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2013 Legislative Update

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Despite being a "short session," the 2013 General Assembly saw the introduction of 673 bills and passage of 132. Many of these new laws will directly impact criminal defendants and the criminal justice system at large. In this issue of *The Advocate*, we will explore the changes to Kentucky Law that all defenders should know. The effective date of legislation was June 25, 2013 unless the bill had an emergency clause. HB 8, the synthetic drug bill, was effective March 19, 2013.

Bill Allowing Post-Conviction DNA Tests Passes!!

In 2013, consistent with prior sessions, the chances of a bill becoming law was less than 1 out of 5. Fortunately, this year, thanks to the tireless efforts of Rep. Johnny Bell (D – Glasgow) and Sen. Jon Schickel (R – Union), House Bill 41 was one of the bills that made it across the finish line and was signed by Governor Beshear. HB 41 addressed DPA's top legislative priority, Post-Conviction DNA Testing, and removed Kentucky from the very short list of states that limited post-conviction testing to capital cases only.

House Bill 41 amends KRS 422.285 to expand the availability of DNA testing to all who are convicted of Capital, Class A, Class B, or Violent Offenses, but does not apply if a defendant was convicted only of offenses in KRS Chapter 218A (*i.e.*, drug offenses). While this greatly expands the potential applicants for testing, the bill contained provisions that will prevent any potential "floodgates."

First, when a qualifying person makes a motion for DNA testing, the court's first and only step will be to appoint DPA to act in a gatekeeper capacity, investigating the merits of the application. Thus, if any "floodgates" occur, it will be DPA, not the courts or prosecutors, that will be under water. Only if and when DPA determines that the application meets the standard in KRS 31.110(2)(c) - that the action is one "that a reasonable person with adequate means would be willing to bring at his or her own expense" – does the motion proceed for a prosecutor's response and a hearing.

Recent history supports DPA's ability to serve this gatekeeper function and protect the courts from frivolous applications. DPA already applies the KRS 31.110(2)(c) standard in post-conviction cases and regularly withdraws from cases that do not meet the standard, so this responsibility is not new to the Department. In the DNA testing context, the DPA Kentucky Innocence Project has investigated thousands of cases under a federal grant and has requested testing in less than 1% of those cases.

When the Department determines that a case does have merit and should proceed, testing is still far from automatic. Testing is only authorized if all of the following are true:

(a) A reasonable probability exists that the petitioner would not have been convicted if the requested test had been conducted and exculpatory results were obtained (Testing is permitted, but not required, if a lower standard of a "more favorable" verdict or the production of exculpatory evidence is met.);

(b) The evidence still exists and can be tested;

(c) The evidence has not been previously tested in the manner requested;

(d) The petitioner was convicted after a trial or the entry of an *Alford* plea;

(e) The testing is not sought for "touch DNA" resulting from casual or limited contact; and

(f) The petitioner is still incarcerated or on supervision, monitoring, or registration for the offense to which the DNA relates.

While the limitations and conditions of KRS 422.285 make it available to only a small subset of the correctional population, the changes brought about by HB 41 mean that a prisoner with a legitimate innocence claim will finally have a vehicle by which he or she could prove that they have served time for a crime they did not commit and demonstrate that the real perpetrator is still at large. Passage of HB 41 is a victory for justice and for public safety in the Commonwealth.

New Laws Relating to Criminal Justice

Human Trafficking Bill

House Bill 3 was landmark legislation sponsored by Rep. Overly (D – Paris) and Rep. Wuchner (R – Burlington) addressing the problem of Human Trafficking in the Commonwealth. From the defender's perspective, the bill's provisions may be broken into three goals: Identifying Victims, Immunity from Charges, and Increased Penalties.

