

# **Report of the Task Force on the Penal Code and Controlled Substances Act**



**Research Memorandum No. 506**

**Legislative Research Commission**  
Frankfort, Kentucky

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and Controlled Substances Act January 19, 2011



## Foreword

The Task Force on the Penal Code and Controlled Substances Act was created by 2010 House Concurrent Resolution 250 to study and report on recommended changes to the Kentucky Penal Code and the Controlled Substances Act.

The task force was directed to provide to the Interim Joint Committee on Judiciary and the Legislative Research Commission draft changes to the Penal Code, the Controlled Substances Act, and other necessary statutes.

Staff would like to acknowledge the valuable assistance of those who provided testimony and expert insight. Staff also acknowledges the Public Safety Performance Project at the Pew Center on the States and its partners, JFA and CJI, that provided technical assistance to the task force.

Robert Sherman  
Director

Legislative Research Commission  
Frankfort, Kentucky  
January 19, 2011



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## Summary

The 2010 General Assembly adopted House Concurrent Resolution 250 that created the Task Force on the Penal Code and Controlled Substances Act.

The task force was directed to provide to the Interim Joint Committee on Judiciary and the Legislative Research Commission draft changes to the Penal Code, the Controlled Substances Act, and other necessary statutes. The draft shall be based on the principles of “Justice Reinvestment” and shall provide for alternatives to incarceration; the use of community treatment, education, and rehabilitation programs that have been proven to reduce recidivism; the monitoring of defendants where necessary; and a reduction of recidivism while protecting and enhancing public safety.

The following is the result of this work.

### Correctional Population

Over the past decade, Kentucky has had one of the fastest growing prison populations in the nation. Despite a decline during the past 3 years, the Commonwealth’s inmate population is 45 percent larger than it was at the beginning of 2000, compared with 13 percent growth in the U.S. state prison system as a whole (U.S. Dept. of Justice. Bureau. “Prisoners in Year End 2009”).

Looking back over a longer period, the state’s prison population has jumped more than 260 percent since 1985, from about 5,700 inmates to more than 20,700 in 2010, according to the Department of Corrections. At year-end 2007, 1 of every 92 adults in Kentucky was incarcerated, compared with 1 of every 100 adults nationally (Pew. *One*).

This high rate of prison expansion is not due to an increase in crime. Kentucky’s serious crime rate has been well below that of the nation and other southern states since the 1960s, and the current crime rate is about what it was in 1974 (Disaster Center). Nevertheless, the state imprisonment rate went from well below to slightly above the national average between 1985 and 2009.<sup>1</sup>

### Costs of Corrections

During the past 2 decades, the Commonwealth’s spending for the increased incarceration has grown dramatically. In fiscal year 1990, general fund corrections spending in Kentucky totaled \$140 million. In FY 2010, that amount was \$440 million, an increase of 214 percent.<sup>2</sup>

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<sup>1</sup> According to the *Sourcebook of Criminal Justice Statistics Online*, the state imprisonment rate in 1985 was 133 per 100,000 residents, compared with a U.S. rate of 187 per 100,000 residents. The 2009 number is found in Appendix Table 9 of the U.S. Department of Justice Bureau of Labor Statistics’ “Prisoners in 2009.”

<sup>2</sup> In 2010, general fund spending for corrections was reduced by \$75 million and replaced with \$75 million in federal stimulus funding. The \$440 million figure for FY 2010 includes the \$75 million in federal stimulus funding. For FY 2012, there will be no federal stimulus funding for Kentucky corrections, and the \$75 million in state general fund spending was restored.

In Kentucky, average state spending per prisoner rose about 10 percent between FY 2005 and FY 2009. It currently costs approximately \$19,000 per year to house each inmate.<sup>3</sup> Meanwhile, resources to reduce recidivism and hold offenders accountable in the community are scarce. The department also reported that spending for offenders on probation and parole between FY 2005 and FY 2010 dropped from \$1,191 per year to \$961 per year.

Greater spending on prisons has not translated into a better return for public safety. The state's recidivism rate—the number of offenders who return to prison within 3 years of release—has fluctuated over the last decade and improved slightly in recent years, but it is still high and remains above the levels from the late 1990s.

### **Drivers of the Prison Population**

The task force's analysis indicates several leading causes of Kentucky's prison growth.

**Increase in Arrests and Court Cases.** While reported crime remained basically flat between 2001 and 2009, adult arrests increased 32 percent during that time.<sup>4</sup>

**High Percentage of Offenders Being Sent to Prison.** Kentucky uses prison as opposed to probation or other alternative sentences at a much higher rate than most other states.

**Technical Parole Violators.** Offenders on parole who are sent back to prison and who do not have a new felony conviction have nearly doubled as a percentage of prison admissions.

**Drug Offenders.** The Kentucky Department of Corrections reported that between 2000 and 2009, the percentage of all admissions that were drug offenders rose from 30 percent to 38 percent.

### **Reforms**

Seeking new ways to protect public safety while controlling the growth of prison costs, the General Assembly in 2010 established the bipartisan, inter-branch Task Force on the Penal Code and Controlled Substances Act.

With the Assistance of the Pew Center on the States and its partners, the group conducted a detailed analysis of Kentucky's sentencing and corrections data; solicited input from a wide range of stakeholders; used that information to develop tailored policy options, including proposals that would reinvest a portion of any savings from averted prison spending into evidence-based strategies to strengthen probation and parole programs and reduce recidivism; and facilitated the construction of a package of legislative and administrative reforms.

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<sup>3</sup> Average per-prisoner spending was calculated using the data from Department of Corrections' "Cost to Incarcerate by Type of Institution" and includes an average of maximum security, medium security state and private, and minimum security state and private facilities.

<sup>4</sup> Per Kentucky State Police accounting practices, these figures refer to charges, not individual arrests.

The tailored policy options focus on four areas:

- Strengthening Probation and Parole
- Adopting Common Sense Sentencing Reforms
- Supporting and Respecting Victims
- Improving Government Performance

## **Impact**

If adopted, these reforms will improve public safety, hold offenders accountable, and control corrections costs. Over the next 10 years, these reforms are estimated to reduce the prison population by approximately 3,000 to 4,000 inmates and save Kentucky taxpayers millions in prison operation costs. Most importantly, these reforms will improve public safety by reducing recidivism.

