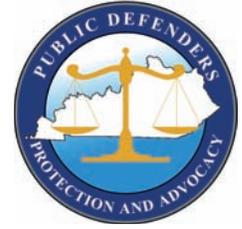


The Advocate



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June 2011

Changes in Criminal Law or Criminal Procedure in HB 463

Damon Preston, Deputy Public Advocate

HB 463 - Statement from the Sponsors

Sen. Tom Jensen (R - London)
Rep. John Tilley (D - Hopkinsville)



Damon Preston
Deputy Public Advocate

Revolutionary in its scope and concept, House Bill 463 will affect every facet of the criminal justice system, reforming counterproductive and expensive practices while protecting public safety and maintaining accountability for lawbreakers. Such grand promise will only materialize, however, if all players in the system are familiar with the new laws and are willing to ensure its full implementation. This article summarizes the various parts of the bill. Future editions of The Advocate will delve more deeply into specific provisions.

Generally, the most significant changes to the law in House Bill 463 can be broken into the following categories:

1. **Expansion of Pretrial Release** - Changes to the law will result in responsible expansion and consistency in the pretrial release of persons accused of crimes. The most significant advancement is the mandatory use of a "research-based, validated assessment tool" to measure a defendant's risk of flight or of posing a risk to the public. In most circumstances, defendants who are low or moderate risk will be released without financial bail being required. For moderate risk defendants, courts will be empowered to impose reasonable non-financial conditions to address any concerns raised by the assessment. Defendants who remain in jail pretrial will be entitled to a daily credit towards their bond, unless they are a flight risk or a risk to others.

Because of these changes, county jails will not bear the expense of housing pretrial defendants who are not a high risk. Further, low or moderate risk defendants who cannot post a financial bond will not serve additional jail time solely due to their poverty and those who are innocent will not serve time at all upon their release. Upon a conviction, a court can impose an appropriate sentence and the guilty person will be held accountable for their criminal activity.

2. **Reform of Criminal Drug Statutes** - The changes to the drug laws were made in recognition of some basic principles:
 - a. Not all trafficking offenses are equal,
 - b. Drug possession should be addressed through supervision and treatment, and
 - c. Subsequent offender sentencing enhancements are not appropriate in the drug possession context.

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Over the past decade, Kentucky has had one of the fastest growing prison populations in the country. Since 2000, the inmate population increased 45 percent, compared to 13 percent for the U.S. state

prison system as a whole. This growth has driven the state's corrections spending to \$440 million a year, an increase of over 330% over the last 20 years, despite the fact that the state's serious crime rate has been well below that of the nation and other southern states since the 1960s. It has been clear for some time that Kentucky cannot continue down the path we have taken during the last decade, when the crime rate remained relatively low, but the growth in our prison population far outpaced the national average.

In 2010, Kentucky lawmakers created the Task Force on the Penal Code and Controlled Substances Act to recommend changes we could make to the state's penal code and drug laws that would control the growth in corrections while maintaining public safety. In addition to our membership as co-chairs, the task force members were: Chief Justice John D. Minton, Jr., the Secretary of the Justice and Public Safety Cabinet J. Michael Brown, County Judge/Executive Tommy Turner, Tom Handy, a former prosecutor, and Guthrie True, a former public defender.

As co-chairs of the task force, we maintained an open, bipartisan, inter-branch, data-driven process involving considerable outreach to and participation from stakeholders representing diverse interests in the criminal justice and public safety areas, including judges, prosecutors, public defenders, victims' advocates, law enforcement officials, local government officials, jailers and others. The task force also received support and technical assistance from the experts at the nationally-respected, nonpartisan Public Safety Performance Project of the Pew Center on the States to develop fiscally sound, data-driven policy recommendations that will give taxpayers a better return on their public safety dollars.

