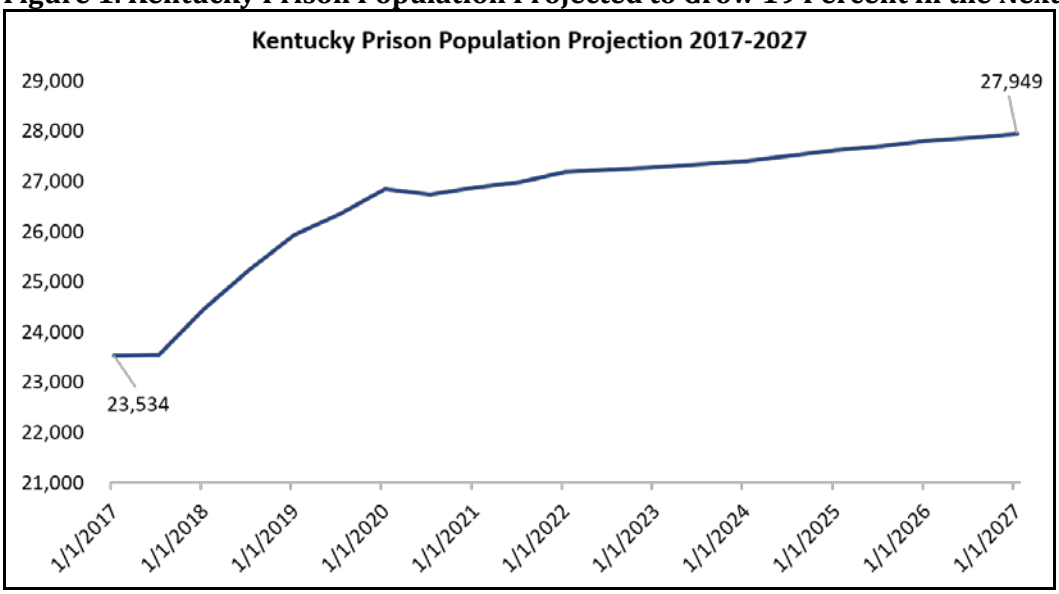
Kentucky's prison population has grown eight percent since 2012. The Commonwealth had the tenth highest imprisonment rate in the country in 2015, and the fifth highest for incarcerated women at almost twice the national average. While prison populations across the country have stabilized or declined, Kentucky's has risen.

This growth is the result of increasing admissions to prison. Between 2012 and 2016, overall admissions to prison grew 32 percent, driven by dramatic increases in admissions for the lowest tier of offenses both as new sentences to prison and failures on supervision. Over this five-year period, there was a 38 percent growth in Class D felony admissions, the least serious of Kentucky's felony offenses, including a doubling in drug possession admissions. At the same time, admissions for parole revocations increased by 50 percent, and, by 2016, supervision failures made up 61 percent of all admissions to prison.

These trends have left Kentucky's state prisons at maximum capacity and its county jails critically overcrowded. Almost half of the DOC inmate population was housed in county jails in 2016, with limited access to treatment and programming; this disparity is even more striking for the female population, 70 percent of whom are housed in county jails.

Sustained growth in the inmate population forced the DOC to enter into a contract with a private prison in November of 2017 for 800 beds, but the capacity will neither eliminate the current overcrowding nor mitigate the pressures of ongoing growth. Absent significant legislative solutions, Kentucky's prison population is projected to grow 19 percent in 10 years, adding over 4,400 beds, at a cost of more than $600 million dollars to taxpayers.

Figure 1. Kentucky Prison Population Projected to Grow 19 Percent in the Next Decade



Source: Data from the Kentucky Department of Corrections, Analysis by CJI

For many offenders, incarceration is not more effective at reducing recidivism than non-custodial sanctions

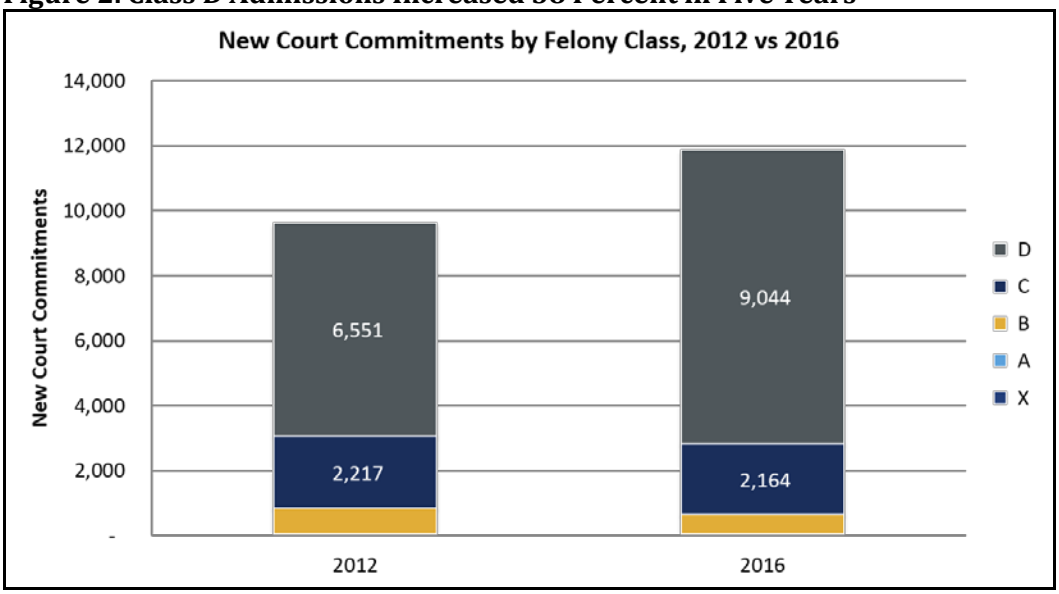
The Work Group examined the value of prison sentences compared to non-custodial sanctions such as drug court, probation, and electronic monitoring. Researchers have studied this question by matching samples of individuals sent to prison with those given non-custodial sanctions and have consistently found that prison either does not impact, or actually increases, re-arrest or re-conviction rates, both in short-term and in long-term analyses. These findings remain true even when controlling for individuals' education, employment, drug abuse status, and current offense.[11]

The crime-producing effect of prison seems to be concentrated among low-level and first-time offenders.[12] Research on the "schools of crime" theory suggests that for many types of nonviolent offenders, the negative impacts of incarceration outweigh the positive: that is, sending people to prison may cause them to commit more crimes upon release. Specific studies of drug offenders, technical violators, and first-time offenders all show this negative impact.[13]

Despite evidence of the null or negative effect of incarceration on recidivism, Kentucky uses substantial prison resources on low-level, nonviolent offenders with limited criminal history. In 2016, almost two-thirds of new admissions were sentenced for drug and property offenses, and nearly half of people sentenced directly to prison for drug and property offenses had no prior felony record.[14]

The Commonwealth's increasing use of imprisonment is concentrated entirely in the lowest tier of felony conduct: between 2012 and 2016, Class D admissions rose 38 percent, while admissions for all other felony classes declined (see Figure 2).

Figure 2. Class D Admissions Increased 38 Percent in Five Years[15]

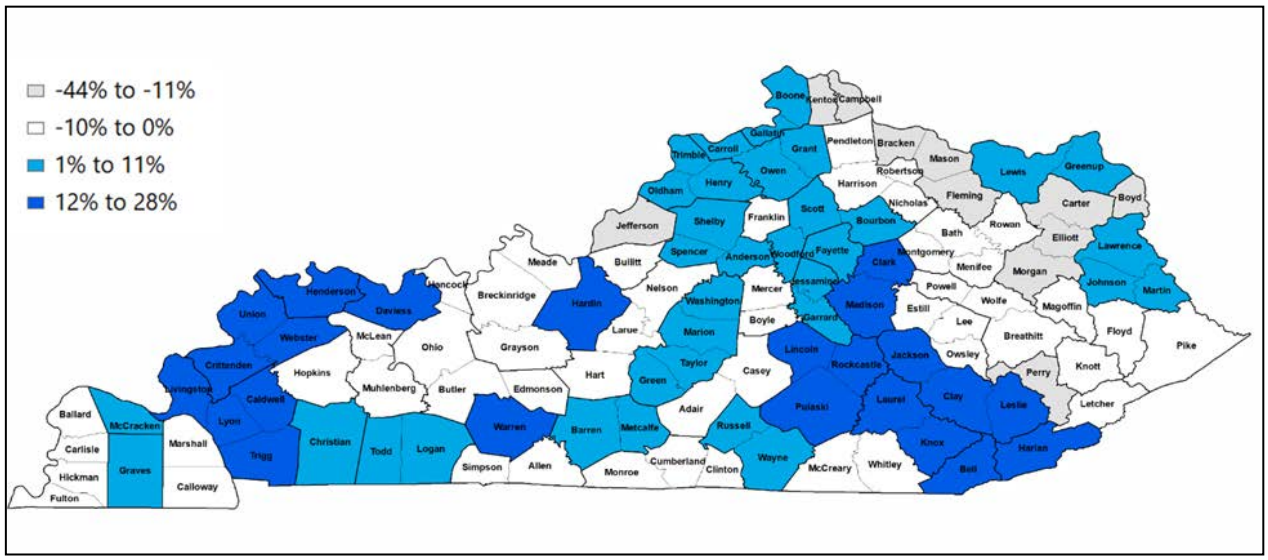


Source: Data from the Kentucky Department of Corrections, Analysis by CJI

This growth in Class D admissions has been precipitated by changes in sentencing practices. The Work Group found that despite decreases in nonviolent crime rates,[16] felony indictments rose seven percent since 2012, driven by an 18 percent increase in Class D indictments. The majority of felony convictions in 2016 received a prison sentence, regardless of felony class. In fact, 56 percent of Class D convictions received a prison sentence in 2016. The rate at which prison is used has not changed over time, despite growth in lower-level felony cases. Furthermore, the volume of Class D offenses is not the result of plea bargains down from more serious charges like drug trafficking: 82 percent of Class D convictions in circuit court originated with an indictment charging no offense more serious than a Class D felony.