## **Background and Work of the Task Force**

Seeking new ways to protect public safety while controlling the growth of prison costs, the General Assembly in 2010 established the bipartisan, inter-branch Task Force on the Penal Code and Controlled Substances Act. The task force members include

- Senator Tom Jensen, task force Co-Chair and Chair of the Senate Judiciary Committee;
- Representative John Tilley, task force Co-Chair and Chair of the House Judiciary Committee;
- Secretary J. Michael Brown, Justice and Public Safety Cabinet;
- Chief Justice John D. Minton, Jr., Kentucky Supreme Court;
- Tom Handy, former Commonwealth's attorney;
- J. Guthrie True, former public advocate; and
- Judge/executive Tommy Turner, Larue County.

Beginning in the summer of 2010, the group began a detailed analysis of Kentucky's sentencing and corrections data; solicited input from a wide range of stakeholders; used that information to develop tailored policy options, including proposals that would reinvest a portion of any savings from averted prison spending into evidence-based strategies to strengthen probation and parole programs and reduce recidivism; and facilitated the construction of a package of legislative and administrative reforms.

The task force was given authority to request assistance from outside organizations, which it did of the Public Safety Performance Project of the Pew Center on the States. Pew and its partners have provided assistance to a dozen states, analyzing state data to identify what is driving prison growth and developing research-based, fiscally sound policy options to protect public safety and strengthen offender accountability, while containing corrections costs. Pew is partnering in Kentucky with the Crime and Justice Institute and the JFA Institute.

## National Picture

Across the country, states are facing challenges similar to those in Kentucky as prison populations have grown significantly over the past two decades, accompanied by large cost increases. Yet, despite incarcerating more individuals than ever before, recidivism rates have remained high, and many states that dramatically expanded their prison systems have not seen crime rates drop any faster than states whose prison growth was more moderate. Spurred on by research from the Pew Center on the States, state leaders across the nation are working to use their correctional dollars in smarter ways, by developing more effective criminal justice systems that increase public safety, that hold offenders accountable, and that control corrections spending.

Research and data show that the increase in national prison populations was driven not by an increase in crime but by state decisions to incarcerate nonviolent offenders and to increase prison terms for violent and nonviolent offenders. In addition, the number of people on probation or parole has reached more than 5 million. This has overwhelmed many community corrections and reentry programs, and a high percentage of persons on parole and probation are returned to prison for violations of their conditions of supervision.

As a result of the increase in state prisoners, spending on corrections has risen dramatically to become one of the fastest growing line-items of state budgets. “Over the past two decades, its growth as a share of state expenditures has been second only to Medicaid.” Twenty-one years ago, states spent \$14 billion on corrections; today, state spending on corrections is more than \$50 billion (Pew. *One*).

Despite the significant increase in spending on corrections, results are not keeping up with the costs. Nationally, recidivism rates remain unchanged, as more than half of released prisoners return to prison within 3 years. More than one-third of probationers and nearly half of parolees do not complete their supervision terms successfully. Those on parole account for up to two-thirds of admissions in some states.

Policy makers across the country are examining ways to reduce crime and cut prison spending. Research shows that evidence-based sentencing and corrections practices do work and can reduce crime rates more effectively than prisons, at much lower costs (Aos and Drake). Such practices include better ways to identify which offenders should be in prison and which can safely be supervised in the community, new technologies to monitor their whereabouts and behavior, and more effective supervision and treatment programs to help them rehabilitate. Taken together, these trends are encouraging policy makers to diversify their states’ array of criminal sanctions with options for low-risk offenders, which save tax dollars but still hold offenders accountable for their actions. A number of states already are reaping encouraging results.

Facing daunting projections of significant increases in correctional costs due to the growth in their prison populations, states such as Kansas and Texas have embraced a strategy that blends incentives for reduced recidivism with greater use of community supervision for lower-risk offenders. In addition, these states increasingly are imposing sanctions other than prison for

parole and probation violators whose infractions are considered technical, such as missing a probation or parole appointment. The new approach, born of bipartisan leadership, has allowed the two states to ensure they have enough prison beds for violent offenders, while helping less dangerous lawbreakers become productive, taxpaying citizens.

State data in Kansas and Texas indicate that these reforms have reduced crime and cut costs since 2007. In Kansas, parole revocations to prison have dropped by 34 percent, and probation revocations have dropped 16 percent. The state has averted \$80 million to date. Similarly, Texas has seen a reduction in probation and parole revocations, helping to save \$444 million through fiscal year 2009. The state is projected to save as much as \$2 billion through FY 2012.

In 2010, South Carolina enacted a comprehensive package of sentencing and corrections legislation that makes common sense sentencing reforms, improves parole release decision making, strengthens supervision for offenders on probation and parole, and provides ongoing oversight of sentencing and corrections reform in the state. These reforms are projected to save the state up to \$175 million in construction costs and avoid more than \$66 million in operating costs during the next 5 years.

In addition, many other states are currently addressing issues similar to those in Kentucky. Over the last 2 years, states enacted the following legislation:

- Several states, such as Alabama, Arkansas, Indiana, Louisiana, North Carolina and Ohio, have ongoing task forces, commissions, or working groups to develop recommendations that legislatures anticipate addressing in their 2011 sessions.
- Colorado reduced penalties for drug use and possession offenses, while increasing penalties for drug distribution by an adult to a minor.
- States such as North Carolina, Tennessee, Illinois, and New York are creating or expanding use of risk assessments to identify offenders who are appropriate for community-based sentences and those who need to be incarcerated.
- Several states, including California, Illinois and South Carolina, enacted performance incentive funding programs that give counties a share of the savings if they reduce probation revocations to state prisons.
- Several states, including Louisiana, Tennessee, Colorado, Mississippi, Oregon, New York, Nevada, and California, created or expanded inmate earned time or good time policies.
- South Carolina and New Hampshire require that many inmates leaving prison receive a minimum amount of supervision as they reenter the community.
- Maine, Washington, and New York expanded eligibility for medical parole.
- Georgia permits a continuum of administratively applied sanctions for probation violations; Minnesota permits an intermediate sanctions facility pilot program for probation violators; and New Hampshire permits short, swift jail sanctions for minor probation violations and established intermediate sanctions for minor parole violators.
- New York instructed its Board of Parole to consider graduated sanctions and risk assessments for parole supervision.

With immense fiscal challenges, state leaders across the country must ensure that taxpayer dollars are wisely spent. Understanding that the current crime and punishment policies are not delivering satisfactory results, many states in addition to Kentucky are looking to analyze their

data, review research, and use evidence-based programs to improve public safety, hold offenders accountable, and balance their budgets.