For six months in 2010, we jointly led this bipartisan group of stakeholders from across state and local government on a quest to reduce Kentucky's prison costs and increase the public's return on our



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Trafficking Offenses - Thresholds were established to distinguish between low-level peddlers and higher-level traffickers. Defendants convicted of trafficking in amounts above the new thresholds will face the same range of penalties and enhancements as under the former law. Those convicted of trafficking in lower amounts will face lesser punishments. Separate trafficking incidents within a 90-day period may be aggregated to reach the new thresholds.

Thresholds for selected drugs:

Cocaine - 4 grams

Heroin or Methamphetamine - 2 grams

LSD, PCP, GHB, or Rohypnol - No threshold; any quantity is higher level

Other Schedule I or II Controlled Substances - 10 or more dosage units

Schedule III Controlled Substances - 20 or more dosage units

Drug Possession - Defendants charged with felony drug possession will face a possible penalty of one to three years (reduced from a range of one to five years), but will be subject to Deferred Prosecution or Presumptive Probation for first or second offenses with the legislature deeming Deferred Prosecution as the preferred alternative for first offenses.

Deferred Prosecution - Eligible defendants will be able to have prosecution deferred for up to two years while participating in a probation-like program of supervision and treatment. Upon successful completion, the criminal charge will not only be dismissed, but expunged and sealed as if the charge never existed. If a defendant fails in the deferral program, he/she can then be prosecuted as usual, with all other options remaining available as appropriate. In the event a prosecutor objects to an eligible defendant's participation in the program, the prosecutor must state on the record "substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety."

Presumptive Probation - For defendants who are convicted of a first or second offense of felony drug possession, probation is mandatory unless the sentencing court finds "substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety."

Sentencing Enhancements - Defendants convicted of trafficking drugs will still be subject to all former sentencing enhancements, but many enhancements for other drug offenders have been eliminated.

Persistent Felony Offender (PFO) - Felony drug possession can no longer be enhanced by PFO and a prior felony drug

possession conviction cannot be used as a predicate for later PFO enhancements unless the defendant has been convicted of a different felony since the drug possession conviction.

Subsequent Offender Enhancements - Raising the penalty for second or subsequent drug offenses have been eliminated from most non-trafficking statutes.

- Community Supervision Changes** - Community supervision encompasses probation, parole, and post-incarceration supervision. Under all three programs, a research-based validated Risk and Needs Assessment will be used to determine supervision/treatment needs and progress on an individualized case plan developed for each supervised person. When a supervised person demonstrates prolonged compliance and meets other conditions, he/she may be removed from active supervision. In the event of violations, a system of graduated sanctions will be developed to hold offenders accountable without court proceedings or Parole Board hearings being required for many technical violations. Revocation and re-incarceration for failure to abide by conditions of supervision is only authorized "when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community."
- Re-entry or Post-Incarceration Supervision** - Almost every person who is incarcerated in prison will face a period of supervision upon their release. For sex offenders, the five-year period previously conditionally discharged now is reestablished as a period of supervision under the authority of the Parole Board. For certain "dangerous" offenders (those convicted of an A felony or capital offense, ineligible for parole, or who have a maximum security classification), an additional one-year period of supervision will be added to the end of their sentence. For everyone else, release on parole will be mandatory when a prisoner has 6 months remaining on his/her sentence unless the total sentence is 2 years or less or the person has less than 6 months to serve after final sentencing or recommitment after a violation of supervision.
- Arrest Powers** - With limited exceptions, law enforcement officers must issue citations for misdemeanors, even when committed in the officer's presence.
- Nonpayment of Fines** - Defendants found guilty of non-payment of fines may be sentenced to jail for nonpayment or nonappearance in court to address nonpayment, but may satisfy the unpaid fine at a rate of \$50 per day (or \$100 per day if working in community service while incarcerated).

Many other provisions of HB 463 make changes that fall outside these general categories. The full text of the bill and other resources to assist lawyers, judges, and others in understanding and implementing the bill are available at <http://theadvocate.posteros.com/tag/hb463>.

