

The Advocate



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March 2014 (Part 2)

10 Commonsense ways to reduce waste in Kentucky's criminal justice system: Lasting and Unrealized Benefits of HB 463

Through the foresight of Kentucky leaders, HB 463 has brought significant savings while not adversely affecting public safety. This is what taxpayers want. However, more reforms are necessary to continue to safely reduce waste in the Kentucky criminal justice system and to fully achieve what taxpayers want. While the Kentucky crime rate declines, the Kentucky corrections population continues to be above projections at a significant and unnecessary cost to the state. There are sound measures to address the waste.

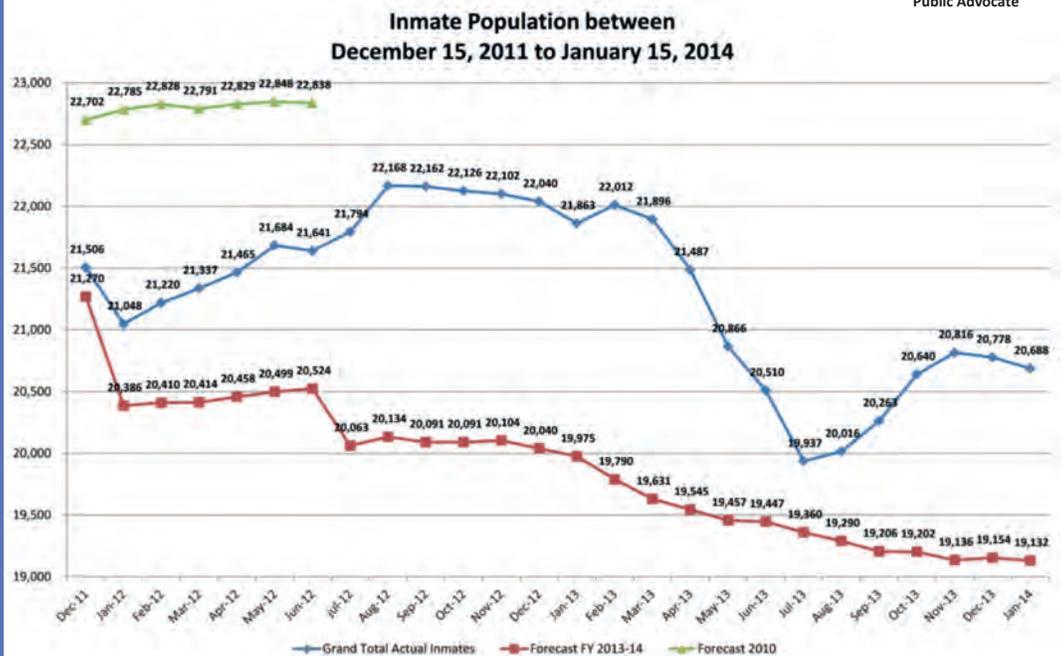


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10 Commonsense ways to reduce waste in Kentucky's criminal justice system: Lasting and Unrealized Benefits of HB 463

1. \$3.7+ million yearly net incarceration savings to the state by creating alternatives to incarceration
2. \$3.5 million by providing alternative sentencing plans for flagrant non-support instead of imprisonment for felony
3. Substantial savings from reducing days in the county jail by creating "clear and convincing" standard for the pretrial release decision
4. Substantial savings from reclassifying minor misdemeanors to violations
5. Substantial savings from creating "gross misdemeanor" classification for low level felonies
6. Substantial savings from presuming parole for eligible low-risk offenders
7. Up to \$9.4 million in new revenue from promoting employment/reducing recidivism by creating Class D felony expungement
8. Substantial savings from reducing waste by limiting capital prosecutions
9. Substantial savings from modifying violent offender and PFO statutes
10. Increase the felony theft limit from \$500 to \$2,000

This prison incarceration graph illustrates the significant cost savings of HB 463 and its unrealized benefits.