### Challenges Facing Kentucky

Over the past decade, Kentucky has had one of the fastest growing prison populations in the nation. Despite a decline during the past 3 years, the Commonwealth's inmate population is 45 percent larger than it was in 1999. The U.S. state prison system as a whole had a 13 percent growth (U.S. Dept. of Justice. Bureau. "Prisoners in Year End 2009").

Looking back over a longer period, the state's prison population has jumped more than 260 percent since 1985, from about 5,700 inmates to more than 20,700 in 2010, according to the Kentucky Department of Corrections. At year-end 2007, 1 of every 92 adults in Kentucky was incarcerated, compared with 1 of every 100 adults nationally (Pew. *One.*).

This high rate of prison expansion is not due to an increase in crime. Kentucky's serious crime rate has been well below that of the nation and other southern states since the 1960s, and the current crime rate is about what it was in 1974 (Federal). Nevertheless, the state imprisonment rate went from well below to slightly above the national average between 1985 and 2009.<sup>5</sup> That high incarceration rate applies to both men and women in Kentucky. Kentucky now has the fifth highest imprisonment rate for females (U.S. Dept. of Justice. Bureau. "Prisoners in 2009").

### Rising Costs, Low Public Safety Return

During the past 2 decades, the Commonwealth's spending for the increased incarceration has grown dramatically. In FY 1990, general fund corrections spending in Kentucky totaled \$140 million. In FY 2010, that amount was \$440 million, an increase of 214 percent.<sup>6</sup>

In Kentucky, average state spending per prisoner rose about 10 percent between FY 2005 and FY 2009. It currently costs approximately \$19,000 per year to house each inmate.<sup>7</sup> Meanwhile, resources to reduce recidivism and hold offenders accountable in the community are scarce. The department also reported that spending for offenders on probation and parole between FY 2005 and FY 2010 dropped from \$1,191 per year to \$961 per year.

Greater spending on prisons has not translated into a better return for public safety. The state's recidivism rate—the number of offenders who return to prison within 3 years of release—has

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<sup>6</sup> In 2010, general fund spending for corrections was reduced by \$75 million and replaced with \$75 million in federal stimulus funding. The \$440 million figure for FY 2010 includes the \$75 million in federal stimulus funding. For FY 2012, there will be no federal stimulus funding for Kentucky corrections and the \$75 million in state general fund spending was restored.

<sup>7</sup> Average per-prisoner spending was calculated using the data from the Department of Corrections' "Cost to Incarcerate by Type of Institution" and includes an average of maximum security, medium security state and private, and minimum security state and private facilities.

fluctuated over the last decade and improved slightly in recent years, but it is still high and remains above the levels from the late 1990s. The recidivism rate for those leaving prison in 1997 was 37 percent. The Kentucky Department of Corrections reported that the rate peaked for those leaving prison in 2003 at 44 percent, and it was 40 percent for those who left prison in 2007. In addition, while the state's crime rate has declined 6 percent over the past 10 years, that drop is only one-third the size of the 19 percent drop nationwide (Federal).

The state prison system is at capacity and local jails hold more than one-third of state inmates, which is significantly higher than the 6 percent average for all states (U.S. Dept. of Justice. Bureau. "Prisoners in 2009"). Because of that data, the task force considered data-driven alternatives that will contain prison growth and corrections spending while protecting public safety.

### **What Is Driving the Prison Growth?**

The task force's analysis indicates several leading causes of Kentucky's prison growth.

**Increase in Arrests and Court Cases.** While reported crime remained basically flat between 2001 and 2009, adult arrest rates increased 32 percent during that time.<sup>8</sup> This was driven by a 70 percent increase in arrests for drug offenses, a 22 percent increase in arrests for Part 1 offenses and an increase of 33 percent for Part 2 offenses.<sup>9</sup> Meanwhile, the Administrative Office of the Courts reported that the number of criminal cases filed in Kentucky's circuit courts rose from 25,591 in 2002 to 32,026 in 2009.

**High Percentage of Offenders Being Sentenced to Prison.** Kentucky sentences offenders to prison as opposed to probation or other alternative sentences at a much higher rate than most other states. In 2009, district and circuit courts sentenced 57 percent of all convicted felony offenders to prison, which is higher than other jurisdictions. The federal Bureau of Justice Statistics reports that in 2006, 41 percent of all felony convictions resulted in a sentence to state prison (U.S. Dept. of Justice. Bureau. "Felony").

**Technical Parole Violators.** Offenders on parole who are sent back to prison and who do not have a new felony conviction have nearly doubled as a percentage of prison admissions. The Kentucky Department of Corrections reported that such parole violations accounted for 10.2 percent of total prison admissions in FY 1998, yet rose to 19.5 percent of all admissions in FY 2010. Admissions by parole violators who have a new felony conviction accounted for just 2.2 percent of total admissions in FY 2010, up from 1.8 percent of total admissions in FY 1998.

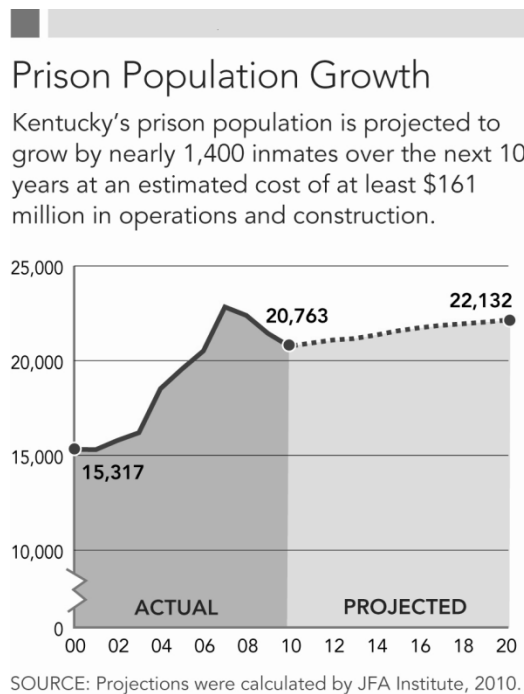
**Drug Offenders.** The Kentucky Department of Corrections reported that between 2000 and 2009, the percentage of all admissions that were drug offenders rose from 30 percent to 38 percent. In addition, 25 percent of current prison inmates are being held for drug offenses. In

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<sup>8</sup> Per Kentucky State Police accounting practices, these figures refer to charges, not individual arrests.