The growth in Class D admissions resulted in a Class D population of over 9,700 inmates at the end of 2016, 82 percent of whom were being housed in county jail facilities. The DOC pays a per diem to jailers for housing Class D inmates, who are generally required by statute to serve their sentence in a county jail.[17] Though the mounting costs of this population are born by the state, the growth is not uniform across Kentucky: there is substantial regional variation in contributions to the overall Class D population growth (see Figure 3). In the map below, the darker areas represent regions that have contributed a higher percentage of the overall growth in Class D admissions.

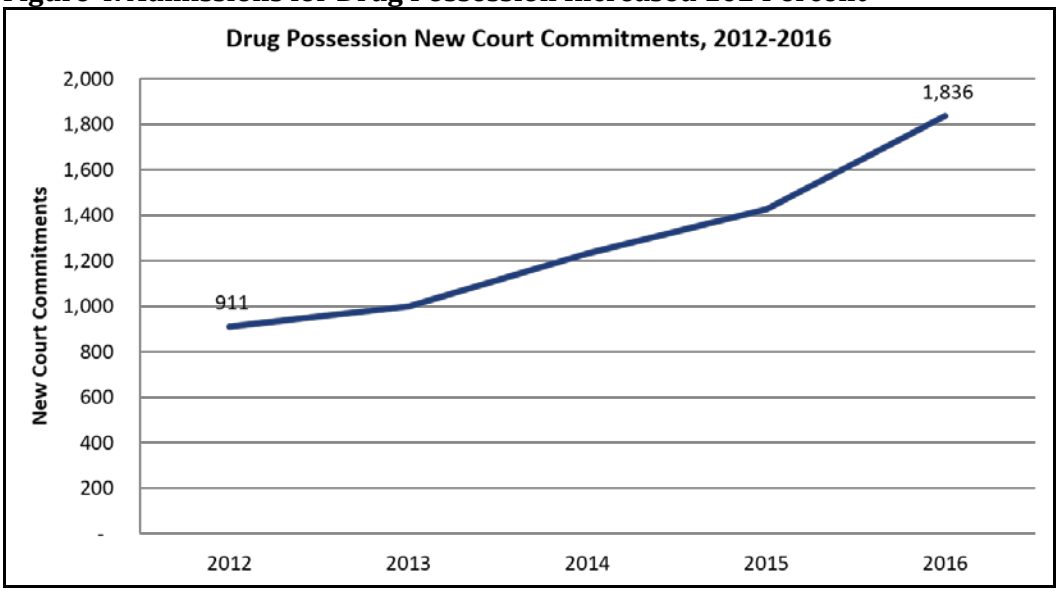
Figure 3. Substantial Regional Variation in Contribution to Class D Growth
Contribution to Growth in Class D Admissions by Circuit Court, 2013 - 2016



Source: Data from the Kentucky Department of Corrections, Analysis by CJI

The Work Group found that drug possession comprised a striking portion of the Class D felony growth. This is especially surprising considering that House Bill 463, passed in 2011, modified the drug possession statute to encourage the use of deferred prosecution and probation. Between 2013 and 2016, convictions for drug possession increased by 71 percent, with 47 percent of drug possession convictions being sentenced to prison in 2016. The result was 102 percent growth in the number of drug possession cases sent to prison over the last five years (see Figure 4).

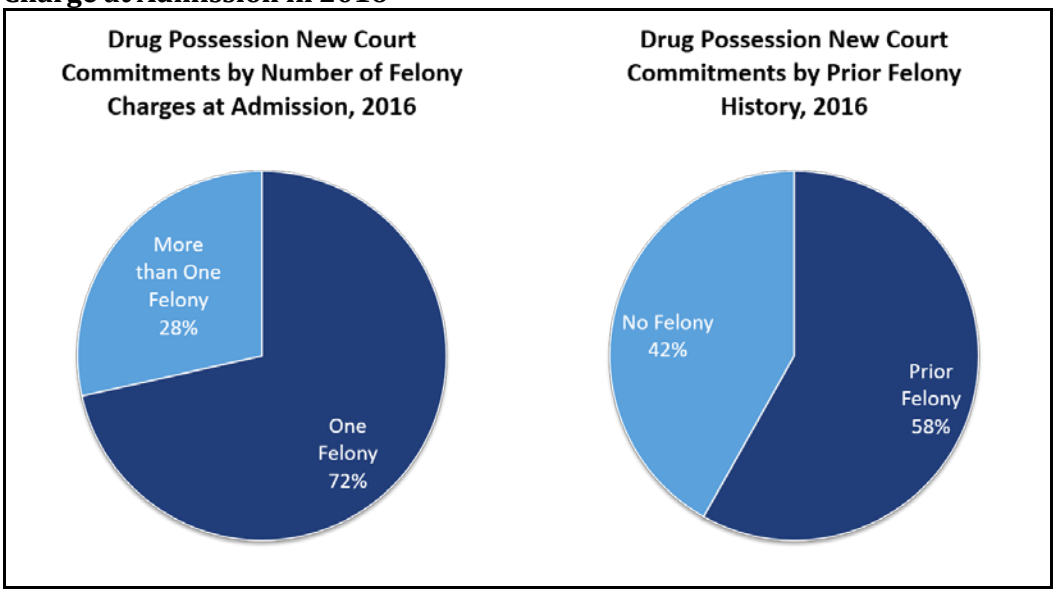
Figure 4. Admissions for Drug Possession Increased 102 Percent



Source: Data from the Kentucky Department of Corrections, Analysis by CJI

Of those sentenced to prison in 2016 for drug possession, 42 percent had no prior felony convictions,[18] and 72 percent were convicted of only a single possession charge leading to admission (see Figure 5).

Figure 5. More than 70 Percent of Drug Possession Commitments Had Only One Felony Charge at Admission in 2016



Source: Data from the Kentucky Department of Corrections, Analysis by CJI

Longer prison stays do not reduce recidivism more than shorter prison stays

The Work Group also considered the relationship between the length of prison terms and recidivism. The best measurement of the deterrent effect of longer sentences is whether similar offenders, when subjected to different terms of incarceration, recidivate at different rates. Rigorous research studies find no significant effect, positive or negative, of longer prison terms on recidivism rates.[19]

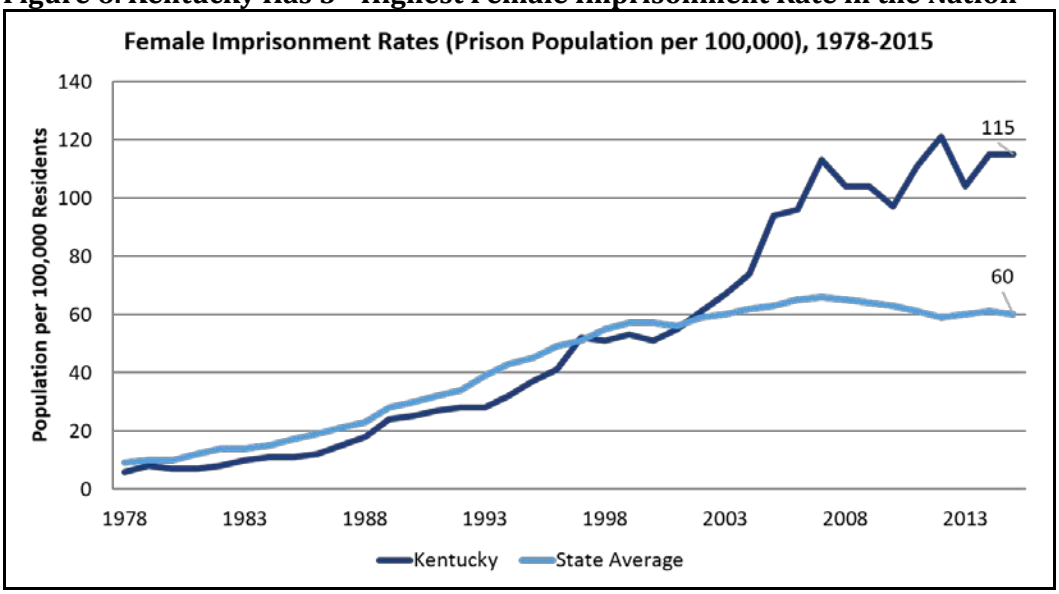
Analyzing lengths of stay in Kentucky over the past five years, the Work Group found that average time served has been decreasing, driven by the dramatic growth of the Class D cohort with the shortest sentence range. However, new court commitments[20] released in 2016 served, on average, 47 percent of their sentence in prison, even though the vast majority were parole-eligible at either 15 percent or 20 percent of their sentence.[21]

Despite broad parole eligibility, in 2016 only 41 percent of inmates were released on parole, and the parole grant rate has been decreasing since 2013. A high percentage of inmates are expiring their sentences without supervision to follow, even after the creation of the Mandatory Reentry Supervision carve-out in 2011. Currently, 38 percent of Class D releases are being paroled, and those not being paroled are serving, on average, an additional 9.6 months longer in prison. Of Class D releases in 2016, 39 percent never received a parole hearing.

Women in Prison

The Work Group found that Kentucky's female prison population exhibited similar patterns to the overall population over the past five years, but significantly amplified. While overall DOC admissions grew 32 percent over this period, female admissions grew 54 percent. This steep increase was driven by growth in drug offenses, both as new court commitments and as supervision revocations.