Identifying Victims

Identifying ongoing victims of human trafficking was one of the primary purposes of House Bill 3. KRS 620.030 and 620.040 have been amended to add child trafficking to the mandatory reporting statutes. All persons are now required to report incidents of suspected child trafficking to law enforcement or the Cabinet. Under amendments to KRS 605.030, the Court Designated Worker is now authorized to screen juveniles who may be charged with status or public offenses for indications that they may be victims of human trafficking. The Kentucky State Police are required to create a special Human Trafficking unit to develop strategies for identifying, investigating, and addressing dealing with human trafficking in Kentucky.

Immunity Provisions

Because of the circumstances in which many trafficked children live, victims often end up in court as juvenile defendants, charged with running away from home, missing school, or being beyond the reasonable control of their parent or guardian. House Bill 3 created a new section to be placed in KRS Chapter 630 (Status Offenders) establishing immunity from prosecution for or adjudication of status offenses in any case where "reasonable cause" exists to believe the child is a victim of human trafficking. Once this "reasonable cause" is raised, the immunity remains unless and until it is determined that the child is not a victim. This provides a key protection for juvenile victims of human trafficking and should be explored as a defense in status offense cases.

Because a minor engaged in prostitution is by definition a Victim of Human Trafficking (as defined in KRS 529.010), House Bill 3 prohibits the prosecution of a child under 18 for the offenses of prostitution or loitering for the purpose of prostitution. Instead, a law enforcement officer who arrests a person under 18 for prostitution is required to notify the Cabinet for Health and Family Services, which is required to initiate an investigation for dependency, neglect, or abuse.

Increased Penalties

House Bill 3 increased the penalties for those convicted of a human trafficking offense in two ways. First, anyone convicted now faces a mandatory $10,000 service fee, which will be paid to the "human trafficking victims fund" created in the bill. Second, all property, including real property used in the offense, is subject to forfeiture upon a conviction for human trafficking.

Changes to Violent Offender Statute

KRS 439.3401, the Kentucky Violent Offender statute, has been amended to include Reckless Homicide and Manslaughter 2nd Degree convictions only when the offense involves a peace officer or firefighter killed in the line of duty. Under the new law, convictions for these offenses will fall into one of three categories:

1. Ineligibility for Probation or Parole Until 85% of Sentence is Served – This applies only when a person is convicted of Manslaughter 2nd Degree, the victim was a peace officer or firefighter killed in the line of duty, and the victim was "clearly identifiable" as a peace officer or firefighter.
2. Ineligibility for Probation or Parole Until 50% of Sentence is Served – This applies when a person is convicted of either Reckless Homicide or Manslaughter 2nd and the victim is a peace officer killed in the line of duty.
3. Eligibility for Probation and 20% Eligibility for Parole – All other Reckless Homicide or Manslaughter 2nd Degree Convictions.

This new definition of a Violent Offender raises an important issue. Who decides if the officer was in the line of duty and clearly identifiable? These factor or elements have not been added to the definition of the offense and do not impact the minimum or maximum sentence to be given by a jury. Would a jury make a determination that

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is relevant only to parole eligibility? If not, what authority does the court have to make a finding of fact and what showing is required to establish this fact? Is an evidentiary hearing required?

"Big Ticket" Theft by Unlawful Taking

Penalties have been raised in the Theft by Unlawful Taking statute for high-value thefts. For offenses where the stolen property's value is less than $1,000,000, there are no changes. However, a new Class B felony is created for theft offenses when the value is $1,000,000 or more. For offenses when the value is $10,000,000 or more, the defendant is ineligible for probation or parole until he has served at least 50% of his sentence.

Although these cases will be rare, it is worth noting that these changes have been made only to the Theft by Unlawful Taking statute, KRS 514.030, and do not apply to any other Theft statute (Theft by Deception, Theft of Services, Theft by Failure to Make Required Disposition) or to the Receiving Stolen Property statute.