<sup>9</sup> Data from Kentucky State Police. Part I offenses include murder and non negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft and arson. Part II offenses include the additional 21 crimes tracked by the FBI's Uniform Crime Reports, including drug offense violations.

addition, 75 percent of these drug offenders are in prison for possession offenses or trafficking first offenses.



### The Cost of Doing Nothing

Despite these longer-term trends, Kentucky's prison population has declined for the past 3 years. A significant reason for this drop has been an increase in the parole grant rate. Parole officials indicate the grant rate has risen as a result of the use of a validated risk assessment tool. As a result of using this tool, the parole board began granting release at a higher rate to lower-risk offenders who were incarcerated for less severe offenses. However, even with the current level of parole, prison growth is expected to resume in Kentucky if no changes are made to the state's criminal justice system. If current policies remain in place, independent experts and the Department of Corrections project the prison population will increase by nearly 1,400 inmates during the next 10 years (JFA Institute).

If the state does not act to contain this growth, policy makers will have to significantly increase Kentucky's current spending on corrections. According to new projections from the Department of Corrections, by 2020, the state would need to spend at least \$161 million more on corrections to cover this growth. This includes an additional \$120 million in cumulative operational costs for the Kentucky Department of Corrections and \$41 million for construction of an additional 800 prison beds; these additional beds would still leave the state nearly 600 beds short, requiring officials to find beds within existing facilities. In addition, if the prison construction is financed through bonds, debt service could nearly triple the cost.<sup>10</sup>

<sup>10</sup> Calculation assumes 6 percent interest on a 20-year bond on the \$41 million expansion, which would result in an annual debt service of approximately \$3.6 million per year, or a total of \$72 million over the life of the bond.

## **Policies To Protect Public Safety, Hold Offenders Accountable, and Contain Corrections Costs**

### **Strengthen Probation and Parole**

The corrections system contributes to public safety by separating dangerous offenders from society and by reducing the likelihood that convicted offenders will commit new crimes. The ongoing challenge for corrections is offering a continuum of incarceration and community supervision options that are effective in reducing recidivism and that make the best use of limited public resources.

When states embarked on a significant expansion of prisons beginning in the 1970s, little research was available on effective approaches to curbing rates of reoffending. Some 40 years later, a great deal of scientific study has been conducted, and it provides guidance on building effective corrections systems. By adopting a comprehensive, research-based approach to supervision, corrections systems can reduce recidivism by up to 30 percent. This significantly improves public safety, and at a cost savings. Georgia has calculated that it saves \$7 million for each percentage point reduction in recidivism, given the size of its offender population.

The Commonwealth of Kentucky faces several persistent challenges. Fortunately, the Department of Corrections (DOC) and the Administrative Office of the Courts have put in place many policies and practices that align with current research and that are creating a solid foundation on which to build. Action by Kentucky to codify and expand upon these efforts will allow the system to address these challenges and to increase efficiency and the ability to effect long-term reductions in recidivism.

### **Challenges in Kentucky**

**Recidivism rates in Kentucky remain high.** The state's recidivism rate—the number of offenders who return to prison within 3 years of release—has fluctuated over the last decade and has improved slightly in recent years but is still high and remains above the levels from the late 1990s. Since the late 1990s, offenders who are sent back to prison for a parole violation have nearly doubled as a percentage of prison admissions.

**Kentucky has a high percentage of offenders being sentenced to prison.** Kentucky sentences offenders to prison as opposed to probation or other alternative sentences at a much higher rate than most other states. In 2009, district and circuit courts sentenced 57 percent of all convicted felony offenders to prison, which is higher than other jurisdictions. The federal Bureau of Justice Statistics reports that in 2006, 41 percent of all felony convictions resulted in a sentence to state prison (U.S. Dept. of Justice. Bureau. "Felony").

**The Department of Corrections, and the Commonwealth as a whole, struggles with a lack of community intervention resources, notably for substance abuse.** Risk reduction interventions in concert with supervision are essential to reduce recidivism among medium- and high-risk offenders. However, resources for those interventions are at a premium within the DOC and in the community. For example, a recent review by the University of Kentucky Center on

Drug and Alcohol Research stated that residential substance abuse treatment beds, including those funded by the Department of Corrections, are consistently at capacity and most report waitlists, indicating an extremely over-burdened system of care.

**Barriers exist to accessing available community-based sentencing options.** Inmates who are eligible for home incarceration often lack stable home environments to return to and thus remain in prison to serve out their sentence. Some parole-eligible offenders opt for incarceration over community treatment because they can receive earned-time credits for treatment in prison but not for community treatment. In addition, the use of global positioning systems (GPS) supervision is available for pretrial, probation, and parole populations, but its application varies widely.

The recommendations from the task force are aimed at addressing these and other challenges. These recommendations build on the foundation created by the Department of Corrections and the Administrative Office of the Courts and will assist the state in creating a stronger parole and probation system that holds offenders accountable and reduces the number of offenders committing new crimes.

## Recommendations

### Recommendation 1

#### Base Key Decisions on Risk and Needs Data

- A. Require the use of a risk and needs assessment for pretrial supervision.** The Administrative Office of the Courts should administer a validated pretrial risk assessment instrument to all defendants who are being considered for incarceration while awaiting trial. The assessment will measure the risk the individual poses to public safety and the risk that the individual will not return to court. The assessment will categorize the individual by risk level, such as “low,” “moderate,” or “high.” This information must then be provided to the judge for consideration when determining the most appropriate level of supervision for the individual. (Not a 2011 legislative change.)
- B. Incorporate risk and needs data into the Presentence Investigation (PSI) Report.** KRS 532.050, pertaining to the presentence procedure for a felony conviction, should be amended to include the risk assessment results in the presentence report. In addition, the Department of Corrections should administer a validated risk and needs assessment instrument to all offenders awaiting sentencing on a felony conviction who are eligible for incarceration or probation supervision. The assessment will measure the risk the individual poses to public safety and the factors that contribute to the individual’s criminal behavior. This information must then be provided to the sentencing judge for consideration when determining the terms of an individual’s sentence.
- C. Require the use of risk and needs information in making decisions on parole release and in setting terms of parole.** The Department of Corrections would be required to administer a validated risk and needs assessment instrument to all inmates who are eligible for parole release. The assessment will measure the risk the individual poses to public safety and the factors that contribute to the individual’s criminal behavior. The Department of Corrections should provide the risk and need assessment information to the Parole Board and incorporate that information into the development of the inmate’s reentry plan.
- In addition, the Parole Board would be required to consider the results of risk and needs assessment instruments when setting terms of supervision for those who will be granted parole. This includes considering the level of risk to public safety when setting conditions related to the intensity of supervision and considering criminal factors when setting requirements for treatment or other interventions.
- D. Require the use of a risk and needs assessment throughout the period of probation and parole supervision.** The Department of Corrections must administer a validated risk and needs assessment upon intake to probation or parole supervision, unless an initial assessment has been conducted previously by the Department of Corrections. The Department of Corrections shall then readminister the risk and needs assessment at regular intervals as determined by agency policy.