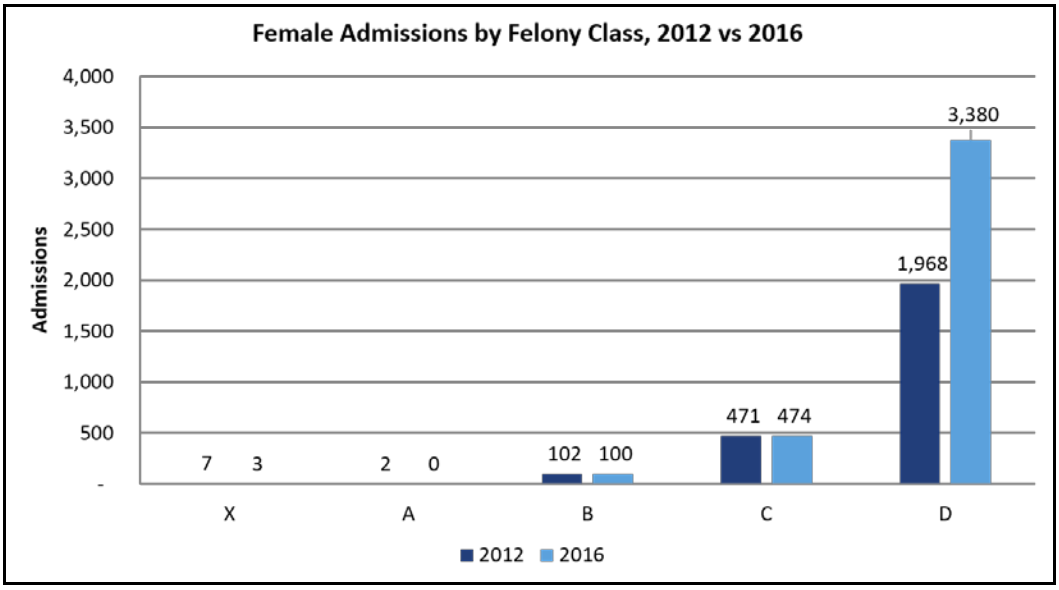
Figure 6. Kentucky Has 5th Highest Female Imprisonment Rate in the Nation



Source: Data from the Bureau of Justice Statistics, Correctional Statistical Analysis Tool

This admissions growth led to a 16 percent increase in the female DOC population, twice the rate of the increase in the total population. Because the female population consists even more disproportionately of nonviolent Class D offenders, 70 percent of the female population is housed in county jails, up from about 50 percent in 2012. Due to limited space and the logistical challenges of housing female inmates, women in local jails are even less likely to receive programming and substance abuse treatment than their male counterparts. Women stay in DOC custody for less than a year on average, creating a revolving door effect for justice-involved women with little opportunity for meaningful rehabilitation.

Figure 7. Class D Felonies Account for 85 Percent of Female Admissions, Grew 72 Percent Since 2012[22]



Source: Data from the Kentucky Department of Corrections, Analysis by CJI

Community Supervision

More than three-quarters of the individuals released from prison in 2016 were placed on some form of community supervision. Over the last thirty years, a growing body of research has offered support for several strategies for reducing recidivism and increasing public safety through improved community supervision practices. These strategies include: identifying and focusing resources on higher risk offenders; using swift, certain, and proportionate sanctions; incorporating rewards and incentives; frontloading resources in the first weeks and months following release from prison; and integrating treatment into supervision, rather than relying on surveillance alone.

Focus supervision and treatment resources on higher-risk offenders

The Work Group examined how supervision resources were being allocated for individuals on community supervision. Research has consistently shown that offenders' likelihood to recidivate – that is, to commit new crimes upon release – can be accurately predicted with the use of a validated risk and needs assessment, an actuarial tool shown to predict the likelihood of recidivism for a specific population.[23] Many states have adopted validated risk and needs assessment tools to identify offenders' likelihood to recidivate and allocate resources accordingly. Using a risk assessment, parole and probation officers can focus their oversight and resources on those who pose the highest risk of reoffending. Conversely, low-risk offenders who engage in intensive supervision or treatment programs may be more likely to reoffend by over-engagement with the criminal justice system.

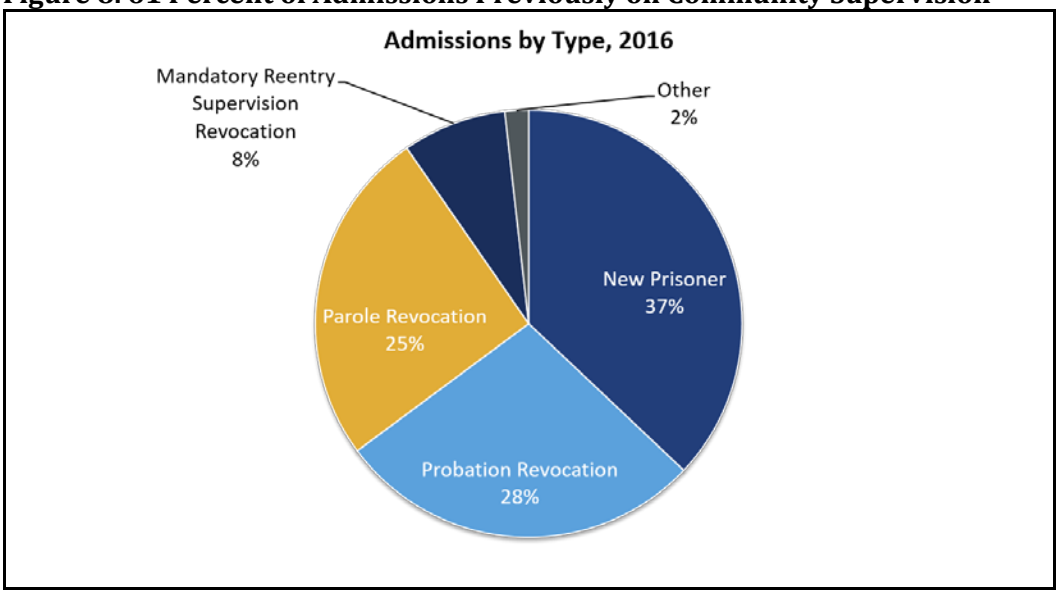
In Kentucky, the DOC is statutorily mandated to use the results of a validated risk and needs assessment to assess individuals' risk to recidivate and must prioritize supervision and program resources for individuals assessed as high risk. While individuals assessed as low risk can be placed

on administrative supervision, there are statutory restrictions on when an individual assessed as low risk can be transferred to administrative supervision.

Use swift, certain, and proportionate sanctions

The Work Group found that one of the main drivers of the recent growth in the prison population was revocations from community supervision. In 2016, 61 percent of DOC admissions stemmed from a revocation of community supervision (see Figure 8). In addition, parole revocations increased by 50 percent between 2012 and 2016, despite a small decline in the parole supervision population over this period.

Figure 8. 61 Percent of Admissions Previously on Community Supervision



Source: Data from the Kentucky Department of Corrections, Analysis by CJI

Kentucky is devoting an increasing percentage of its prison resources to incarcerating individuals for technical violations of their probation or parole conditions, currently defined as a violation of supervision conditions that does not rise to the level of a new felony conviction. These individuals are overwhelmingly admitted to prison for not complying with the terms of their supervision, most often by failing treatment or a drug test, absconding, or missing meetings with their probation or parole officer. Of those admitted to prison for a parole revocation in 2016, 96 percent were for technical violations.

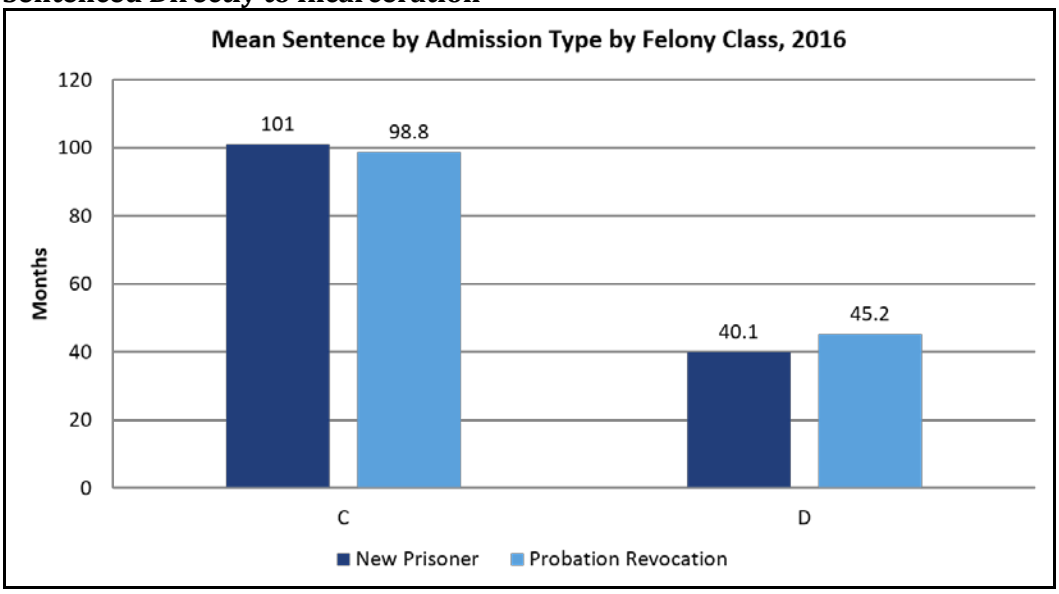
The Work Group examined the Commonwealth's use of swift, certain, and proportionate sanctions in responding to violations committed while on community supervision. Research suggests that violations that do not rise to the level of criminal conduct can most effectively and safely be handled with the use of swift, certain, and proportionate non-custodial sanctions in the community. These responses to noncriminal conduct work because they help offenders see the sanction as a consequence of their behavior, and because individuals heavily weigh the present over the future (consequences that come weeks and months later are steeply discounted). Certainty establishes a credible and consistent threat, thereby creating a clear deterrent for non-compliant behavior.

