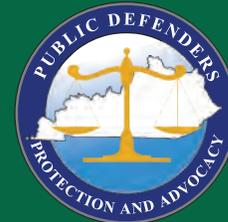


# The Advocate



JULY 2012  
LEGISLATIVE  
UPDATE



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## 2012 Legislative Update



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The 2012 General Assembly did not produce as much criminal legislation as prior sessions, mostly because of the necessary attention paid to the biennial budget and redistricting, but also out of recognition that expansion of criminal laws comes at a cost to counties and the state. House Bill 463 from the 2011 session had revolutionized the Commonwealth's approach to criminal law and recognized that long-term public safety and responsible fiscal policy were both best met by responding to many offenses with treatment-oriented sanctions, not mere incarceration. While some technical improvements were made to the laws

changed by House Bill 463, no further steps towards reform were taken this year. Likewise, though, progress was not lost in that no significant criminal law legislation was passed that would restart the rise in Correctional Costs.

In this issue of *The Advocate*, we focus on new legislation that relates to or impacts criminal law. We begin with House Bill 54, which was amended and passed to include many updates to House Bill 463. We will also look at a number of other bills that were passed during this session. Finally, we will consider many bills that did not pass that will hopefully receive stronger consideration in 2013. All passed legislation has an effective date of July 12, 2012 unless otherwise indicated.

## Updates to 2011 HB 463 (2012 House Bill 54)

House Bill 54 made no alterations of the policy behind HB 463, but made necessary changes to specific provisions that, in hindsight, were not clear or effective in implementing the policy. The result is a more cohesive, less ambiguous bill which continues to maintain public safety while relying upon evidence-based practices to produce better outcomes for non-violent offenders. Below are specific changes that were made in the bill.

### 1. Clarified Process for Pretrial Release Consideration

HB 463 clearly intended for the pretrial risk assessment to be used for pretrial release decisions, but nothing in the bill explicitly required it. Now, in making a determination of whether a defendant is a flight risk, unlikely to appear for trial, or likely to be a danger to the public if released, a court is required to consider the pretrial risk assessment for a "verified and eligible defendant." "Verified and eligible defendant" means a defendant whom Pretrial Services is able to interview and assess, and whose identity is able to be confirmed through investigation.

Requiring consideration of the assessment is not the same as requiring courts to follow the assessment, but deviations from the assessment should be based on evidence before the court with grounds documented on the record.

### 2. Clarified Bail Credit Provisions

Defendants who are entitled to bail credit shall be released when bail is satisfied by jail service without the need for a court order. In cases where the court has approved a 10% bond, bail credits shall be applied to the 10% deposit, not the full bond amount. No changes were made to existing law as to who is or is not entitled to bail credit. For those who are not found to be ineligible by the court, release should now be easier as it should occur automatically upon determination by the jail of sufficient credit and quicker in cases where a 10% bond has been approved.

### 3. Eliminated Inconsistency in Exemptions to ROR Bond

Under House Bill 463, "danger to himself or herself" was included as a reason a court may decline to allow an ROR or unsecured bond for a defendant charged with an offense which may result in presumptive probation. Other provisions that allow a court to deny release under HB 463 refer only to "danger to others" or "danger

to the public." House Bill 54 brings consistency by disallowing denials of bond based on "danger to self," which some courts have used to detain drug users who would otherwise be entitled to release.

### 4. Fixed Drafting Error in Trafficking in the Second Degree

HB 463 edited the trafficking statutes to differentiate between trafficking over or under a threshold amount. As to second-degree only, the drafters mistakenly omitted the element of "knowingly and unlawfully traffic[ing]" from the section relating to offenses involving amounts under the threshold, leading to some dismissals of prosecutions. By adding the words "He or she knowingly and unlawfully traffics in" to KRS 218A.1413 (trafficking in a controlled substance in the second degree), House Bill 54 has fixed this drafting error.

### 5. Voiding of Felony Conviction reinstated

Prior to HB 463, a felony possession of a controlled substance conviction could be voided by the trial court after successful completion of probation and treatment. Because HB 463 introduced Deferred Prosecution as the preferred alternative for felony possession cases, KRS 218A.275 was limited to misdemeanor possession cases. This drew criticism from some courts that preferred to void convictions after treatment rather than defer prosecutions. Also, some jurisdictions do not allow Deferred Prosecution because of objections from prosecutors or courts.

By removing the word misdemeanor from KRS 218A.275(8), House Bill 54 reinstates the ability of a court to void a felony conviction for a defendant who did not benefit from Deferred Prosecution and who demonstrates to the court successful treatment.