Collateral Consequences of the 50% Parole Eligibility Tier

In the amendments to the Violent Offender statute and the Theft by Unlawful Taking statute, the General Assembly has created what had not existed before, a 50% tier for parole eligibility. The 2014 session will undoubtedly include proposals to increase the parole eligibility of other non-violent Class C and D felonies to 50%. DPA has long advocated for a wholesale review of sentences and parole eligibility in the penal code. While some offenses may arguably be suitable for higher parole eligibility (and wantonly killing an identifiable police officer would be on that list), some offenses may also be suitable for lower sentences or parole eligibility. By selectively amending the parole eligibility of a couple of statutes rather than conducting or authorizing a comprehensive review, the 2013 General Assembly has created a risk of reversing the reasoned and broad analysis that led to House Bill 463 and reverting to the practice of gradually ratcheting up the prison population that made HB 463 necessary.

Viewing Child Porn

To try to address online streaming child pornography sites that do not require a user to download material, KRS 531.335 has been amended to prohibit the intentional viewing of child porn in addition to the knowing possession of child porn. Under the new language, it is the deliberate, purposeful and voluntary viewing that will run afoul of the law, not inadvertent viewing. This blanket prohibition will not apply to criminal or civil investigations, school investigations, or to the viewing by a minor or the minor's parents. The exemption of minors is important in that "sexting" would not fall under the purview of the new Viewing Child Pornography prohibition, but the exemption is limited to the Viewing and does not apply to the possession of child pornography so some children would still be at risk of being prosecuted for felony possession of child porn because of "sexting" activity if they are caught in possession of material involving a minor.

Various Changes Involving Offenses Against Minors

KRS 500.092 now authorizes the forfeiture of Real Property for violations or attempted violations of Use of a Minor in a Sexual Performance or Promoting a Sexual Performance by a Minor

KRS 500.120 has been amended to give the KSP Commissioner administrative subpoena power to obtain limited internet service records when reasonable cause exists to believe an account used in child exploitation. The Attorney-General already has this power.

KRS 510.155 has been amended to read: "The solicitation of a minor through electronic communication under subsection (1) of this section shall be prima facie evidence of the person's intent to commit the offense ***and the offense is complete at that point without regard to whether the person met or attempted to meet the minor***~~[even if the meeting did not occur]~~." This language could be subject to challenge as it appears to create a strict liability standard for the offense.

Sex Offender Registration

While no broad changes were made to the sex offender registration system, one change may impact many registrants and could lead to future charges. KRS 17.546 has been amended to prohibit the intentional photographing or filming of any minor without the written parental consent of the minor's parent and the consent, if sought, must affirmatively state that the photographer is a sex offender subject to registration requirements. Violations of this statute would be a Class A Misdemeanor. So sex offenders cannot take pictures at their own child's graduation or performance in a school or church play?

Synthetic Drugs – 2013 Version

Every year, the General Assembly passes a bill to update the prohibition on synthetic drugs to include new manufactured products that are not covered by current law. In 2013, the following were added to the list: Tetramethylcyclopropanoylindoles and Adamantoylindoles. Defenders should make sure that the substance possessed by a defendant charged with a synthetic drugs offense was actually covered by the statute in place at the time.

Religious Freedom Bill

Though certainly not intended as a Criminal Law bill, the Religious Freedom bill (House Bill 279) could provide a defense in some criminal cases. It reads, in full (emphasis added): "Government shall not substantially burden a person's freedom of religion. *The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include* indirect burdens such as withholding benefits, *assessing penalties*, or an exclusion from programs or access to facilities."

Clearly, a criminal conviction and sentence is a "burden" under this law. If a defendant is charged with an action that is related to a sincerely held religious belief, then the prosecution must show by clear and convincing evidence that the government has a compelling government interest in punishing that action.

Revocation of Driver's License for Incompetent Defendant

KRS 186.560 has been amended to require the revocation of the driver's license for anyone found incompetent to stand trial under KRS 504. The revocation order remains in place until the defendant is found competent or the criminal case is dismissed.