The Work Group found that supervision violation events have increased for all violation types, with a growth of approximately 52 percent in violations related to substance abuse and treatment failure. Most notably, absconding violations increased by 98 percent between 2012 and 2016. In 2016, 86 percent of absconding violations resulted in revocation, despite anecdotal evidence from DOC Probation and Parole Services that many absconding violations represent less serious conduct than willful absconding, and are frequently due to individuals who have relapsed or failed a treatment program, and then fail to report. The DOC administratively classifies technical violations as either major or minor violations. Minor violations include such things as failing to seek employment or failure to comply with programming conditions. Major violations include failing to complete treatment or a refusal to submit to a drug or alcohol test. Currently, DOC treats absconding as a major violation, which is automatically reported to the releasing authority without the use of graduated sanctions or other alternatives to formal revocation.

Finally, the Work Group found that for the least serious class of offenses, supervision failure resulted in the imposition of a harsher sentence than that received by offenders who were deemed unworthy of supervision in the first place.

Trial courts often impose higher sentences on probated offenders in the belief that a longer sentence will be a greater incentive for compliance. In addition to being contrary to research showing that sentence length does not impact recidivism, this practice has meant that less serious offenders serve longer sentences when revoked than more serious offenders who are released sooner back into the community. In 2016, those revoked from probation for Class D offenses faced longer sentences than those sentenced directly to custody. Drug possession probationers who were revoked from probation were sentenced to nine months longer, on average, than drug possession offenders sentenced straight to prison for a new offense.

Figure 9. Probation Revocations for Class D Offenses Receive Longer Sentences Than Those Sentenced Directly to Incarceration



Source: Data from the Kentucky Department of Corrections, Analysis by CJI

Incorporate rewards and incentives

Historically, probation and parole supervision was focused on surveillance and sanctioning to catch or interrupt negative behavior. However, research shows that encouraging positive behavior change through the use of incentives and rewards can have an even greater effect on motivating and sustaining behavior change than using sanctions alone.[24] For example, one powerful incentive is offering earned discharge opportunities, which encourage offenders to comply with their conditions of supervision in exchange for a reduction in the period of time spent on supervision. At least 15 states have implemented earned discharge policies, reducing caseloads while encouraging positive behavior.[25]

In Kentucky, individuals on parole and mandatory release supervision are eligible to earn credits to reduce their supervision term for completing evidence-based programming, maintaining employment, and complying with the terms and conditions of supervision. However, this incentive is not currently available to individuals on probation.

Frontload resources in the first weeks and months following release

Research has shown that supervision resources have the highest impact when concentrated on the first weeks and months following an individual's release from prison or placement on supervision. By frontloading limited resources, states can better target offenders at the time when they are most likely to reoffend, thereby reducing future violations by addressing non-compliant offender behavior early in the process.[26]

Average supervision terms for offenders who successfully complete supervision in Kentucky are almost five years (56.3 months) for probation and a little over two years (26.2 months) for parole. The average probation term in Kentucky is well beyond the period where probationers are most likely to reoffend, as 70 percent of revocations in 2016 occurred within the first two years of supervision. These lengthy probation terms contribute to high caseloads and poor supervision ratios. Furthermore, the likelihood of violations and the value of ongoing supervision diminish as supervisees gain stability and demonstrate longer-term success in the community.

Integrate treatment into surveillance

Lastly, research shows that a combination of surveillance and treatment focused on an individual's criminogenic needs is more effective at reducing recidivism than supervision consisting of surveillance alone.[27] Supervising officers should be trained to use cognitive behavioral techniques to support rehabilitation through positive reinforcement, rather than simply monitoring the individual until he or she fails.

In Kentucky, the DOC uses a risk and needs assessment to both guide supervision intensity and to identify criminogenic needs, which form the basis for the development of the individualized case management plan. However, the Work Group heard a number of anecdotal reports regarding gaps in treatment resources, as well as regional disparities in the availability of community-based treatment and programming, especially for those placed directly on probation supervision. In addition, transportation was identified as a major barrier to individuals accessing and successfully completing treatment or programming in the community.

Pretrial Detention

Since abolishing commercial bail in 1976, Kentucky has been a national leader in pretrial practices, and has made substantial advancements in the use of risk-based pretrial decision-making through statewide Pretrial Services, housed under the Administrative Office of the Courts (AOC). Emerging research around effective pretrial policy supports Kentucky's current direction, and highlights opportunities for improvement. Currently, two-thirds of all district court bookings are released at some point before disposition or indictment, though there is substantial variation in release rates statewide. Pretrial success rates for those who are currently released in Kentucky are very high: 88 percent of both felony and misdemeanor defendants released pretrial in 2015 had no new arrest during their pretrial period.

While criminologists have been studying post-conviction imprisonment and community corrections for many decades, publications on the pretrial phase of the criminal justice system were, until recently, focused almost exclusively on legal and constitutional questions rather than scientific

ones. In the last decade, however, rigorous scientific research into the area of pretrial policy has rapidly expanded. Today, a growing body of literature supports the following three principles of pretrial policy.

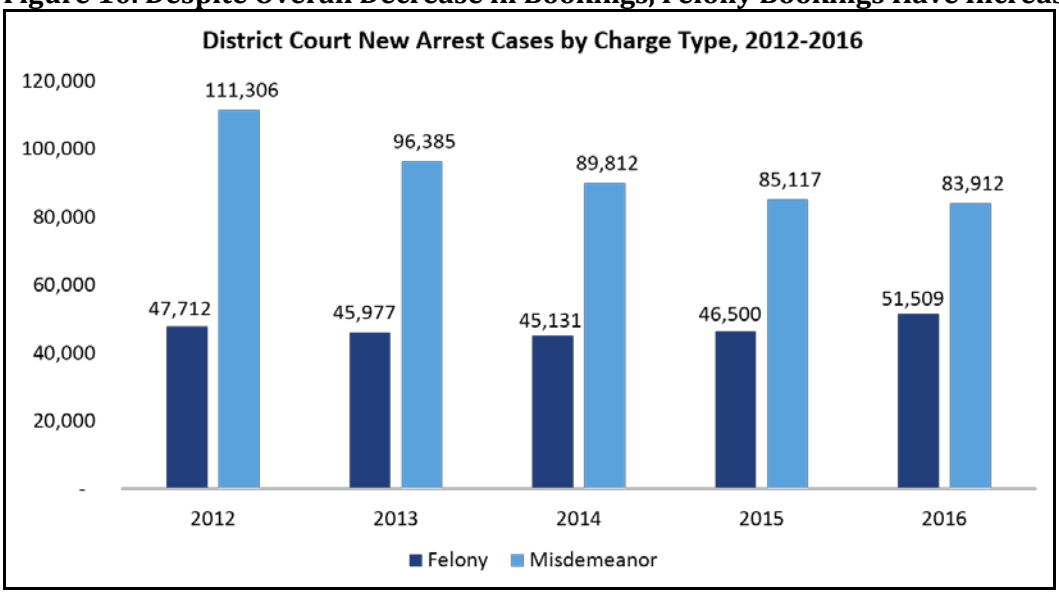
Pretrial risks can be predicted and used to guide release decisions

In Kentucky, all non-capital defendants are "bailable" under the constitution.[28] This means that there is a presumption of unsecured release for all defendants. A judge may only impose pretrial conditions of release—including monetary bail—if he or she finds that: (1) unsecured release will not reasonably assure the appearance of the defendant, or (2) the person is a flight risk or a danger to others.[29] Research demonstrates that pretrial risk assessment tools can accurately predict these types of risk by identifying and weighing factors that are associated with each type of pretrial failure.[30]

Research also supports using these assessments to guide decisions about conditions of release. Restrictive release conditions, such as electronic monitoring and drug and alcohol testing, do not improve outcomes for all pretrial defendants. Restrictive release conditions can decrease the likelihood of pretrial failure (measured as failure to appear or bail revocation due to new arrest) for higher risk defendants. However, when restrictive conditions are applied to lower risk defendants, they can actually do the opposite. Compared to similar defendants not assigned these restrictive release conditions, lower risk defendants with restrictive release conditions are more likely to fail during their pretrial release period.[31]

Kentucky has made substantial progress with risk-based pretrial decision-making, especially for misdemeanants: the Administrative Release Program administered by AOC's Pretrial Services has established risk-based release determination for nonviolent, non-sex misdemeanants, and as a result the rate of Own Recognizance[32] release increased for misdemeanants between 2012 and 2016. However, despite similar pretrial outcomes and criminal profiles, there has been a decline in the use of Own Recognizance release for felony defendants since 2012. Pretrial outcomes for felony defendants are increasingly important for Kentucky's jail population: though overall bookings in district court declined between 2012 and 2016, the decline was driven entirely by misdemeanor bookings, while felony bookings make up an increasing share of the pretrial cohort (see Figure 10).