### 6. Assigns Ongoing Oversight to the Criminal Justice Council

The Criminal Justice Council ("CJC") was designated to oversee the ongoing implementation of HB 463 and submit a report to the Interim Judiciary Committee by October 1 of each year.

One meaning of this designation is that the three-year Task Force on the Controlled Substances Act and Penal Code has been disbanded, at least for now. Second, it empowers the Criminal Justice Council to review implementation efforts and make recommendations for further advancement of the policies of HB 463. The Secretary of the Justice and Public Safety Cabinet chairs the Council, which also includes the following members or designee:

- a) Attorney General;
- b) Chairs of the House and Senate Judiciary Committee;
- c) Executive Director of AOC;
- d) President of Kentucky Association of Criminal Defense Lawyers;
- e) Deputy Secretary of the Justice and Public Safety Cabinet;
- f) Commissioner of the Kentucky State Police;
- g) Commissioner of the Department of Criminal Justice Training;
- h) Commissioner of the Department of Corrections;
- i) Commissioner of the Department of Juvenile Justice;
- j) A representative of the County Attorneys Association;
- k) The Public Advocate; and
- l) A representative of the Commonwealth's Attorneys Association.



J. Michael Brown  
Secretary, Justice and  
Public Safety Cabinet  
Chair, Criminal Justice  
Council

Given that the first report is due October 1, 2012, the CJC will likely resume meetings later this summer.

### 7. Authorized Credit for Home Incarceration

A new statute was created to require that time spent in pretrial home incarceration under KRS 431.517 be credited as time spent in custody for a defendant upon conviction. This removes the inconsistent treatment of defendants on home incarceration. Before this change, a defendant on home incarceration was not considered in custody for purposes of receiving credit, but was in custody for purposes of being charged with escape if he left his home. Now, the law will recognize the significant infringement of freedom that home incarceration creates.

## Other Significant 2012 Criminal Law Legislation

### 1. House Bill 481 - Synthetic Drugs Bill (with EMERGENCY CLAUSE)



Rep. John Tilley  
D - Hopkinsville

House Bill 481 created the new crimes of Trafficking in Synthetic Drugs, a Class A misdemeanor for 1st Offense and a Class D felony for each subsequent offense, and Possession of Synthetic Drugs, a Class B misdemeanor with maximum sentence of 30 days. Six prior laws have been repealed - Trafficking, Possession, and Manufacture of Synthetic Cannabinoid Agonists (KRS 218A.1426, 218A.1427, and 218A.1428, respectively) and Trafficking in, Possession of, and Manufacturing Substituted Cathinones (KRS 218A.1453, 218A.1454, and 218A.1455, respectively).

Under the new law, synthetic drugs are given very specific chemical definitions (covering 79 lines of the bill), are considered to be Schedule I controlled substances, and are included in the ban on trafficking drugs within 1000 feet of a school and in the firearm enhancement in KRS 218A.992. Prior offenses involving synthetic drugs had been exempted from both trafficking near a school and the firearm enhancement. Activity relating to synthetic drugs remains exempted from prosecution under Unlawful Transaction with a Minor.

In prosecutions for trafficking in synthetic drugs, an affirmative defense has been created for an "innocent" employee of a retail store who did not know a sold substance was a synthetic drug. Persons convicted of trafficking may face, in lieu of a normal fine, a penalty of double the gain of the trafficking activities. This penalty would be treated as forfeiture proceeds and distributed as such.

Because the bill had an EMERGENCY clause, it is already effective.

### 2. House Bill 480 - Traffic Safety Programs for traffic offenders.

House Bill 480 authorizes a County Attorney to run a local traffic safety program for traffic offenders. The County Attorney may charge a reasonable fee for the program, but no guidance is provided as to what is a "reasonable fee," so fees are likely to vary across the state. In current traffic diversion programs, fees vary from around \$50 to almost \$200. In addition to the County Attorney's fee, participants in the program must pay a \$25 fee to the clerk's office, which will go into a fund to be used to hire additional clerks and enhance deputy clerk salaries. Each county attorney with a program must annually report the fee charged, the total number of participants in the prior fiscal year, and the specific traffic offenses diverted.