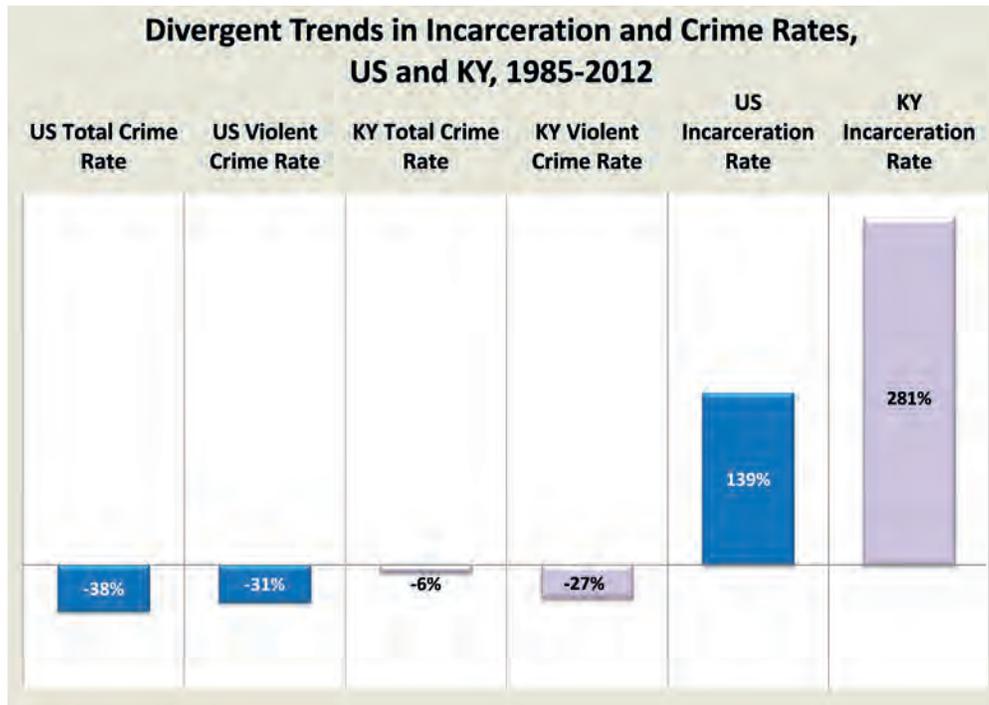


The imprisonment level is above projections no doubt for a variety of factors. One of those factors is a decline in the parole rate as indicated by the following data:

Comparison	FY 12-13	13-Oct	13-Nov	13-Dec
Parole Recommendation Rate	65%	53%	55%	54%
All Cases Recommendation Rate	54%	39%	43%	41%
Initial Parole Rate	67%	56%	55%	56%
Deferred Parole Rate	63%	49%	55%	50%
File Review Parole Rate	67%	54%	56%	56%
Face to Face Parole Rate	60%	49%	48%	45%

There are unambiguous divergent trends between the incarceration rates and crime rates from 1985 - 2012:

- US total crime rate down 37.7%
- US violent crime rate down 30.5%
- KY total crime rate down 5.8%
- KY violent crime rate down 27.1%
- US Incarceration rate up 139%
- KY Incarceration rate up 280.7%



Significant financial benefit of modest criminal reforms

Many of DPA’s funding needs could be met with the savings from the expansion of the DPA alternative sentencing program and from modest changes to the criminal laws of the Commonwealth that would not adversely affect public safety. For instance:

1) \$3.7+ million yearly net incarceration savings to the state by creating alternatives to incarceration