Figure 10. Despite Overall Decrease in Bookings, Felony Bookings Have Increased



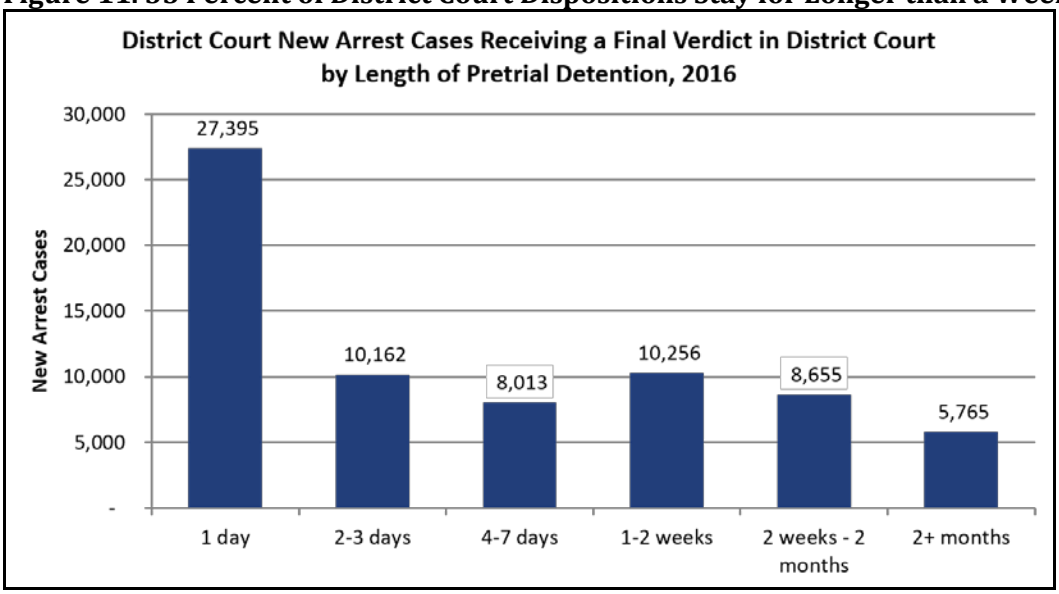
Source: Data from the Kentucky Administrative Office of Courts, Analysis by CJI

Pretrial detention longer than 24 hours can lead to worse outcomes, particularly for low-risk defendants

Researchers have examined the impact of pretrial detention on defendants' outcomes. In one study, researchers matched defendants with similar criminal charges, risk levels, and demographic characteristics who were detained pretrial for different lengths of time. This study found that low-risk defendants who are detained for more than 24 hours experience an increased likelihood of failure to appear and of new criminal activity during the pretrial period.[33] In addition, the study found that being detained for the entirety of the pretrial period is associated with an increased likelihood of new criminal activity across all risk categories.[34]

However, Kentucky continues to use pretrial detention for low-level, low- and moderate-risk defendants despite the likelihood of increased criminality. The Work Group found that in 2016, 35 percent of cases closed in district court, meaning misdemeanor convictions or dismissals, were detained for longer than one week, including 31 percent of low and moderate risk cases.

Figure 11. 35 Percent of District Court Dispositions Stay for Longer than a Week



Source: Data from the Kentucky Administrative Office of Courts, Analysis by CJI

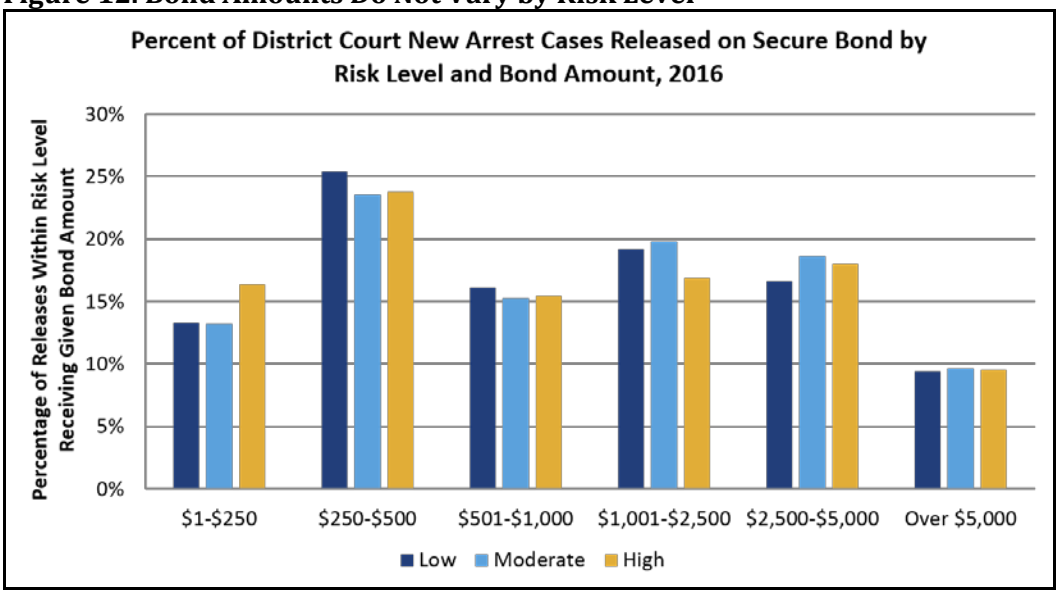
Unsecured bail is as effective as secured bail

Across the nation, the length of pretrial detention is often tied to whether a defendant can afford to pay secured monetary bail, *i.e.*, an upfront cash amount that is forfeited in the event of nonappearance. While this is a common practice, it does not have a foundation in the growing body of research on pretrial risk. Ability to pay monetary bail does not make a person low risk.[35] There are defendants who cannot afford monetary bail who are unlikely to engage in new criminal activity during the pretrial period. Additionally, there are defendants who can afford to pay their monetary bail, but who are more likely to engage in new criminal activity. For these reasons, monetary bail is not the most effective tool for protecting the public during the pretrial period.

Research supports the use of unsecured monetary bail and other release conditions in place of secured monetary bail to reduce length of pretrial detention.[36] Research has shown that when comparing defendants with similar risk levels, defendants released on unsecured bail are just as likely to appear in court and refrain from new criminal activity as defendants released on secured bail.

In Kentucky, despite a statutory presumption against the use of secured monetary bail,[37] 34 percent of initial bond decisions in 2016 involved monetary bail. The Work Group found substantial growth in the use of monetary bail for low-risk defendants over the last five years, from 22 percent to 31 percent of low-risk releases at district court between 2012 and 2016. AOC data shows that the amount of the secured bond is not a risk-driven decision: the pattern of bond amounts set did not vary by risk level in 2016 (see Figure 12).

Figure 12. Bond Amounts Do Not Vary by Risk Level



Source: Data from the Kentucky Administrative Office of Courts, Analysis by CJI

Policy Recommendations

Based on the Work Group's review of evidence-based practices and an evaluation of the Commonwealth's alignment with those practices in the areas of sentencing, release, pretrial, and supervision, the Work Group developed 22 policy recommendations, which together are projected to avert 79 percent of the growth in the prison population through 2027 and provide an avenue for Kentucky to avoid nearly $340 million in additional spending over the next decade.

The following 22 policy recommendations will:

- Strengthen pretrial release;
- Focus prison and jail resources on serious and violent offenders;
- Strengthen community supervision;
- Minimize financial barriers to successful reentry; and
- Ensure the sustainability of criminal justice reforms.

The Work Group's Recommendations

Strengthen pretrial release

Recommendation 1: Expand the Administrative Release Program

In 2013, the Kentucky Administrative Office of the Courts established an Administrative Release Program intended to expedite the pretrial release of low- to moderate-risk defendants charged with nonviolent, non-sex offenses, and to direct resources to pretrial supervision for higher-risk defendants.[38] From 2013 to 2016, the Administrative Release Program expanded for misdemeanants, but use of the program for Class D felony defendants—a group with similar characteristics to Class A misdemeanor defendants—remains low.

The Work Group reviewed research demonstrating that even short jail stays for low- and moderate-risk defendants greatly increase pretrial failure rates.[39] Moreover, pretrial detention of any length significantly increases the likelihood of a defendant ultimately receiving a longer jail or prison sentence.[40]

In Kentucky, a significant number of low- and moderate-risk misdemeanor defendants are still being held pretrial. In 2016, 24,676 low- and moderate-risk district court cases (*i.e.*, misdemeanor convictions or dismissals only) were detained pretrial for more than one week. By contrast, pretrial failure rates for those who are released are low: 90 percent of defendants released pretrial—both those charged with misdemeanors and those charged with felonies—had no new criminal arrest during their pretrial release period.

The Work Group recommends:

a. Expanding the AOC's existing pretrial Administrative Release Program to include nonviolent, non-sex Class D felonies.
b. Allowing counties, by passage of local rule, to further expand Administrative Release to include low- and moderate-risk defendants charged with nonviolent and non-sex Class C felonies.

Recommendation 2: Limit the use of monetary bail

In the United States, a person may not be jailed solely because they cannot afford to pay for their release, unless the court has made an inquiry into the person's ability to pay and determined that non-payment was willful, or that no other condition will serve the government's legitimate interests.[41]

In Kentucky, a significant number of defendants continue to be held pretrial on relatively low bail amounts despite the statutory presumption in favor of unsecured release for low- and moderate-risk defendants. In fact, there was substantial growth in the use of monetary bail for low-risk defendants over the last five years, from 22 percent to 31 percent of low-risk releases at district court between 2012 and 2016.

The Work Group recommends:

a. Establishing a pretrial detention option for violent and sex offenders (of any risk level) that allows a judge to detain a defendant upon making a determination that no combination of conditions of release would both ensure the defendant's reappearance in court and prevent re-offense during the pretrial period.
b. Restricting the use of monetary bail to high-risk defendants charged with a nonviolent, non-sex offense.
c. Developing appropriate conditions for the release of all low and moderate risk defendants.

Recommendation 3: Reclassify certain non-DUI traffic offenses

Over 18,000 police bookings in 2016 were for non-DUI misdemeanor traffic offenses, including: operating on a suspended license; failure to maintain insurance; driving without a license; failure to register the transfer of a motor vehicle; unauthorized use of a motor vehicle, and others.

The Work Group recommends:

a. Reclassifying the following non-DUI traffic offenses from a misdemeanor to a violation:
    i. Operating on Suspended/Revoked Operators License
    ii. Failure of Owner to Maintain Required Insurance/Security
    iii. No Operators/Moped License
    iv. Failure of Non-Owner Operator to Maintain Req. Insurance
    v. Failure to Register Transfer of Motor Vehicle
    vi. License to be in Possession
    vii. Possessing License When Privileges are Revoked/Suspended
    viii. Unauthorized Use of Motor Vehicle

Focus prison and jail resources on serious and violent offenders

Recommendation 4: Reclassify drug possession

Research demonstrates that incarceration is no more effective at reducing recidivism than non-custodial sanctions like probation, and that those sentenced to incarceration have the same or higher rates of future criminal behavior (as measured by re-arrests and re-convictions).[42]

In Kentucky, between 2012 and 2016, there was a 102 percent growth in new court commitments for simple drug possession. Of those sentenced to prison in 2016, 42 percent had no prior felony charges, and 72 percent had only a single possession charge on that admission, and no other felony charges.