E-Proof of Insurance

Insurers of drivers in Kentucky may now issue a Proof of Insurance card by electronic means only. Vehicle owners must have either a Proof of Insurance card or an electronic insurance card and a portable electronic device with which to display the card. A warning, though: the new law explicitly provides that a person who uses a mobile device to display their insurance card assumes all liability for damage to the device while in an officer's possession. Fortunately, the bill also includes an explicit limitation on the officer's use of the device to view the insurance card only; he may not view or search any other parts of the device.

Expungement Statutes

The Kentucky State Police must establish a process by which they may certify eligibility for expungement. KRS 431.076 has been amended to provide that cases ending in acquittals or dismissals with prejudice can now be actually expunged (deleted), not just sealed. Also, KRS 431.078 has been amended to provide that traffic infractions do not stand in the way of a person getting a prior violation or misdemeanor expunged after other conditions are met.

Left to right, Ed Monahan, John Schickel, Johnny Bell, Joe Blaney

In 2013 Representative Bell, a criminal defense lawyer, introduced a DNA reform measure for the third straight session, and Senator Schickel, a former jailer and US Marshall, likewise introduced a DNA reform measure saying, if you can get into prison because of DNA you should be able to get out of prison because of DNA. A 2013 Public Advocate Award was presented to Representative Johnny Bell and Senator John Schickel for passage in 2013 of a bill that allows for DNA testing for someone already convicted who has a claim of innocence without limiting it to only those sentenced to death. There are countless ways for bills never to become law. But the hurdles and improbabilities of passage were overcome because of the work of these two legislators. Many cynical observers only see legislators as people of self-interest. To the contrary, there are statesmen who do what is necessary for better, fairer government. We have such statesmen in Representative Johnny Bell and Senator John Schickel. For their work, a Public Advocate's Award was presented by Public Advocate Ed Monahan at the Annual Public Defender Conference in Louisville. Joe Blaney, Director of State Legislative Reform of NY's National Innocence Project, also presented these legislators with recognition for their work to reform the KY DNA post-conviction process.

Expansion of Wireless Access in Kentucky Courthouses

Previously limited to the purchases of "books" for the "county law library," KRS 172.200 has been amended to include "equipment" and "Court of Justice facilities." As of the passage of SB 98 amending the statute, more than $2 million was unused in county law library funds around the state as local communities decline to purchase physical books in the internet age. With the change in wording, we hope this will allow local county law library trustees to authorize the purchase of networking equipment so that members of the Bar can have wireless access within the courthouses of Kentucky. With network access, DPA attorneys would be more efficient and productive, improving services to clients and the courts. As of this spring, a poll of DPA attorneys revealed that only 38 courthouses in the 120 counties had wireless access available to defense attorneys.

Reestablishment of the Unified Juvenile Code Task Force

Senate Concurrent Resolution 35 reinstituted the Juvenile Code Task Force for a second year. The Task Force is established to study a number of issues relating to the juvenile system, including: the use of validated assessments, alternatives to incarceration, availability of community resources, the protection and treatment of children with special needs, establishment of a minimum age of responsibility, rewriting status offense laws, and any other changes the Task Force deems necessary.

Under SCR 35, the Public Advocate recommends one member of the Task Force. In 2012, the Public Advocate recommended Pete Schuler, Chief Juvenile Defender in the Louisville Metro Public Defender's Office, who was a persuasive advocate for juvenile clients. Pete was unable to continue service on the Task Force in 2013. Glenda Edwards, DPA Trial Division Director and longtime juvenile defense attorney, was recommended by the Public Advocate and will represent the Department.

In 2012, DPA representatives testified before the Task Force and submitted detailed recommendations for positive reforms to the juvenile system. This year, DPA will continue to be active in the Task Force's activities and work with allies to take advantage of this opportunity to improve the system for our clients and for the Commonwealth.