In addition, the Department of Corrections must apply the results of the risk and needs assessment to establish an appropriate level of supervision, to determine the content of a supervision plan that addresses the offender's criminal needs, and to respond to compliant and noncompliant offender behavior. The Department of Corrections must establish administrative policy to determine appropriate levels of supervision, guidelines for supervision planning, and guidelines for responses to offender behavior.

The above recommendations reflect evidence-based practices and codify existing DOC and Parole Board policy.

## **Recommendation 2**

### **Boost the Chances that Inmates Will Successfully Transition to the Community**

**A. Implement mandatory reentry supervision.** Currently, more than 5,000 inmates are discharged at the end of their sentences with no supervision, monitoring, or any reentry intervention such as substance abuse treatment. Mandatory reentry supervision will ensure reentry planning for these offenders and reduce their likelihood of recidivism. The DOC will be required to implement mandatory reentry supervision for inmates who are not granted discretionary parole and would otherwise be released into Kentucky communities without any supervision or oversight. The provision would exclude offenders sentenced to class A and capital felonies, offenders with significant discipline problems, and offenders with maximum- or close-security classification. It would also not apply to an offender who has been sentenced to two years or less of incarceration, or who has nine months or less to be served after his or her sentencing by a court. This provision would be implemented as temporary legislation with a report to the legislature after 3 years so that it can be terminated if it is not working.

In addition, a separate provision would provide that an offender convicted after the effective date of the legislation of a capital offense or a class A felony, or who would not otherwise be eligible for discretionary parole or mandatory supervision, would be subject to one year of post-incarceration supervision upon the expiration of his or her sentence.

**B. Improve the efficiency of the Parole Process.** The Parole Board will hear cases at least 60 days prior to the parole eligibility date for all sentenced felons confined in penal institutions, halfway houses, or local jails. Under current policy, parole hearings are not held until the month of the inmate's parole eligibility date and because of this processing lag, many offenders are held beyond their parole eligibility date before being released. In FY 2010, 86 percent (7,076 out of 8,196) of the discretionary parole releases were released late and were held an average of 31.5 days beyond their parole eligibility dates before being released. This created a significant cost to the state. With this recommendation, inmates granted parole will be released on their eligibility dates.

**C. Improve the Parole Board deferment process.** The Parole Board's deferment process will be improved by limiting the maximum deferment to 24 months for Class C or D nonviolent, nonsexual offenders and to 10 years for all others, except for life sentences. In addition, the

task force recommends limiting the maximum deferment to 5 years unless by a vote of the full board.

- D. Allow parolees to complete programming in the community.** The Department of Corrections will be authorized to determine an appropriate residential or nonresidential placement for parolees who are required to complete an intervention program as a condition of release. The Department of Corrections may release a parolee from a DOC facility to a residential intervention program or release a parolee to appropriate community housing in order to complete a nonresidential intervention program. This provision codifies a provision currently included in 2010 Special Session HB 1.
- E. Allow for placement of offenders in local jails at the end of their sentences.** The Department of Corrections will be authorized to work with counties to place offenders in local jails to serve the final months of their sentences. Such arrangements would only occur if the county has available beds for such inmates and agrees to accept those inmates.
- F. Expand community-based transitional housing options and GPS monitoring.** The Department of Corrections will continue to expand the use of transitional housing or GPS monitoring to facilitate reentry for inmates eligible for conditional release. The Department of Corrections will establish eligibility criteria for conditional release by administrative regulation.

### **Recommendation 3**

#### **Improve Parole and Probation Supervision**

##### **Use Technology and Proven Supervision Practices and Programs To Improve Outcomes**

- A. Expand the use of GPS for pretrial supervision.** The Administrative Office of the Courts should establish recommended guidelines for pretrial GPS supervision, focusing on defendants who are assessed as at least moderate risk and who otherwise would be placed in jail. Judges should consider these guidelines when setting terms of pretrial supervision. In addition, the task force supports the efforts of the Finance and Administration Cabinet to enter into a statewide master agreement for GPS and electronic monitoring services in order to establish consistent service and economies of scale across the Commonwealth.
- B. Target pretrial supervision to medium- and high-risk offenders.** The Administrative Office of the Courts should establish eligibility guidelines for the Pretrial Community Supervision Program that focuses supervision on defendants that are assessed as at least moderate risk by a validated pretrial risk assessment tool. Judges should consider the guidelines when setting terms of pretrial supervision. In addition, the Administrative Office of the Courts should develop a process for administering and monitoring the use of the guidelines.
- C. Require DOC to supervise offenders according to evidence-based practices.** The Department of Corrections will be required to establish administrative policy for probation and parole that includes

1. Administering a validated risk and needs assessment to all probationers and parolees to determine risk to the community and to identify intervention targets.
2. Allocating caseload and workload based on offender risk level, with more resources dedicated to higher-risk offenders.
3. Developing a supervision plan for medium- and high-risk offenders that targets the criminal risk factors identified in the risk and needs assessment and supervising offenders according to that supervision plan.
4. Requiring interventions applied through the Department of Corrections and through contract and referral agencies to be proven by research to be effective in reducing recidivism.
5. Providing appropriate training on evidence-based supervision and intervention to Department of Corrections employees who interact with probationers and parolees.

**D. Require that state funding be used for programs and practices that are evidence-based.**

The Department of Corrections will be required to demonstrate that state-funded intervention programs provided by the department for inmates, probationers, and parolees have been evaluated for effectiveness in reducing recidivism or that similar programs have research demonstrating such effectiveness. In addition, the Administrative Office of the Court also must demonstrate that state-funded supervision and intervention programs provided to pretrial defendants have a documented evidence base or have been evaluated for effectiveness in reducing absconding and criminal activity.