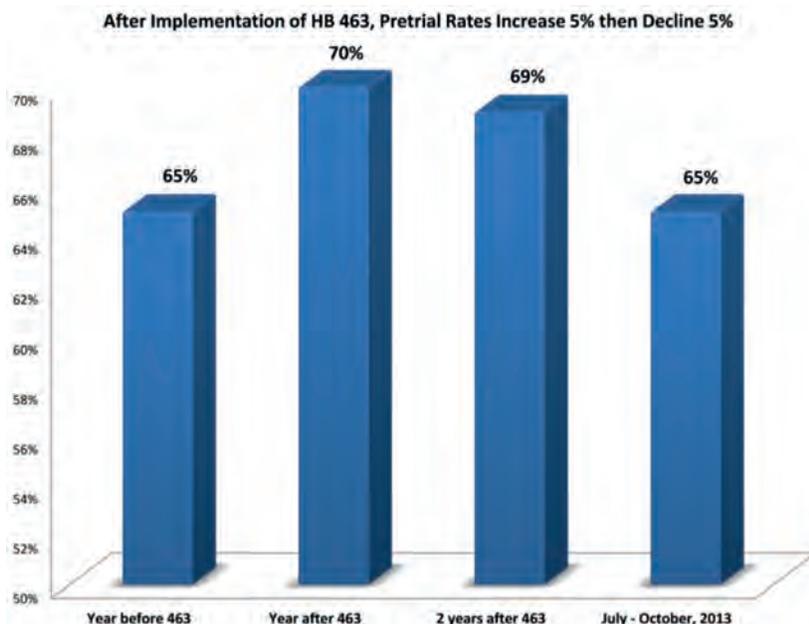
Adding 19 DPA alternative sentencing social workers beginning January 1, 2015 and an additional 18 beginning October 1, 2015 would have a first year cost of \$565,600 and a biennial cost of \$ 2.6 million. For every dollar spent on the DPA alternative sentencing program, there is a savings of \$4.47 to \$6.80. See *The Kentucky Department of Public Advocacy Social Worker Alternative Sentencing Program Pilot Evaluation Study 2013*, Robert Walker, M.S.W., L.C.S.W., Jennifer Cole, M.S.W., Ph.D., Jaime Miller, B.A. University of Kentucky Center on Drug and Alcohol Research.

2) \$3.5 million by providing alternative sentencing plans for flagrant non-support instead of imprisonment for felony

As of November 2013, the Kentucky Department of Corrections housed over 282 offenders with a conviction for only felony Flagrant Non-Support. Individuals held solely for Flagrant Non-Support charges have an average sentence length of more than 4 years, and serve an average of nearly 2 years at a cost of \$5,779,973. The cost is based on the FY 2013 per diem cost of \$34.59 for 654 days for 282 offenders. Yearly, the cost is \$3,560,348.70.

3) Substantial savings from reducing days in the county jail by creating “clear and convincing” standard for the pretrial release decision

This will allow for better enforcement of the HB 463 presumption for release of low and moderate risk arrestees. This is necessary in light of the falling pretrial release rates. This would bring substantial savings to county jails that have an average cost of housing an inmate of \$36.25. See Kentucky’s Auditor of Public Account’s 2006 Report *Kentucky Jails: A Financial Overview*.



4) Substantial savings from reclassifying minor misdemeanors to violations

During FY 12 there were 35,066 convictions in District Court for minor misdemeanor offenses set out in 2013’s reclassification measure, HB 395. Its LRC Fiscal Note indicated that enactment would bring savings to jails, reduce court time, and increase General Fund revenue from fines.