Defendants meeting any one of the following criteria would be ineligible to participate: 1) Charged with DUI under KRS 189A.010; 2) Holds a commercial driver's license (CDL) under KRS Chapter 281A; 3) Charged with violations under KRS Chapters 177, 186, or 189 that have mandatory suspension or revocation penalties; or 4) Charged with a traffic violation that is alleged to have occurred when the defendant's license was already suspended or revoked. The bill was apparently intended to exclude defendants charged with No Insurance, but the statute referenced in the bill, KRS 304.30-010, deals with Insurance Premium Finance Companies. The compulsory insurance laws, KRS 304.39-080 and 304.39-117, are not referenced so presumably someone charged with No Insurance would still be eligible for the diversion program.

Many questions are not answered by the statute:

- What role, if any, does the court play in approving or restricting participation in the program?
- Is a dismissal guaranteed or could a County Attorney simply agree to amend a case to a non-moving violation (improper equipment?) for participation?
- Is a case dismissed or resolved upon referral to the program or continued until completion of the program?
- What is the enforcement mechanism of the \$25 clerk's fee? The fee is mandatory, but the program is not enforced by the court making contempt seemingly unavailable. Would a County Attorney expel a participant for not paying a fee to the clerk?
- Whatever the program is, can a person fail? In other words, could a defendant end up paying the County Attorney's program fee and still end up facing the charges in court? Is "failure" determined by the County Attorney or the Court?

**3. House Concurrent Resolution 129** creates the Unified Juvenile Code Task Force to review the juvenile laws to remove "ambiguities and inconsistencies in order to provide the Commonwealth's children with the care and treatment needed." The Task Force consists of:

- Chair of the Senate Judiciary Committee or designee - Senator Katie Stine, Co-Chair
- Chair of the House Judiciary Committee or designee - Representative John Tilley, Co-Chair
- District Court or Family Court Judge - Judge Lisa Jones, Daviess District Court
- Director of AOC or designee - Justice Mary Noble, Kentucky Supreme Court
- Current or former County Attorney - Robert Neace, Boone County Attorney
- Current or former public defender - Pete Schuler, Jefferson Metro Public Defender's Office
- Commissioner of Department of Juvenile Justice - Hasan Davis
- Commissioner of Department of Community Based Services - Teresa James
- Superintendent from a local board of education - Steve Trimble, Johnson County Schools
- County Judge/Executive - Harry Berry, Hardin County Judge Executive
- Provider of community based treatment services for children - Pamela Priddy, Executive Director of Kentucky NECCO

Under the resolution, the Task Force has been asked to provide recommendations in the following areas: a) The use of validated risk and needs assessments; b) Alternatives to incarceration; c) The use of community resources, education, and rehabilitation programs for victims and defendants; d) Reinvestment of savings from the reduction of use of detention and placement facilities into community-based treatment programs; e) Establishing means of protection and treatment for special needs children; f) The feasibility of establishing an age of criminal responsibility; g) Whether or not to eliminate status offenses or modify how status offenses are handled and status offenders are treated; h) An understanding of issues relating to children exposed to domestic violence; i) A plan for improved coordination of services to children exposed to and affected by domestic violence; and j) Such other recommendations as may be needed and desirable.

The Task Force will begin work in July and is to issue a report with proposed changes to the Juvenile Code no later than January 7, 2013.

**4. House Bill 485** - Changes all references to "mental retardation" or "mentally retarded" in the Kentucky Revised Statutes to "intellectual disability" or "individual with an intellectual disability." The bill specifically states that the new terms "shall be understood to have the exact meaning as the terms that they replace." Still, to the extent that words matter, criminal law practitioners should be aware that the following changes have been made.

- KRS 197.010, KRS 197.045, and KRS 197.410 - The requirement of completion of the Sexual Offender Treatment Program prior to the parole of an "eligible sexual offender" excludes a person with an *intellectual disability*.
- KRS 504.020 - The criminal responsibility statute now says a person is not responsible for criminal conduct if, as a result of *intellectual disability*, he lacks substantial capacity to appreciate criminality of the conduct or to conform his conduct to law.
- KRS 510.020 - An individual with an *intellectual disability* is incapable of consent to a sexual act.
- KRS 532.025 - At a trial in which the death penalty may be authorized, it is a statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct was impaired as a result of an *intellectual disability*.
- KRS 532.130, KRS 532.135, and KRS 532.140 - No offender who is determined to be an offender with a *serious intellectual disability* shall be subject to execution.
- KRS 635.505 - "Juvenile sexual offender" definition does not include an *individual with an intellectual disability*, which is defined as a juvenile with an IQ of 70 or below (which is the definition of "serious intellectual disability" in KRS 532.130, dealing with capital sentencing).