Objective criteria for evidence-based interventions must be established by the state agency providing the service, and a process for auditing must be established. Programs that do not meet the criteria based on audit results will be given an opportunity to improve performance. If the criteria are not met upon a second audit, the program will be defunded. These requirements apply only to programming aimed toward preventing recidivism or failure to appear in court.

These requirements will be phased in according to the following schedule: 25 percent of funding allocated in FY 2012 and FY 2013 must be applied to documented evidence-based programming; 50 percent of funding in FY 2014 and FY 2015; 75 percent of funding in FY 2016 and thereafter.

**Reduce Supervision Caseloads So Officers Can Focus on High-Risk Offenders**

- E. Require the use of administrative caseloads.** The Department of Corrections must establish administrative policy for the supervision of low-risk offenders through administrative caseloads. Requirements of administrative supervision will include monitoring offenders to ensure that they have not engaged in new criminal activity and are fulfilling financial obligations to the court. Offenders on administrative supervision who fail to meet financial obligations can be placed on a higher level of supervision at the discretion of the Department of Corrections. Those who engage in criminal activity can be prosecuted, can be revoked, or can be placed on a higher level of supervision.

Offenders on higher levels of supervision who, upon reassessment demonstrate a reduction in dynamic risk factors and who achieve the goals established on their supervision plans can be placed on administrative supervision at the discretion of the Department of Corrections. Offenders on higher levels of supervision will presumptively be placed on administrative supervision if they have completed 12 months of supervision, have not been found to have violated the terms of their supervision in the previous 12 months, demonstrate a reduction in dynamic risk factors upon reassessment, and have achieved the goals established on their supervision plans. The Department of Corrections may establish conditions for overriding presumptive administrative supervision by administrative policy.

- F. Authorize earned-time credits for parolees and early termination for probationers.** The Department of Corrections will establish administrative policy extending earned-time credit to parolees in the community using similar criteria to what currently applies to inmates.

The Department of Corrections also will be required to establish administrative policy recommending early termination for probationers who have demonstrated a reduction in dynamic risk factors upon reassessment, have achieved the goals established in their supervision plans, and have fulfilled all financial obligations to the court. The Department of Corrections will review offender's alignment with these criteria at regular intervals that coincide with reassessment. If the offender meets the above criteria, the Department of Corrections will petition the court with a request for early termination of supervision. In addition, the administrative policy will require petitions for early termination for probationers who have met the above criteria, have served at least 18 months of their sentences, and have not been found to have violated the terms of supervision in the previous 12 months. Whether or not to grant the petition for early termination remains within the court's discretion. The Department of Corrections may establish conditions for overriding the presumption for submitting a termination petition by administrative policy.

### **Increase Accountability for Violations**

- G. Authorize intermediate sanctions for technical parole violators.** The task force recommends codifying the budget language currently authorizing the Department of Corrections to respond administratively to certain parole violations according to a sanctions grid established through administrative policy.
- H. Authorize administrative responses to probation violations.** The Department of Corrections, in cooperation with the Administrative Office of the Courts and the Court of Justice, must develop an administrative sanctions grid for responding to violations of probation, including the use of short jail stays. The administrative sanctions grid should have the following objectives:
- Responding quickly and consistently to violations, based on the nature of the violation and the risk level of the offender
  - Reducing the time and resources expended by the Department of Corrections and the Courts to respond to offender violations
  - Reducing the commission of new crimes and revocation rates

- I. Ensure probation revocations hearings are held within a reasonable time.** The task force recommends that the Judiciary consider measures to ensure that probation revocation hearings are held within a reasonable amount of time after the offender is placed in jail. (Not a 2011 legislative change.)
- J. Pilot a project HOPE model.** The task force recommends authorizing the Department of Corrections to partner with at least two local courts (one urban court or docket and one rural circuit court or docket) to implement a pilot of the Hawaii Opportunity Probation and Enforcement (HOPE) model, with the objectives of
1. Identifying probationers at high risk of violating their terms of supervision, specifically in relation to substance use;
  2. Responding swiftly and certainly to violations, using brief jail stays as primary sanctions;
  3. Targeting treatment resources to offenders who are unable to comply with their probation conditions after an initial sanction and who need treatment; and
  4. Reducing violation behavior and new crimes, thereby reducing revocations to prison.

### **Adopt Common Sense Sentencing Reforms**

An increasing number of states are implementing changes in their criminal controlled substance laws as part of a strategy to reinvest scarce corrections resources from less cost-effective sanctions and programs to more cost-effective ones. These reinvestments are based on an analysis of their marginal justice system costs and benefits and on returns on their public safety investments.

States are now applying analyses of marginal costs and benefits and returns on investments to changes in state criminal laws and policies. For example, the Washington State Institute for Public Policy, which provides data and analysis regarding proposed changes in laws and policies under consideration by the state legislature, reported that the state received 37 cents in benefits in terms of reduced crime and victimization for every dollar spent to incarcerate drug offenders (Aos). The institute also reported that the state received between \$7 and \$10 in benefits for every dollar invested in the community-based supervision and drug treatment programs supported by the Washington's Drug Offender Sentencing Alternative Act (Aos, Phipps, and Barnoski).

In Kentucky, a growing number of offenders are being sent to prison for drug offenses. Between 2000 and 2009, the percentage of all admissions to prison in Kentucky who were drug offenders rose from 30 percent to 38 percent. Of these drug offenders, 42 percent were admitted for drug possession offenses. In addition, 25 percent of current prison inmates are being held for drug offenses, compared to 20 percent nationally.

The task force finds that many of these low-risk, nonviolent offenders could be effectively supervised in the community at a lower cost. By not spending so much to incarcerate nonviolent offenders, the state will have more prison beds for dangerous offenders and can shift some of those prison dollars to create a stronger system of community punishments that will reduce recidivism.