For pending cases involving offenses committed prior to June 8, 2011, defendants can "opt in" to most provisions of the new law under KRS 446.110, which states, in part: "...If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." For information on the requirements for a defendant to take advantage of a change in law, see *Commonwealth v. Phon*, 17 S.W.3d 106 (Ky. 2000).

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corrections investment by reducing recidivism and incarceration rates. The task force conducted an extensive review of Kentucky's corrections data to identify what was driving increases in the state's prison population and costs, and the task force crafted recommendations for legislative reform based on that data.

The Task Force identified four key drivers of Kentucky's prison growth:

An 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, and drug arrests increased 70 percent.

A 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.

During the 2011 Regular Session of the General Assembly, we introduced identical bills in both the Senate and the House of Representatives. These bills incorporated the recommendations of the Task Force, as well as recommendations from other stakeholders. Now, as Kentucky works to implement those changes with the passage of House Bill 463 signed into law on March 3, those six months of work are about to pay off.

The provisions in House Bill 463 focus on:

Strengthening probation and parole by basing key decisions on the risk posed by offenders, linking offenders to appropriate community resources, and improving parole and probation supervision.

Modernizing drug laws by distinguishing serious drug trafficking from peddling to support an addiction by establishing a proportionate scale of penalties based on quantity of drugs sold and by providing deferred prosecution, presumptive probation, and reduced prison time for low-risk, non-violent drug offenders who possess drugs and reinvesting related savings in increasing drug treatment for those offenders who need it.

Supporting and restoring victims by improving restitution and creating web-based tools to provide key information on offenders.

Improving government performance with better ways to measure and encourage a reduction in recidivism and criminal behavior.

The reforms in House Bill 463 are expected to bring a gross savings of \$422 million over 10 years by reducing the state's burgeoning prison population. Net savings of \$218 million will likely accrue over 10 years, with \$204 million to be reinvested in stronger probation and parole programs, expanded drug treatments and the addition of more pretrial services. Twenty-five percent of savings unrelated to changes in the drug laws will be put into a new local corrections assistance fund to help local jails, garnering full support from our counties.

Without the work of the Task Force on the Penal Code and Controlled Substances Act, the 2011 General Assembly would not have been able to pass the major criminal justice reforms found in House Bill 463 as quickly as we did. Changes to the penal code would likely have continued to be made in a piecemeal fashion. By including reauthorization of the task force as a provision of House Bill 463, lawmakers have ensured future deliberations without delay and with the best possible outcome for Kentucky.

Changes similar to those made in House Bill 463 have been implemented in other states, including Texas, Kansas and South Carolina, with much success. These states have seen a drop in both their crime rate and corrections costs. There is no reason to believe, based on the evidence, that Kentucky will not enjoy similar success under the most far-reaching criminal justice reforms Kentucky has seen in generations.

House Bill 463 is the result of nearly every major group affected by the changes in the law coming together to create something better. Kentucky will be better off because of its passage.



Governor Steve Beshear signs HB 463 into law.

Pictured from left to right: Robert Stivers, Senate Majority Leader; Chief Justice John D. Minton, Jr., KY Supreme Court; Sec. J. Michael Brown, Justice and Public Safety Cabinet; Tommy Turner, LaRue County Judge/Executive; Greg Stumbo, Speaker of the House; J. Guthrie True, defense attorney; Governor Steve Beshear; Representative John Tilley, Co-Chair; and Senator Tom Jensen, Co-Chair.



Chief Justice John D. Minton Jr. at the HB 463 signing ceremony.

Pictured from left to right: Sec. J. Michael Brown, Justice and Public Safety Cabinet; Greg Stumbo, Speaker of the House; Chief Justice John D. Minton, Jr., KY Supreme Court; Senator Tom Jensen, Co-Chair; and Senator David L. Williams, Senate President.



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