2013 Members of the Unified Juvenile Code Task Force

Senator Whitney Westerfield, Co-Chair

Representative John Tilley, Co-Chair

Hasan Davis –Commissioner, Department of Juvenile Justice

Teresa James – Commissioner, Dept. of Community Based Services

Lisa P. Jones – Daviess District Judge

Steve Gold – Henderson County Attorney

Mary C. Noble – Deputy Chief Justice, Kentucky Supreme Court

Pamela Priddy - Executive Director of Kentucky NECCO

Glenda Edwards – Trial Division Director, DPA

John Sivley – L.C.S.W., LifeSkills, Inc.

Bo Matthews – Superintendent, Barren County Schools

Harry L. Berry – Hardin County Judge Executive

Juvenile Matters

Confidentiality

KRS 610.340, the juvenile statute mandating confidentiality in juvenile proceedings, has been amended to allow a "crime victim" to reveal information relating to a juvenile case after an adjudication hearing in the case. This change stems from the controversy in Jefferson County when a juvenile victim of an alleged sexual assault posted on social media comments relating to the juvenile prosecution of her assaulters and was threatened with a contempt of court charge for violating confidentiality.

The new language in the statute follows: ***(11) Nothing in this section shall be construed to prohibit a crime victim from speaking publicly after the adjudication about his or her case on matters within his or her knowledge or on matters disclosed to the victim during any aspect of a juvenile court proceeding.***

While the intent of this new provision is laudable, the actual application is complicated by a number of factors:

1. It only applies to one side of a two-sided controversy. If an alleged victim says something untrue or inflammatory on Twitter, would the Defendant be permitted to respond without violating the confidentiality laws?
2. "Crime victim" is not identified. The victim of a sexual assault may be clear, but in many cases, the victim is less clear. Also, as victims in juvenile cases are often juveniles themselves, are the parents of a victim included in the confidentiality exemption?
3. There is no limitation on the information that may be disclosed. The broad new language allows disclosure of any "matters disclosed to the victim during any aspect of a juvenile court proceeding." In many cases, a victim will learn private medical, psychological, or social information about a juvenile defendant simply by being involved in case preparation or at an adjudication hearing. All this information may now be disclosed without limitation by the victim.
4. A finding of guilt is not required. While the new language requires that disclosure wait until "after the adjudication," it does not require that the juvenile defendant be found guilty. This means that an alleged victim who thought a juvenile defendant was wrongfully acquitted can publicly reveal his/her side of the case and denigrate the juvenile proceedings, unfairly revealing confidential information about a juvenile who was found not guilty.

Compulsory Attendance

Beginning 2015-16 school year, local boards may adopt a policy to require children to remain in school until 18. Once 55% of all school districts in Kentucky adopt such a policy, the statewide dropout age rises to 18 four years later. While this does not directly impact the criminal law, it is predictable that this change will result in more juvenile status cases for Truancy or Beyond Control of School as students aged 16 and 17 who would have dropped out are now legally required to maintain attendance and good behavior.

Retention of School Recordings

KRS 160.705, dealing with educational records, has been amended to required school officials to retain a complete unaltered master copy of any digital, video, or audio recordings of school activities for 1 week under all circumstances and 1 month if any injury to students or employees is alleged to be included in the activities recorded. This should allow or better evidence when criminal offenses are alleged to have been committed at school, but defenders or family members must act quickly to secure the evidence before the mandatory retention period passes.

Proposals That Did Not Pass

DPA-Supported Proposals That Did Not Pass in 2013

- Restoration of Voting Rights to Persons Who Have Completed Service of Time for Felony offenses
- Death Penalty Reforms, based on the thorough and specific recommendations by the ABA Assessment Team
- Expungement of Class D felonies in some circumstances
- Amendment of Many Misdemeanors to Violations so Court dockets and DPA caseloads are eased
- Presumptive Parole for Offenders who are deemed Low Risk after an evidence-based assessment
- Restrictions on the use of Location Tracking technology (cell phone information) without a warrant

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