In some states—such as Tennessee, Utah, and Iowa—the first or second offense for simple possession of heroin, cocaine or methamphetamine is a misdemeanor, not a felony. In others, including Oklahoma and West Virginia, simple possession is never a felony.[43]

The Work Group recommends:

a. Adjusting the offense class for drug possession from a Class D felony to a Class A misdemeanor for the first and second conviction.
    i. Requiring probation for the first conviction, unless the individual has been convicted of a violent, sex, or domestic violence offense within five years preceding the current possession conviction.
    ii. Maintaining the existing presumption of deferred prosecution or pretrial diversion for first- and second-time possession offenders.
    iii. Front-loading appropriate substance abuse treatment and supervision at the misdemeanor level through the cost-sharing mechanism identified in the "Reinvestment Priorities" section of the report.

Drug Possession	Penalty
First Conviction	Class A Misdemeanor, presumptive probation*
Second Conviction	Class A Misdemeanor
Third or Subsequent Conviction	Class "Baby D" Felony 1-3 years

***** For the first conviction, the presumption of probation is overcome if the person was convicted of a violent, sex, or domestic violence offense within five years preceding the current possession conviction.

Recommendation 5: Increase felony theft threshold

Between 2012 and 2016, Larceny-Theft crime in Kentucky declined 13 percent.[44] Despite this decline, new court commitments for both Class D theft by unlawful taking and Class D receiving stolen property grew 48 percent. A file review of Class D theft convictions from 2016 found that 52 percent of these involved amounts of less than $1,000, and 73 percent involved amounts of less than $2,000.

Since 2000, over 37 states have raised their felony theft thresholds. Kentucky last raised its felony threshold in 2009, from $300 to $500. Research has found that raising the felony theft threshold has no impact on overall property crime or larceny rates.

The Work Group recommends:

a. Adjusting the threshold for Class D felony theft offenses from $500 to $2,000.
    i. The recommendation would apply to all felony theft offenses that involve a monetary threshold, including but not limited to: theft by unlawful taking, receiving stolen property, and theft of services.[45]
b. Creating a Class B misdemeanor offense for thefts of property valued under $100.

Property Value	Penalty
$99 and less	Class B Misdemeanor
$100 - $1,999	Class A Misdemeanor
$2,000 - $9,999	Class D Felony
$10,000 - $999,999	Class C Felony
$1,000,000 or greater	Class B Felony

Recommendation 6: Revise the persistent felony offender statute for nonviolent offenses

Kentucky's current persistent felony offender (PFO) statute dramatically increases penalties for a second or subsequent felony, without taking into consideration the nature of an offender's criminal history. Therefore, a person convicted of only nonviolent offenses can face the same enhancement as a person who has multiple convictions for violent offenses. For example, both a defendant convicted of flagrant nonsupport and receiving stolen property, and a defendant convicted of second degree criminal abuse of a child and third degree assault, would face the same mandatory 5 to 10 year prison sentence, despite the significant difference in the severity of their respective crimes.[46]

Among all PFO-enhanced prison admissions in 2016, 34 percent were for a new property offense, and 33 percent were for a new drug offense. A file review of PFO-enhanced admissions to prison in 2016 found that 54 percent of the PFO-enhanced defendants had no current or prior violent offense.[47]

Further, the structure of the PFO statute—requiring an enhancement of one full sentencing class rather than an increase in the allowable maximum sentence—allows for far less discretion for judges than exists in other states. This is because Kentucky's consecutive rather than overlapping felony sentencing classes (1 to 5 years; 5 to 10 years; 10 to 20 years; and 20 to life) do not allow for flexibility with regard to minimum sentence after the enhancement to a higher class.

Kentucky's statute is significantly more severe than the enhancements in comparable states, especially when it comes to the mandatory enhancement for second-time nonviolent offenders.

The majority of states—including Ohio, Indiana, Tennessee, Utah, Mississippi, Arkansas, Wyoming, and Texas—have no enhancement for offenders convicted a second time of a nonviolent offense.

Research demonstrates that longer time spent in prison is not associated with lower recidivism, and that long sentences may be adding significant costs to the taxpayer with very little or no public safety return.[48]

The Work Group recommends:

a. Creating a second tier PFO enhancement that applies to offenders convicted of only nonviolent Class C and D offenses. The enhancement for these nonviolent offenses would be to add a specified number of years to the maximum sentence for the new offense, instead of enhancing by an entire sentencing class.
    i. Second degree PFO would add five years to the maximum sentence, while first degree PFO would add 10 years.

Recommendation 7: Increase felony threshold for flagrant nonsupport

In Kentucky, a person can be charged with a felony for nonpayment of child support once the person has accrued $1,000 or more in outstanding child support payments, or if the person has failed to make child support payments for a period of six consecutive months. Felony nonsupport—or flagrant nonsupport—is among the most common felony offenses at admission to DOC custody, both for men and women. By contrast, many states, including Alabama, West Virginia, Virginia, Wyoming, South Carolina, North Carolina, do not make flagrant or willful nonsupport a felony at any level.

A file review of a sample of 2016 flagrant nonsupport cases found that 45 percent of offenders owed child support payments of less than $10,000 at the time of conviction, and 22 percent of offenders owed less than $5,000 at the time of conviction.

Kentucky is also unusual compared to other states in that the incarceration of an obligor parent does not cease the accrual of child support obligations. This means that arrears continue to grow while he or she is incarcerated, despite the change in earning capacity. Research shows that incarceration is a highly ineffective way to enforce payment of child support obligations and can impede an individual's lifetime earning potential. One study found that incarceration reduces the wages that ex-offenders earn by 10 to 20 percent and inhibits wage growth, compared to those who were not incarcerated, by 30 percent.[49]

The Work Group recommends:

a. Raising the flagrant nonsupport threshold from $1,000 to $10,000.
b. Requiring both a specified amount of arrears AND four out of six months of nonpayment, rather than either, for the elements of flagrant nonsupport to be met.
c. Suspending the accrual of child support obligations while an individual is incarcerated, unless there is an affirmative finding that the person can pay support while incarcerated.

Recommendation 8: Exclude motor vehicles from 3rd Degree Burglary

In Kentucky, an individual is guilty of 3rd degree burglary when he or she, with the intent to commit a crime, knowingly enters or remains unlawfully in a building.[50] Third degree burglary is a Class D felony, and some motor vehicle break-ins are being charged as felony 3rd degree burglaries. In some

states such as Texas vehicular break-ins are not considered burglaries, and are punished as thefts by unlawful taking, property damage, or some combination of the two.

The Work Group recommends:

a. Clarifying that motor vehicles are not included in the definition of "structure" for the purposes of the felony 3rd degree burglary statute.

Recommendation 9: Establish a streamlined parole process for inmates convicted of nonviolent, non-sex Class C or D offenses

In 2016, only 41 percent of inmates were released on parole, despite the fact that most people sent to prison are eligible for parole. Parole release rates have been dropping since 2013. Though parole supervision affords greater accountability than other forms of post-release supervision, the Work Group found that parole is underutilized, especially for low-level offenders. Of Class D offenders released in 2016, 39 percent had not had a parole hearing, and only 38 percent were paroled. This underutilization of the parole mechanism is due both to the limited time and resources of the Parole Board and to the fact that some offenders choose to waive their participation in the parole process in the interest of leaving custody without supervision to follow.

The Work Group identified solutions from other states that have addressed the same problem. Two states in particular, Mississippi and South Dakota, have successfully implemented administrative parole processes that allow for inmates to be paroled without a hearing, as long as they meet certain eligibility requirements and have been compliant during their time in prison.

The Work Group recommends:

a. Creating an administrative parole process for inmates convicted of nonviolent, non-sex Class C or D offenses that allows cases to be reviewed for administrative parole prior to their parole eligibility date. If eligible, inmates will be released at their parole date without a hearing unless the Parole Board finds that:
    i. The inmate has had a Category III through VII institutional violation within a year of their parole eligibility date, or during the period between the date of administrative review and their parole eligibility date.
    ii. The victim or Commonwealth Attorney has requested a parole hearing, after being notified of the administrative parole release date in advance for administrative parole-eligible inmates.
b. Allow current inmates to participate in the administrative parole process if eligible.
c. If a parole-eligible inmate is deemed to be ineligible for administrative release based on the above criteria, the inmate will be subject to the traditional parole review process.
d. During the traditional review process, when the Parole Board grants parole contingent on successful program completion, the programming or treatment shall be completed in the community rather than in a DOC facility, provided that such treatment in the community is available.

Recommendation 10: Implement a specialty parole option for long-term, geriatric inmates

Researchers have consistently found that age is one of the most significant predictors of criminality, with criminal activity decreasing as a person ages.[51] Studies on parolee recidivism found that the probability of parole violations also decreases with age, with older parolees the least likely to be re-incarcerated.[52] Furthermore, older inmates have higher incidence of serious health conditions compared to their younger peers, leading to much greater medical costs. Due to these increased

needs, prisons across the nation spend roughly two to three times more to incarcerate geriatric individuals than younger inmates.[53]

In Kentucky, the 55-and-older cohort of the inmate population increased 30 percent from 2012 to 2016. In 2016, 49 percent of the 55-and-older cohort were sentenced for Class C and D felonies. Furthermore, 54 percent of the Class D offenders and 42 percent of the Class C offenders aged 55 and older were convicted of drug or property offenses. Currently, no statutory mechanism exists to parole a person whose advanced age has significantly reduced the risk of future criminal behavior.

The Work Group recommends:

a. Establishing a geriatric parole process that allows inmates who have aged out of criminal behavior to become eligible for parole consideration by the Parole Board at age 60, after serving 15 percent of their sentence:
    i. Excluding felony sex offenses; and
    ii. Excluding violent felony offenses.
b. Applying geriatric parole eligibility retroactively to eligible inmates.