### 5. Senate Bill 3 - Pseudoephedrine Bill

Senate Bill 3 reduces the amount of pseudoephedrine that can be acquired without a prescription to 7.2 grams (from 9 grams) within a 30-day period or 24 grams within any 1-year period. Any person convicted of any offense relating to methamphetamine or anhydrous ammonia may not possess or attempt to possess pseudoephedrine until 5 years after completion of sentence. Persons convicted prior to July 12, 2012 may possess pseudoephedrine with a prescription. Unlawful possession of pseudoephedrine would (apparently) be a Class B misdemeanor. No specific sanction is written into the statute so the catch-all provision of KRS 218A.993 would apply.

**6. Senate Bill 58** creates in KRS 431.005 and 431.015 an exception to the general rule that persons accused of misdemeanors should be given a citation rather than

arrested for persons accused of fourth-degree assault occurring in an emergency room. The exception allowing an arrest is specifically limited to only allegations of fourth-degree assault occurring in an emergency room. Future efforts to expand this exception to other crimes and other locations can be expected.

**7. House Bill 563** created the new crime of Fraudulent Firearm Transaction. It will now be a Class D Felony for a prospective buyer to provide false information to a gun seller with intent to deceive the seller as to the legality of the firearm sale. While this reads generically like a statute designed to catch illegal buyers providing false information that would make a sale appear to be legal, the intent is actually the opposite. In response to undercover investigations of gun sales conducted by Mayor Bloomberg of New York (that uncovered illegal sales around the country), the National Rifle Association proposed HB 563 to prohibit legal buyers from giving false information that, if true, would make the intended purchase illegal. In other words, the bill is intended to quash sting operations that might reveal gun dealers' willingness to engage in an illegal gun sale.

**8. House Bill 484** provided an exemption from the prohibition of carrying a concealed deadly weapon for persons who have a weapon on their own property or, with permission, on the property of a family member, or on the real property of a business of which he or she is the sole proprietor.

**9. House Bill 519** made a number of changes to statutes intended to protect children from abuse. "Person in a position of authority or special trust" is added to the list of persons whose actions could lead to a child being "abused or neglected," meaning that mandatory requirements for reporting abused or neglected children have been expanded. If a person 21 years of age or older commits or allows to be committed an act of sexual abuse, exploitation, or prostitution upon a child less than 16 years old, the child is considered "abused or neglected," again leading to a mandatory reporting requirement for anyone who becomes aware. The age of a victim of a sexual offense by a person in a position of authority or special trust is raised to 18 from 16. The relationships that could lead to an incest charge is expanded to include aunts and uncles, and step-grandparents and step-grandchildren.

**10. House Bill 390** was generally referred to as "The Metals Bill." It puts limitations on the trade of restricted metals and requires registration of secondary metal recyclers. Restricted metals include evaporation or condensation coils made from copper or aluminum, along with other metal items frequently stolen (man-hole covers, guard rails, street signs, railroad equipment, beer kegs, etc.).

The bill also creates the crime of unlawful acts relating to acquiring metals, which is committed when a person intentionally and without permission cuts or injures the personal or real property of another for the purpose of obtaining metal in any amount. Unlawful acts relating to acquiring metals is a Class B misdemeanor if the injury to the property or the repairs necessary to return the property to its condition is less than \$3,000. If the damage is \$3,000 or more, the crime is a Class D felony, with a fine of up to \$10,000 or double the gain from the offense, whichever is greater.

**11. Senate Bill 32** established the Kentucky Blue Alert System, a statewide notification system to be used when an officer has been killed or seriously wounded, or is missing, and an identified offender is being sought in connection with the incident. This could lead to traffic stops or searches by officers trying to investigate the Blue Alert. It could also lead to emotional confrontations by officers who encounter the suspect after the Blue Alert warning.

**12. House Bill 396** provided for an expeditious Master Commissioner sale of vacant and abandoned property, but it also has a criminal law aspect. KRS 517.060 is expanded to include actions taken with intent to lower the value of a secured interest in the criminal offense of defrauding secured creditors. At the same time, the thresholds have been amended to be consistent with the theft statutes. It is important to note that the value used to determine the level of offense is the value of the property, not the damage or devaluing that has occurred. If the property is worth under \$500, the offense is a Class A misdemeanor; \$500 or over but under \$10,000, the offense is a Class D felony; and \$10,000 or over, the offense is a Class C felony.