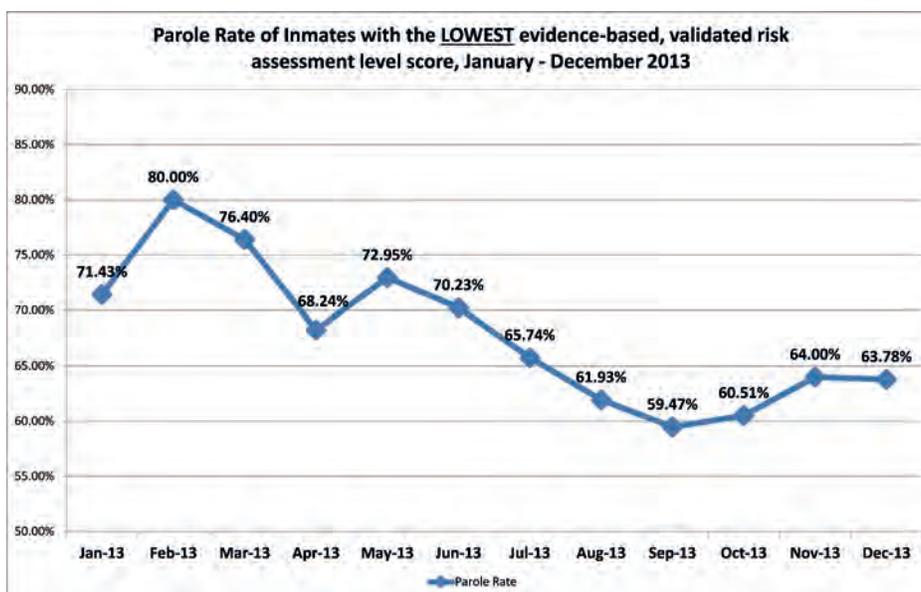
5) Substantial savings from creating “gross misdemeanor” classification for low level felonies

This reduces prison population that has a daily per day inmate cost of at least \$46 by lowering the sentence for many non-violent offenses. This concept maintains jurisdiction in Circuit Court and with the Department of Corrections to avoid increase in county expenditures.

6) Substantial savings from presuming parole for eligible low-risk offenders

Only 72.6% of low risk offenders were paroled when eligible in FY 12-13. Some 604 low-risk offenders did not receive parole, 168 of which were given serve outs. This is at an unnecessary cost of \$27,784 per day (604 inmates X \$46 daily incarcerations cost).

Additionally, the rate of parole for low risk offenders is falling. In the first six months of FY14, the Parole Rate for these offenders was 62.57%. If low-risk offenders were released instead of continuing to serve time in prison, the state would save at least \$46 per day per inmate and it would be done safely since the Parole Board uses a validated risk assessment instrument.



7) Up to \$9.4 million in new revenue from promoting employment/reducing recidivism by creating Class D felony expungement

According to Kentucky Administrative Office of the Courts and the Kentucky State Police, 94,645 Kentuckians are eligible for class D felony expungement. Under KRS 431.078(5) there is a \$100 fee for a person having their felony expunged with \$50 going to the general fund and \$50 to the clerk. If all eligible persons had their felony expunged it would mean \$4.7 million to the general fund and \$4.7 million to a trust and agency account for deputy clerks.

8) Substantial savings from reducing waste by limiting capital prosecutions

Often, Kentucky capital cases do not just result in non-capital sentences, but in jury findings that the defendant is not even guilty of murder. These include acquittals, reckless homicides and manslaughters. Three ways to reduce waste through modest limiting of prosecutorial discretion are: a) Limit when the death penalty can be sought; b) Statutorily authorize a judge to eliminate death as a possible punishment when appropriate; c) Require timely, complete open file discovery.

This is neither a liberal nor a conservative idea. It is a commonsense idea. "Whether the death penalty constitutes a reasonable effort to prevent crime is considered from an economic standpoint. Resources directed toward this form of selective, legitimized killing of human beings are not available for crime prevention methodologies proven for their effectiveness. The death penalty not only fails as a solution to the problem of violence in the United States but, because of the excessive costs of implementation, capital punishment interferes with a spectrum of preventive programs that have been demonstrated to work well." Richard C. Dieter, Executive Director, The Death Penalty Information Center.

"Conservatives believe that the government should exercise fiscal responsibility and restraint, and the waste of the death penalty process is in direct conflict with fiscal conservatism." Marc Hyden, National Advocacy Coordinator for Conservatives Concerned about the Death Penalty, The Washington Times, November 10, 2013.