Recommendation 11: Expand the current medical parole option for inmates physically incapable of being a danger to society

Kentucky's current medical parole option is very narrow and excludes those who have serious debilitating health conditions but may not be considered terminally ill. Inmates with serious health conditions are housed in the Kentucky State Reformatory, Kentucky's only nursing care facility for inmates. In 2014, the nursing care facility cost more than $4.4 million a year, with each inmate receiving nursing care costing more than three times the average daily cost for a healthy inmate.

The Work Group recommends:

a. Expanding the eligibility criteria to allow inmates who have serious medical issues to be considered for medical parole release, by defining eligible applicants as:
    i. An inmate who is so physically or mentally debilitated, incapacitated, or infirm as a result of advanced age, chronic illness or disease to be physically incapable of being a danger to society.
    ii. Inmates convicted of Class A homicide are not eligible.
    iii. Inmates on death row are not eligible.
b. Changing the medical parole application process to:
    i. Allow the following individuals to submit a request for an inmate to be considered for medical parole:
        i. Inmate seeking medical parole
        ii. An attorney
        iii. A prison official/employee
        iv. A medical professional
        v. A family member of the inmate seeking medical parole
    ii. Require the request be in writing, articulate the grounds to support the appropriateness of the medical parole, and document proof of illness.
    iii. Require the Parole Board to make a final decision on medical parole release within ten business days of receiving the request.
    iv. Require the Parole Board, if medical parole is denied, to make a finding as to the reason for the denial.

Recommendation 12: Expand jail credit options available to inmates serving misdemeanor sentences

The Kentucky DOC incentivizes inmates to participate in and complete programs that improve their likelihood of success once transferred to the community. In exchange, inmates receive credits that reduce their sentence.

Allowing offenders to reduce their sentence terms by complying with certain conditions provides incentives for positive behavior.[54] Currently in Kentucky, state inmates are eligible to earn a number of credits to reduce their sentence, but county inmates are not able to earn credits at the same rate as state inmates. This contrast is problematic for population management because many county inmates are serving sentences alongside Class D inmates in the same facilities.

The Work Group recommends:

a. Expanding the available credits for inmates serving misdemeanor sentences in county jails, as follows:
    i. Good Behavior – 10 days credit per month of good behavior;
    ii. Completion of GED or house school diploma – 90 days credit per diploma;
    iii. Acts of exceptional service – Up to 7 days credit per act;
    iv. Meritorious service – Up to 7 days credit per act;
    v. Participation in a drug treatment program– 1 day credit per day of participation.

Recommendation 13: Expand eligibility for home incarceration

Rigorous research studies find no significant effect, positive or negative, of longer prison terms on recidivism rates. Currently, Class C or D inmates are eligible for home incarceration, but they must fall within nine months of their release date. Allowing inmates to leave earlier will alleviate pressure on the availability of prison beds and move appropriate inmates to less restrictive environments.

The Work Group recommends:

a. Expanding eligibility for home incarceration to allow Class C or D inmates who are within 12 months of their sentence discharge date to be eligible for release.
b. Requiring a risk and needs assessment be conducted, and corresponding case plan be developed, to identify programming and treatment needs that will have the greatest impact on reducing recidivism.

Recommendation 14: Expand the use of alternative responses for nonpayment of financial obligations

In Kentucky, an individual who fails to repay financial obligations can be ordered to serve a period of imprisonment. A number of states have expanded the use of alternatives to incarceration when responding to nonpayment of financial obligations. For example, in Ohio, a court may convert financial obligations to community service when a defendant fails to pay court costs or fails to comply with a plan to pay court costs at the time of sentencing or post-judgment proceeding. The court can order up to 500 hours of community service for felonies and up to 30, 200 and 500 hours for certain types of misdemeanors.[55]

The Work Group recommends:

a. Allowing the court to impose alternatives to incarceration, such as community service, in response to nonpayment of financial obligations.

Strengthen community supervision

Recommendation 15: Expand use of swift, certain, and proportional sanctions

Research on behavior change has found that responding to violations with immediacy, certainty, and proportionality interrupts negative behavior more effectively than delayed, random, and severe sanctions. Since 2011, Kentucky has used graduated sanctions to respond to technical violations of community supervision. However, opportunities exist to improve Kentucky's use of swift, certain, and proportional sanctions.

The DOC is authorized to use graduated sanctions for parolees but cannot use graduated sanctions to respond to probationer misconduct unless the court authorizes their use as a condition of supervision. The DOC administratively classifies technical violations as either major or minor violations. Minor violations include failure to seek employment or failure to comply with programming conditions. Major violations include failure to complete treatment or a refusal to submit to a drug or alcohol test. Absconding from supervision is considered a major violation by the DOC, and is typically reported to the releasing authority without the use of graduated sanctions. Absconding violations accounted for a significant share of revocations in 2016. Forty-two percent of probation revocations in 2016 involved an absconding violation, and 70 percent of parole revocations in 2016 included an absconding violation.

The Work Group found that revocations of community supervision are one of the main drivers of the growth of the prison population. Sixty-one percent of admissions in 2016 were sentenced for revocations of community supervision. Furthermore, parole revocations admitted to the DOC increased 50 percent from 2012 to 2016.

The Work Group recommends:

a. Allowing the DOC to respond to technical violations using graduated sanctions for all probationers and allowing the use of graduated sanctions for technical violations committed on home incarceration.
b. Allowing Probation and Parole Officers to use graduated sanctions in response to absconding:
    i. Define absconding as the willful avoidance of supervision and require officers to make at least four documented attempts to locate the individual before the person is placed on absconding status.
    ii. Once an absconder has been apprehended, allow the Parole and Probation Officer, with approval from a supervisor, to use graduated sanctions in lieu of formal revocation if the reason for absconding is determined to be behavior other than new criminal activity, such as relapse due to a substance use disorder. The first time an offender absconds, the use of a graduated sanctions will be presumptive unless the officer determines that continuing an individual's supervision would jeopardize public safety.
    iii. If requested by the circuit court judge at the time of sentencing, the DOC will notify the judge when a graduated sanction is used in response to an absconding violation.
c. Providing the releasing authority with the statutory authority to impose alternative sanctions in lieu of revocation, which would allow the releasing authority to continue

supervision with modified conditions of supervision including, if appropriate, programming or treatment requirements in the community.

d. Allowing a summons to be issued in lieu of an arrest warrant for individuals on parole who commit technical violations, once a violation reaches the point of initiating notification to the releasing authority.

Recommendation 16: Limit the amount of time that can be revoked for a technical violation

The Work Group found that 96 percent of parole revocations in 2016 were for technical violations of supervision. Parole technical violators in 2016 served, on average, 11 months in custody. Furthermore, probation revocations for Class D offenses received longer sentences than those sentenced directly to custody. Drug possession probationers who were later revoked from probation were sentenced to nine months longer than drug possession offenders sentenced straight to prison for a new offense.

The Work Group recommends:

a. Limiting the length of time a probationer or parolee can be revoked for a technical violation, in accordance with the following schedule:
    i. For the first revocation, up to 30 days;
    ii. For the second revocation, up to 90 days;
    iii. For the third revocation, up to 180 days;
    iv. For the fourth and subsequent revocation, up to two years.
b. Defining a technical violation as any violation of the conditions of supervision with the exception of a new criminal conviction (felony or misdemeanor) or willful absconding.

Recommendation 17: Streamline the revocation hearing process

Final parole revocation hearings must be held within 30 days of detainment, but there are no statutory (or administrative) requirements for when a final revocation hearing must be held for individuals on probation.

The Work Group recommends:

a. Requiring that a preliminary hearing be held within 15 business days of detention, and a final revocation hearing be held within 30 business days of the preliminary hearing.
    i. If a hearing is not held within the required time periods, a show cause hearing may be held to extend the detainment. If a show cause hearing is not held before the completion of revocation cap period, the offender will be released from detention and continued on supervision.

Recommendation 18: Expand the use of earned credits for probationers and parolees

Research has found that offender behavior is most effectively changed when rewards are utilized at a higher rate than sanctions. Earned compliance credits can provide a powerful incentive for offenders to participate in programs, obtain and retain employment, and remain drug- and alcohol-free.[56] As compliant offenders earn their way off of supervision, earned compliance credits will also focus limited supervision resources on higher-risk offenders who require the most supervision.

The Work Group recommends:

a. Allowing individuals on probation to earn credits to reduce their supervision period for completing certain programming, maintaining employment, and complying with the terms and conditions of supervision at the same rate currently available to parolees. The credits that probationers would be eligible to earn include:
    i. 90 days for completion of education programs or evidence-based programs approved by the DOC;
    ii. 7 days for completing extraordinary service credit;
    iii. 30 days for every month in compliance with the terms and conditions of supervision; and
    iv. 1 day for every 40 hours worked.
b. Removing the requirement that parolees serve a certain period of time on active supervision before earning compliance credits to allow an individual on parole to begin earning credits immediately upon being placed on parole supervision.
c. Removing the current offense carve-outs for parole earned compliance.

Recommendation 19: Reduce the maximum probation period that can be ordered

Research shows that the initial days, weeks, and months an individual is on supervision are when an individual is most likely to reoffend or violate the terms of their community supervision. The likelihood of violations and the value of ongoing supervision diminish as they gain stability and demonstrate longer-term success in the community. Research has shown that supervision resources have the highest impact when they target this critical period.

Currently, up to a five-year probation term can be ordered for felony offenders. Probationers serve, on average, nearly the whole five-year term (56.3 months) on supervision – well beyond the period when the majority of probationers are most likely to reoffend. Seventy percent of revocations occur within the first two years of supervision.

The Work Group recommends:

a. Reducing the maximum probation supervision period from five to four years.