### **13. House Bill 1 (Special Session) - Pill Mill Bill**

House Bill 1 mostly related to licensing of pain management facilities and prerequisites for prescribing Schedule II or Schedule III (containing hydrocodone) controlled substances. Changes relating to the KASPER system are most relevant to criminal law practitioners. Under HB 1, the KASPER report remains under the Cabinet for Health and Family Services (not the Attorney General's office, as originally proposed), but authorized disclosure of KASPER has been expanded to include Commonwealth's Attorneys and assistants, county attorneys and assistants, and employees of the Inspector General of the Cabinet for Health and Family

Services. Authorization is still limited to "bona fide specific investigation[s] involving a designated person." Attempts to expand this to authorize general investigations were defeated. The penalty for intentional disclosure of confidential KASPER data is reduced from a felony to a misdemeanor (even for repeated violations).

## What Did Not Pass?

**1. DNA Testing Bill (House Bill 178)** - Kentucky failed once again to pass an expansion of DNA testing to include inmates serving lengthy prison sentences who may be innocent of the crimes for which they are serving time. House Bill 178, sponsored by Representative Johnny Bell (Glasgow), would have allowed defendants convicted of A or B felonies or violent felonies to have access to DNA testing if all of the following conditions are met: 1) evidence exists which has not been tested and which could be tested, 2) testing of the evidence, if favorable to the defendant, would create a probability of innocence, and 3) the defendant is still serving time for the offense. In response to concerns about the volume of frivolous requests if the bill passed, DPA agreed to serve as a gateway for claims, reviewing all applications and filing a motion in support if the claims had merit. Claims that did not have merit, and for which a defendant could not pay the costs of testing, would be dismissed and require no response from a prosecutor. Nevertheless, despite passing the House Judiciary Committee unanimously, House Bill 178 died without a vote on the House floor.



Rep. Johnny Bell  
D - Glasgow

**2. Restoration of Voting Rights** for Some Convicted Felons (House Bill 70) - Kentucky remains one of only four states that prohibits all ex-felons from voting. House Bill 70 would have allowed Kentucky citizens to vote on a change to Section 145 of the Kentucky Constitution to provide for automatic restoration of the right to vote for most felons upon completion of their sentence, including any period of probation or parole.

**3. Clear and Convincing Evidence Standard for Pretrial Release Decisions (House Bill 296)** - House Bill 463 greatly increased pretrial bond litigation, but Kentucky's bond statutes do not include a standard of review for bond decisions. This has resulted in inconsistent appellate review of bonds around the state. Under the U.S. Supreme Court case of *U.S. v. Salerno*, 481 U.S. 739 (1987), the standard of proof for reviewing pretrial bond decisions under the Eighth Amendment was that reasons for continued detention must be proven by clear and convincing evidence. House Bill 296 would have simply written into Kentucky statutory law what already exists in federal constitutional law.

**4. ABA Assessment Task Force (House Concurrent Resolution 173)** - In December 2011, assessment team commissioned by the American Bar Association and consisting of former Kentucky Supreme Court Justices, legislators, law professors, and bar leaders issued a comprehensive, evidence-based report on the application of the death penalty in Kentucky. The team found that Kentucky's capital punishment system has significant flaws, resulting in wasteful state spending as convictions are overturned and death sentences vacated. HCR 173 would have created a Task Force to develop recommendations implementing changes recommended by the assessment team.

**5. Task Force on the Costs of the Death Penalty (Senate Concurrent Resolution 190)** - SCR 190 would have created a legislative task force to study all costs of the death penalty in Kentucky, including attorney costs (prosecuting and defending), investigation costs, court costs through extended pretrial and trial litigation, costs of capital jury selection, appellate and post-conviction litigation, incarceration costs of persons charged with a capital offense or awaiting execution, and the costs of an execution.

**6. Exclusion of Severely Mentally Ill from Capital Punishment (House Bill 145)** - Individuals who are seriously mentally retarded cannot be executed under Kentucky law. House Bill 145 would have followed the recommendation of the ABA Assessment Team that individuals who are severely mentally ill should likewise be excluded from the Commonwealth's most severe criminal sanction. Severely mentally ill defendant refers to a defendant "who, at the time of the offense, had a severe mental disorder or disability that significantly impaired his or her capacity to appreciate the nature, consequences, or wrongfulness of his or her conduct, exercise rational judgment in relation to his or her conduct, or conform his or her conduct to the requirements of the law." Defendants meeting this definition would still be eligible for enhanced sentences up to and including life without parole, but could not be executed.



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