There are practical alternatives. In 2009, Maryland limited the cases in which the court or jury could impose a death sentence to those in which the state presents the following types of evidence: a) biological or DNA evidence that links the defendant to the murder; b) videotaped, voluntary interrogation and confession of the defendant to the murder; or c) video recording that conclusively links the defendant to the murder. Maryland specifically prohibited the death penalty if the state relies solely on eyewitness evidence.

In our neighboring state of Indiana a 2010 fiscal report by the Legislative Services Agency found that the average cost of a death penalty trial was around \$450,000. Some cases cost more than \$1 million. Prosecuting a case as a capital case greatly increases the cost even when the most common result is a sentence of less than death. See *FY07 Capital Trial Case Study PAC and Expert Spending in Potentially Capital Cases at the Trial Level* (December 2008).

9) Substantial savings from modifying violent offender and PFO statutes

Persons who are unable to control their violence against others and who are incorrigible should receive very long prison sentences to insure public safety. But public safety will not be adversely affected with simple modifications to current PFO and Violent Offender laws. This would insure Kentucky's most costly punishments are used only to protect public safety.

As of June 15, 2013, Kentucky had 8,037 persistent felony offenders and violent offenders, an increase of 245 over the 7,792 as of July 5, 2011. There were 3,535 persons sentenced as a persistent felony offender and 4,948 persons sentenced as a violent offender. Of these, 446 had been sentenced as both a persistent felony offender and as a violent offender. There were 348 persons imprisoned who were 65 years or older, 173 of which were serving time on non-violent offenses. The total annual corrections cost for those sentenced as a persistent felony offender, a violent offender, or both was \$164 million (8,037 x \$20,410 = \$ 164,035,170 per year).

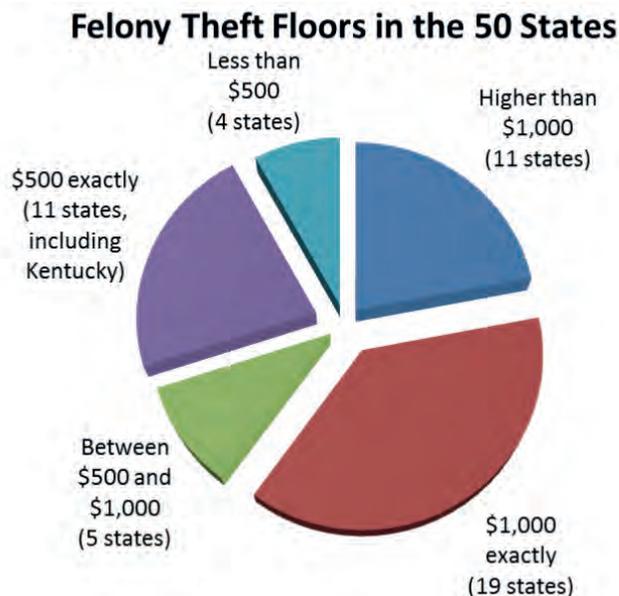
On June 15, 2013, there were 740 inmates serving a prison sentence of five to ten years for a Class D felony enhanced by PFO, 2nd Degree. Incarcerating these low-level felons costs the state over \$12.3 million a year (740 inmates X \$16,674.46 per year cost of incarceration).

10) Increase the felony theft limit from \$500 to \$2,000

This would mean that there would be fewer persons serving a prison sentence at the rate of \$46 per day per inmate.

Felony threshold levels have been increased by states. The Sentencing Project has reported that in recent years, "states have reclassified a range of property offenses from felonies to misdemeanors. Policy changes were adopted to limit the use of incarceration for minor offenses and minimize prosecution and correctional costs. These reforms reflect that the threshold between a misdemeanor and a felony has become reduced in value over time as a result of inflation. Not modernizing property offense thresholds could potentially result in excess incarceration."