Recommendation 20: Expand eligibility for administrative supervision

Research has consistently shown that states can have the greatest impact on reducing recidivism when they focus supervision, treatment, and program resources on those who pose the highest risk to reoffend. Conversely, low-risk offenders who engage in intensive supervision or treatment programs may be made worse by over-engagement with the criminal justice system.[57] Individuals assessed as low risk can be placed on administrative supervision. However, there are statutory restrictions on when an individual assessed as low risk can be transferred to administrative supervision and the DOC does not currently have the ability to automatically transfer an individual to administrative supervision as an incentive for complying with the terms and conditions of supervision.

The Work Group recommends:

a. Allowing an individual on supervision assessed as low risk to be eligible for placement on administrative supervision after six months of active supervision.
b. Authorizing the Department of Corrections to place an individual on administrative supervision for complying with the terms and conditions of supervision.

Minimize financial barriers to successful reentry

Recommendation 21: Minimize financial barriers to successful reentry

Fines, fees, court costs, restitution, and child support payments can often be a substantial hurdle for individuals upon release from prison, especially as they accumulate across jurisdictions even while an offender is incarcerated. The Work Group recognizes the need to lessen financial barriers so that citizens returning to their communities who are making an effort to be productive are not hampered in their rehabilitation process.

The Work Group recommends:

a. Allowing individuals who have been found to be indigent and placed on an installment plan to make payment under the installment plan for the length of the supervision period authorized by law.
b. Prohibiting the extension of supervision due solely to outstanding restitution.
c. Allowing the court and Parole Board to transfer remaining financial obligations to a civil court judgment once an individual reaches his or her supervision discharge date.
    i. The DOC will be responsible for initiating and filing the necessary paperwork to transfer obligations to a civil judgment, to ensure that the burden does not fall to the victim.
d. Suspending the repayment of financial obligations for a minimum of six months following an individual's release from incarceration, or for the duration of an in-patient treatment program.
e. Allowing individuals who have outstanding financial obligations to be eligible for placement on inactive or administrative supervision and eliminating the supervision fee for individuals placed on inactive or administrative supervision.

Sustainability of criminal justice reforms

Recommendation 22: Establish an oversight body to monitor performance measures and implementation of reforms

An oversight body is essential to ensuring the tracking and evaluation of any systemic effort to change the criminal justice system. States around the country have established oversight bodies to examine performance data, troubleshoot issues that arise during the implementation phase, and identify changes that are intended to improve or strengthen the reforms that have been recommended.

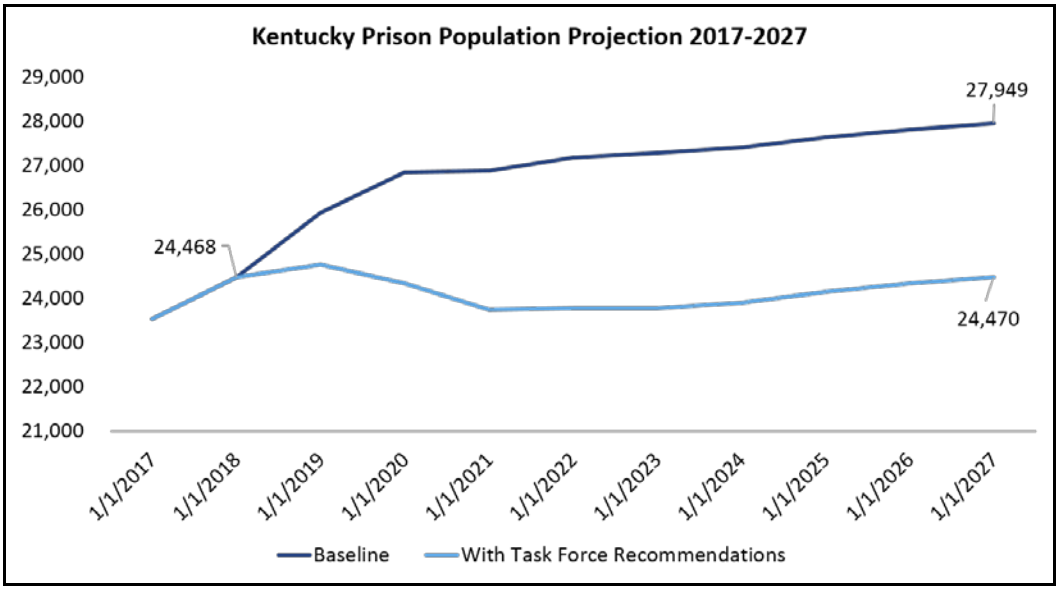
The Work Group recommends:

a. Establishing an oversight body to monitor performance measures and implementation of any changes to ensure objectives are being met.
    i. The oversight body should include representatives from the key criminal justice stakeholder entities in the system, including staff in the field responsible for the actual implementation of the reforms.
b. Requiring the DOC and AOC to collect and report performance measurement data to track and evaluate the implementation of the reforms included in this package.

Impacts of the Work Group's Recommendations

The Work Group's package of recommendations is projected to reduce growth in the prison population by almost 3,500 beds, averting 79 percent of the projected growth in the next 10 years, saving nearly $340 million in corrections costs through 2027. These impacts are contingent upon successful legislative and executive enactment of the Work Group recommendations.

Figure 13. Work Group Recommendations Projected to Avert 79 Percent of Growth



Impact of House Bill 333 Trafficking Changes

Recent legislation is projected to exacerbate the prison growth trends. During the 2017 legislative session, Kentucky enacted House Bill 333, which included critical prescriber limits for opiates and other public health measures to confront the opiate crisis. However, the legislation also eliminated the "peddler distinction" for heroin established in 2011 under House Bill 463, which was designed to distinguish between low-level addict-dealers and high-level traffickers. House Bill 463 had made heroin distribution of less than two grams punishable as a Class D felony (1-5 years). Under House Bill 333, selling or sharing any quantity of heroin is now be punishable as a Class C felony (5-10 years) and requires individuals who are convicted and sentenced to prison to serve at least 50 percent of their sentence before being eligible for parole, or any other type of early release, and eliminated the use of probation or other alternatives to incarceration. Approximately 40 percent of the projected prison population growth over the next decade is due to the sentencing changes advanced in House Bill 333.

Reinvestment Priorities

The Work Group strongly recommends that savings from averted prison costs be reinvested in the following priorities. Further, the Work Group recommends that an appropriate statutory provision be enacted to protect the savings in corrections spending.

Reinvest in treatment

The Work Group heard extensive testimony from commonwealth and county attorneys, defense attorneys, judges and other practitioners about the gap between the treatment needs and the treatment resources available statewide. Shortfalls in substance abuse treatment, mental health treatment, and other proven interventions are identified as a barrier to successful community supervision.

Establish mechanism for sharing costs with localities

The members of the Work Group and criminal justice stakeholders who were interviewed as part of the system assessment process discussed the gaps in local services and programs to reduce recidivism and corrections costs. This shortfall at the local level often makes prison appear as the only viable sentencing option. Furthermore, counties, judicial districts, and local providers are often best suited to identify the correctional programming, treatment, and services that meet the needs of the supervised population and improve public safety outcomes. With this in mind, some states have created performance-incentive grant programs to support counties in their efforts to reduce recidivism and corrections costs.

The Work Group recommends:

a. Developing a cost-sharing agreement between the state and individual counties to:
    i. Incentivize counties to reduce the imprisonment of Class D felony offenders;
    ii. Share the burden of increased cost to counties for reclassification changes; and
    iii. Improve and expand treatment and supervision alternatives to improve public safety.

Reinvest in victims' services

Currently there are gaps in the availability of victim advocates throughout the Commonwealth. Victim advocates are currently only located in 50 out of 57 Commonwealth Attorney circuits, 27 out of 120 county attorneys' offices, and only a handful of police departments.

The Work Group recommends:

a. Creating an assessment and evaluation process to identify gaps in the delivery and implementation of victim services and to assess victim satisfaction and barriers to reporting crime.
b. Increasing funding for victim advocate positions to allow victim advocates in law enforcement offices throughout the state.
c. Increasing funding for the Kentucky Claims Commission for crime victim compensation to eliminate the backlog and delays in reimbursement.

Expand training for criminal justice practitioners

The Work Group recommends:

a. Requiring all Probation and Parole Officers to receive training on evidence-based practices such swift, certain, and proportional sanctions and core correctional practices.
b. Requiring that judges, prosecutors and other relevant stakeholders receive training on the use of swift, certain, and proportional sanctions.

c. Increasing training for prosecutors to ensure greater consistency in how possible outcomes related to criminal cases and sentencing are explained to crime victims.
d. Increasing training for victim advocates, law enforcement officers, prosecutors, and judges related to the enforcement of victims' statutory rights and use of victim impact statements at sentencing and in plea deals.

Endnotes

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[18] Newly sentenced prisoners and probation revocations.
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[38] Kentucky Supreme Court Standing Order 2016-10.
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[43] See Tenn. Code Ann. § 39-17-418; UC § 58-37-8; Iowa Code Ann. § 124.401; 63 O.S. § 2-402; WV Code 60A-4-401.s
[44] Federal Bureau of Investigation, Uniform Crime Reports, UCR Data Tool, accessed at http://www.ucrdatatool.gov/Search/Crime/State/StateCrime.cfm.
[45] Including Theft by unlawful taking (KRS § 514.030); Theft by Deception (KRS § 514.040); Theft of property lost or mislaid (KRS § 514.050); Theft of Services (KRS § 514.060); Theft by failure to make req. disp. of property (KRS § 514.070); Theft by Extortion (KRS § 514.080); Theft of Labor Already Rendered (KRS § 514.090); and Receiving Stolen Property (KRS § 514.110).
[46] KRS § 532.080(2).
[47] For the purposes of this recommendation violent offenses are: violent offenses enumerated in KRS 532.200(3); violent offenses enumerated in KRS 439.3401; sex offenses enumerated in KRS 17.500; and those offenses that AOC considers to impact offender risk assessments.
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