#### **Recommendation 4**

### **Modernize the Controlled Substances Act to focus resources on high-level offenders and provide effective alternatives for non-violent offenders**

- A. Implement presumptive probation for simple possession of drugs.** Amend the possession of controlled substance in the Kentucky Revised Statutes to establish a sentence of presumptive probation for simple possession of drugs. “Presumptive probation” would be defined as “a sentence of probation not to exceed the maximum term specified for the offense, subject to conditions otherwise authorized by law, that is presumed to be the appropriate sentence for certain offenses as designated in this chapter. That presumption shall only be overcome by a statement on the record by the sentencing court of substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community and is not amenable to community-based treatment. Probation may also include an appropriate treatment program.
- B. Create a proportionate scale of penalties for possession based on quantity.** Create in statute quantity levels for drugs that establish a new proportionate scale of penalties for possession of controlled substance in the first degree, so that possession of a smaller amount of controlled substances would result in a lower penalty than possession of a larger amount.
- C. Distinguish between trafficking and peddling.** Refine the statutory definition of “trafficking” by amending in statutes trafficking in the first, second and third degree to include a quantity level of drugs that serves to distinguish between trafficking and trafficking incident to drug use. This distinction would punish more serious trafficking offenses more severely.
- D. Revise the “Drug-free School Zone.”** Refocus the scope of the drug-free school zone by amending KRS 218A.1411, Trafficking in Controlled Substance in or near a School, to change the required distance between a trafficking offense and a school building from 1,000 yards to 1,000 feet.
- E. Revise sentencing enhancements.** Reform sentencing enhancements for possession and trafficking offenses by eliminating sentence enhancements for drug possession involving small quantities of controlled substances, and limiting the application of the persistent felony offender statute to the Penal Code.
- F. Reinvest any savings in drug treatment.** Require that any cost savings from modernizing the Controlled Substances Act be reported to the legislature and allocated to expand and enhance drug abuse treatment by adopting statutory provisions similar to those enacted by the Colorado legislature in 2010.

## **Recommendation 5**

### **Expand Medical Parole**

- A. Expand medical parole.** Amend Kentucky's medical parole statute, KRS 439.3405, to expand the scope of eligibility; require the Parole Board to conduct a hearing prior to considering medical parole of a prisoner convicted of a Class A, Class B, or Class C felony involving a violent or sex offense; and require the medical director of the Department of Corrections, rather than the warden of the institution, to submit the recommendation for or against medical parole to the commissioner of the Department of Corrections.

### **Support and Respect Victims**

Too often in Kentucky, victims of crimes do not have the information they need about offenders, including how long they may serve in prison and when they may be returning to their communities. In addition, too many victims do not receive proper restitution because the ordering, collection, and management of restitution in the state is inconsistent. A primary concern is that there is no central mechanism to track restitution payments.

The following policy options will ensure that victims of crime in Kentucky are receiving the information they need about offenders and will improve the system of restitution so that offenders are held accountable and so that victims are compensated for their loss.

## **Recommendation 6**

### **Improve the Criminal Justice System To Support Victims**

- A. Develop and provide a web-based system for courts.** The Department of Corrections should develop and provide to courts a web-based system that provides to courts, attorneys, and victims, the following information:
- The offender's risk and needs information
  - The offender's expected time served, including the parole eligibility date, good time release date, maximum date, and the historic percent of time served for similar offenders
  - The costs and likelihood of reoffending for various sentencing alternatives
- B. Support the piloting and implementation of the statewide automated restitution system.** The Administrative Office of the Courts should move forward with a planned pilot for a statewide automated system for tracking restitution. If the pilot is successful, the AOC should move forward with statewide implementation. (Not a 2011 legislative change.)

### **Improve Government Performance**

Kentucky faces tough economic challenges, and the state continues to face significant budget shortfalls. In fact, in fiscal years 2009 and 2010, general fund receipts declined for two consecutive years for the first time since World War II. In addition, since 1945, general fund receipts have only declined four times. And FY 2008 revenue levels are not expected to return until FY 2012.

During these tough fiscal times, it is more important than ever to create an effective and efficient system that achieves the best return on investment by improving public safety, by holding offenders accountable, and by controlling costs. The following policy options will help ensure that the Commonwealth's criminal justice programs and policies achieve the results that citizens desire.

### **Recommendation 7**

#### **Define success in corrections as recidivism reduction and reduction of criminal behavior**

The Commonwealth should adopt statutory sentencing policy that incorporates recidivism reduction and public safety as one of the purposes of sentencing and as part of the mission of the Department of Corrections. Ultimately, one of the top priorities of a successful criminal justice system should be to improve public safety and to reduce the number of offenders who are committing new crimes.

### **Recommendation 8**

#### **Establish mechanisms to measure, incentivize, and ensure results**

**A. Establish measures for system accountability and cost effectiveness.** The Department of Corrections should produce an annual report for the General Assembly that provides information on state-funded crime reduction and recidivism reduction efforts, including participation in intervention programming, public safety outcomes, and cost effectiveness. Measures should include but are not limited to the following:

- The percentage of offenders who are participating in or completing treatment consistent with assessment results, in prison and in the community
- The percentage of programs that demonstrate their effectiveness in reducing recidivism
- The percentage of offenders who are employed or in school within 30 days, 6 months, and 1 year of release
- The percentage of offenders who have had stable part-time and full-time employment for 6 months or 1 year
- The percentage of offenders who have housing upon release
- The percentage of admissions to prison by offenders under supervision at the time of admission, accounting for the nature of the violation (criminal or technical)
- The percentage of offenders who are arrested, convicted, and incarcerated within 6 months, 1 year, and 3 years of placement on probation or release from prison

In addition, the Administrative Office of the Courts should produce an annual report for the General Assembly that provides information on state-funded crime reduction and recidivism reduction efforts, including public safety outcomes and cost effectiveness, as well as data on collection of fines, fees, and restitution. Measures should include but are not limited to the following:

- The percentage of defendants on pretrial supervision who appear for court and do not commit a new crime
- The percentage of drug court clients who complete treatment
- The percentage of drug court clients who are arrested, convicted, and incarcerated within 6 months, 1 year, and 3 years
- The percentage of restitution paid by case closure

- B. Establish performance incentive funding pilot projects.** The Kentucky State Corrections Commission should develop pilot projects that offer incentives to reduce the number of offenders sent to prison at sentencing or on a revocation. The Kentucky State Corrections Commission should be authorized to develop up to five pilot projects to incentivize community corrections programs to reduce the number of offenders sent to prison and up to five pilot projects to incentivize community corrections programs to reduce the number of offenders that are revoked to prison.
- C. Introduce performance contracting for service providers to the Department of Corrections.** The Department of Corrections should begin implementing performance-based contracting with service providers. Such performance contracts would
1. Emphasize results related to output, quality, and outcomes rather than to how the work is performed.
  2. Have an outcome orientation and clearly defined objectives and time frames.
  3. Use measurable performance standards and quality assurance plans.
  4. Provide performance incentives and tie payment, contract extension, or renewal to achievement of outcomes. (Not a 2011 legislative change.)