30 States have felony floors \$1,000 or higher



Only 15 States have felony floors \$500 or lower, as Kentucky does

11 States have floors even higher than \$1,000

Wisconsin (\$2,500)*, Colorado (\$2,000), Connecticut (\$2,000), Pennsylvania (\$2,000), South Carolina (\$2,000), Delaware (\$1,500), Georgia (\$1,500)*, Montana (\$1,500), Rhode Island (\$1,500), Texas (\$1,500), Utah (\$1,500)
 (*Wisconsin and Georgia both have a separate \$500 floor for shoplifting offenses)

According to the Kentucky Department of Corrections, the following persons were in Kentucky prisons for a theft charge as of January 2, 2014 with 758 inmates serving felony sentences for only non-violent theft convictions. Over the course of a year, this number of inmates costs the state \$9,570,015 to incarcerate, if lodged in county jails.

	Theft and Other Charges	Theft Only	Total
\$500 to \$10,000	4,107	727	4,834
More than \$10,000	233	31	264
TOTAL	4,340	758	5,098

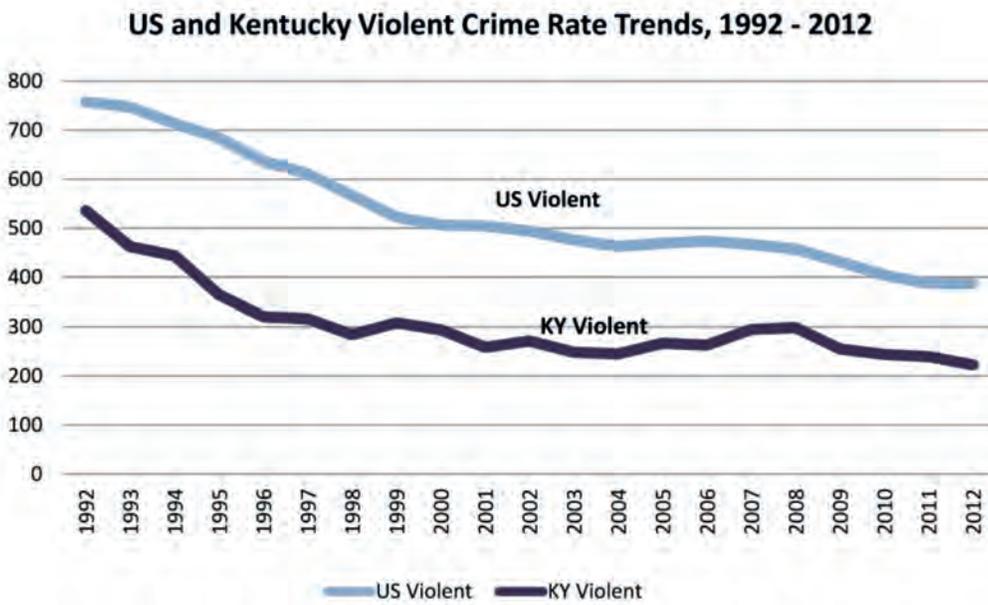
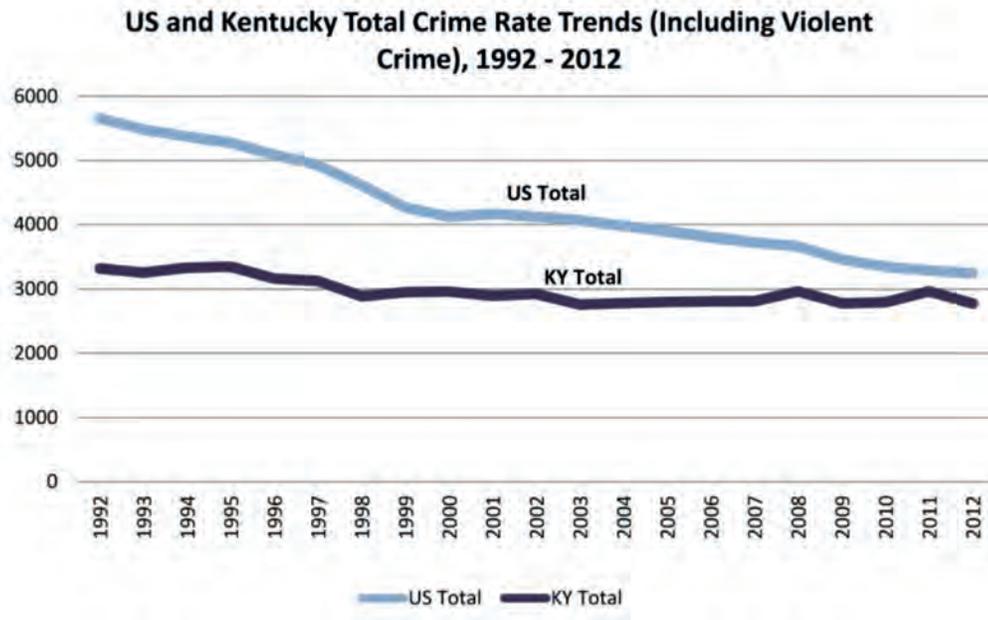
An increase in the level:

- Recognizes the effect of rising prices – An item worth \$500 is not as valuable as it once was.
- Reduces corrections costs for non-violent property crimes – increasing the level does not change burglary or robbery laws, but only non-violent theft. Someone stealing a \$500 iPad deserves punishment, but not up to 5 years in prison.
- Speeds resolution of theft cases – More cases would be handled in District Court rather than going through lengthy Grand Jury and Circuit Court process. Restitution can be ordered quicker. While this would increase the number of cases in District Court, from FY 05-12 the number of District Court cases has declined by 26,457.
- Reduces crippling felony convictions – A felony conviction devastates a person’s ability to get a job and meet their obligations; low-level theft should not carry this life sentence.

SB 476, legislation sponsored by Montana’s Republican Sen. Jim Shockley in 2009, raised the threshold dollar amount on felony theft from \$1,000 to \$1,500. "You have to account for inflation," Shockley said. "The cost of everything goes up. We're hoping that there will be savings, if this results in prosecuting fewer felons. One public cost that people don't think much about is the practical effect of convicting non-violent offenders as felons. Once a person has a felony record, the chances of finding future employment are essentially shot."

The facts provide a context that supports commonsense reform measures

These modest reforms can be done safely as Kentucky’s overall and violent crime rates are below national crime rate levels and are declining:



*Crime rates are calculated from the Uniform Crime Reports of the FBI and KSP.

Many believe that the drop in crime is primarily caused by the enormous increase in incarceration and the decrease in release. “The reality is far more complex.... [A]bout 25% of the decline in violent crime can be attributed to increased incarceration. While one-quarter of the crime drop is not insubstantial, we then know that most of the decline in crime — three quarters — was due to factors other than incarceration.” Ryan S. King, Marc Mauer, *Incarceration and Crime: A Complex Relationship* (2005) at 3,4.

The facts support a less costly response to crime in the context of declining crime rates. “During the last 30 years of incarceration growth, we have learned a great deal about the financial and social costs and limited effectiveness of incarceration on crime rates. While incarceration is one factor affecting crime rates, its impact is more modest than many proponents suggest, and is increasingly

subject to diminishing returns. Increasing incarceration while ignoring more effective approaches will impose a heavy burden upon courts, corrections and communities, while providing a marginal impact on crime. Policymakers should assess these dynamics and adopt balanced crime control policies that provide appropriate resources and support for programming, treatment, and community support." *Id.* at 8.

What do people prefer?

Now is the time to make these reforms to reduce unnecessary incarceration costs because taxpayers tell us that they want less prison time for nonviolent offenders.

In the 2006 National Center for State Courts Sentencing Attitudes Survey, a national poll of 1,502 randomly selected adults, "Americans reveal themselves to be neither hardliners nor softies in their views about how to best deal with those who commit crimes. People want a criminal justice system that is effective and fair in its sentencing policies and practices—tough when it needs to be to ensure public safety, but more flexible in dealing with offenders deemed less threatening to society, or when rehabilitation might be better achieved through means other than incarceration. While people may not agree on all of the details, there is surprising consensus about various aspects of sentencing as it is and how it should be:

Americans consistently favor a much tougher approach in sentencing those convicted of violent crimes than they do in sentencing non-violent offenders.

Americans think rehabilitation is a more important priority than punishment and overwhelmingly believe that many offenders can, in fact, be successfully rehabilitated. But most see America's prisons as unsuccessful at rehabilitation.

Current sentencing policies and practices are widely viewed as unfair to minorities, non-English speakers, and low income offenders, and prone to give higher income offenders preferential treatment.

High levels of public support are found for alternatives to a prison sentence like probation, restitution, and mandatory participation in job training, counseling, or treatment programs, at least for non-violent offenders. The public is particularly receptive to using such alternatives in sentencing younger offenders and the mentally ill."

There is a safe, less costly way forward

In a 2003 article *Three Strikes And You're Broke* Cal Thomas reflected what people are thinking, "After two decades of being 'tough on crime' by 'locking them up and throwing away the key' - to recall two of the effective political slogans of the past - the bill has come due.What are taxpayers getting for their money? They get a false sense of security, as if putting current criminals behind bars insures there won't be future criminals. If locking up everyone now committing crimes would eliminate crime, I'd be all for it, but new criminals are born, or made, every day. Something is wrong with the system....We do retribution well. We should be focusing on restitution."

A smarter, less costly approach to crime is no longer an ideological divide. Leaders at both ends of the political spectrum see a need for commonsense reform.

Conservatives argue for a smarter, less costly criminal justice approach focused on community based solutions. The Conservative Case for Reform is a project of the Texas Policy Foundation in cooperation with the Justice Fellowship. It is focused on fighting crime, prioritizing victims and protecting taxpayers.

Grover Norquist, President, Americans for Tax Reform said, "Misbehavior that leads to disruption in the classroom does not warrant a \$500 Class C misdemeanor ticket and subsequent trip to municipal court. An after-school detention or two, for example, should do the trick just fine, without great cost to the taxpayers or overburdening our courts." Rand Paul, U.S. Senator from Kentucky, said, "Our federal mandatory minimum sentences are simply heavy handed and arbitrary. They can affect anyone at any time, though they disproportionately affect those without the means to fight them. We should stand and loudly proclaim enough is enough. We should not have laws that ruin the lives of young men and women who have committed no violence."

The Pew Charitable Trusts is an organization dedicated to rigorous, analytical, fact-based decision making in public policy. It is an independent, non-governmental organization which attempts to link groups with divergent interests "to pursue common cause and insisting on tangible results."

The Pew Charitable Trusts has available a fact sheet on "Public Safety in Kentucky" as part of its larger Public Safety Performance Project. Pew was involved in bringing groups together and forming action plans for the Public Safety and Offender Accountability Act of 2011, which attempts to concentrate incarceration on the small percentage of violent and repeat offenders and find alternatives to incarceration to the majority of the remaining population. The Kentucky Fact Sheet can be accessed at:

<http://tinyurl.com/pew-ky>



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Defenders have high value: An effective public defense system protects innocent people from wrongful convictions; reduces the cost of pretrial detention by making sure bail proceedings are proper and sensible and release for defendants pretrial is secured for appropriate defendants; reduces the cost of incarceration by identifying defendants who are appropriate for cost-effective alternative sentencing and developing commonsense alternatives to incarceration; and insures that plea agreements and sentences are fair and not excessive under state law, which helps reduce our correctional population.



There are unrealized benefits for Kentuckians. When Kentucky's statewide defender program is able to continue and enhance its pioneering, nationally-recognized, innovative work with full staff and full funding, Kentucky taxpayers will see lower costs for the criminal justice system overall.

I am very proud of our Kentucky public defenders who protect the rights of individuals, advance justice, and provide fiscal efficiency to the criminal justice system.

Jerry Cox

Chair, Kentucky Public Advocacy Commission
President, National Association of Criminal Defense Lawyers