### **Recommendation 9**

#### **Implement a revised legislative fiscal impact statement for any bill that proposes to increase, decrease or otherwise impact incarceration**

The Legislative Research Commission (LRC) should prepare a corrections impact statement reflecting the costs attributable to and necessary appropriations for any bill that would create a new crime; increase or decrease the penalty for an existing crime; change the elements of an offense; or propose to increase, decrease, or otherwise impact incarceration. All organizations deemed necessary by LRC should cooperate and provide the data necessary to complete the corrections impact statement, including the Department of Corrections, the Administrative Office of the Courts, the Parole Board, and the Kentucky State Police. The corrections impact statement should contain estimated costs for pretrial incarceration or supervision, post-conviction incarceration in jail or a state correctional facility; probation supervision; parole supervision; and any treatment, education, or other programs.

In addition, the sponsor of any legislation requiring a corrections impact statement should identify in writing origin of the funds needed to pay for the costs of the provisions in the bill. If the source of revenue is not identified, the bill cannot be considered for final passage.

### **Recommendation 10**

#### **Require a certificate of need on new jail cells**

Prior to constructing new or expanded jails that will house state inmates, the Governor's Office of Local Development and the Department of Corrections will be required to review and approve the county plans based on need and financial feasibility.

## Reinvestment Opportunities and Priorities

The strategies presented to the task force are expected to reduce reliance on incarceration and to prioritize community supervision for those who can be safely supervised in the community. This should ultimately result in resources being made available for reinvestment in effective public safety strategies. Options for reinvestment in risk reduction strategies are described below in priority order.

### 1. Increase investment in evidence-based intervention programs

Evidence-based interventions provide offenders with the knowledge and skills they need to change their attitudes and behaviors, which ultimately leads to reduced reoffending. Investment in practices that have been proven through research to be successful can result in long-term cost savings through reduced victimization, law enforcement and court costs, and reincarceration. This can be true for interventions provided in jails, prisons, and in the community. Such interventions include drug treatment in prison, which is estimated to save nearly \$8,000 annually per participant; cognitive behavioral treatment in prison or the community, which is estimated to save more than \$10,000; and vocational training in the community, which is estimated to save more than \$4,300 per participant (Aos, Miller, and Drake. *Evidence-based Public Policy Options*).

The costs of these programs vary widely. For example, according to the University of Kentucky Center on Drug and Alcohol Research, the average current annual cost for drug treatment in Kentucky is \$1,860 per offender. However, the center recommends that to increase capacity, \$2,000 per participant per year should be budgeted for community treatment, and \$6,000 to \$7,000 per year for a mix of outpatient and inpatient treatment programs. More broadly, the implementation of cognitive-behavioral treatment programs in the community or in facilities provides a relatively low-cost option that can have a substantial impact on future recidivism. In these cases, the cost of these treatment options is lower than the cost of incarceration.

### 2. Invest in increased pretrial community monitoring as an alternative to jail

The pretrial community monitoring program currently in place in Kentucky has proven successful in ensuring that defendants return to court and do not commit new crimes while awaiting trial. Expanding this program to supervise additional individuals who are currently in jail will reduce jail costs while maintaining public safety. As of November 29, 2010, The Administrative Office of the Courts estimated that there were 4,000 defendants in jails across the state that were assessed as moderate risk who could potentially be eligible for community monitoring, with an average time in jail of between 40 and 80 days. For every full-time pretrial officer hired, approximately 100 additional defendants could be supervised in the community at any given time. The cost of one full-time equivalent pretrial officer is approximately \$43,000 annually. The Administrative Office of the Courts also estimated that it is currently supervising 1,200 low-risk defendants who may not be in need of community supervision. If fewer low-risk defendants were placed on supervision, the program could supervise additional moderate-risk clients at no additional cost.

**3. Increase investment in information technology infrastructure**

Information technology can contribute to an effective, efficient public safety system by increasing the capacity of agencies to collect, analyze, and share data. System stakeholders in Kentucky have already identified specific technology needs, such as interfaces between the Administrative Office of the Courts and the Department of Corrections as well as between the State Police and AOC and DOC, that would allow sharing of defendant/offender data and that would reduce duplicative data entry. Examples also exist in other states on the contribution of information technology to evidence-based practices, such as Connecticut's Contractor Data Collection System that allows contracted treatment providers to report required data directly to the state probation agency.

**4. Designate funding for evaluation of state-funded intervention programs**

Ongoing measurement and evaluation is needed to ensure that intervention programs continue to achieve desired outcomes. However, providers often invest limited funding in programs and lack resources for ongoing measurement. By designating a certain portion of intervention funding for evaluation, providers would have the resources for measurement and ability to report on their effectiveness.

**5. Designate funding for piloting and evaluating of promising intervention models**

Innovative policies and practices can only become evidence-based through rigorous evaluation. To support innovative, effective public safety approaches, funding could be allocated for short-term pilot initiatives that include an evaluation component. This could include programs that are developed in Kentucky, such as the Social Work Pilot Project out of the Department of Public Advocacy; or programs that are being considered for replication in the Commonwealth, such as the Hawaii HOPE model. The results of these pilot projects can inform decisions on further investment in the programs.

**6. Increase investment in transitional housing as an alternative to incarceration**

Transitional housing for parolees and inmates eligible for conditional release can allow offenders to transition back to their communities for the purpose of connecting to intervention services, reconnecting with family and community supports, and seeking employment. It can also provide a temporary solution to homelessness. The Department of Corrections does not realize a significant cost savings in funding transitional housing in lieu of incarceration, but investment in transitional housing can promote successful reentry.

**7. Increase investment in GPS monitoring as an alternative to incarceration**

GPS supervision in the community is a viable alternative for offenders who do not require incarceration but who warrant an increased level of supervision in the community either while awaiting trial or as part of a reentry strategy. The cost of GPS supervision currently varies widely across the state; selecting one provider for the state and entering into a master service agreement will stabilize the cost and likely lower it as well. Another variable in the cost of GPS supervision is the use of active monitoring where behavior is being tracked in real time and passive monitoring where past movements can be reviewed.

Of note, investment in GPS presents a cost savings only when used as an alternative to incarceration, not when it is used as a “net-widening” strategy to increase supervision of low- and moderate-risk offenders who would otherwise receive less restrictive supervision.



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