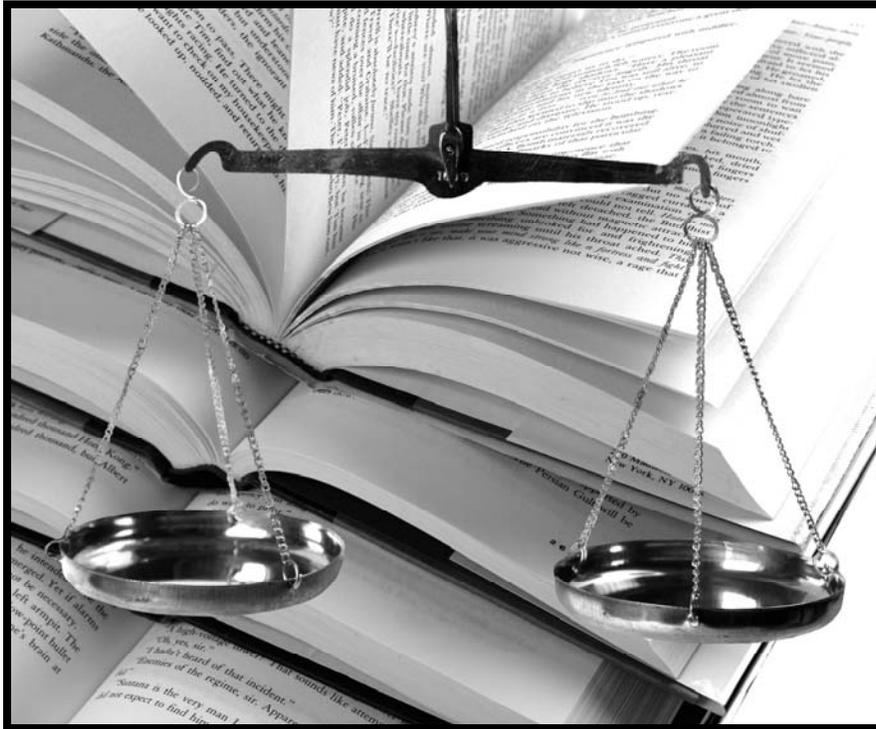


# Report of the Subcommittee on the Penal Code and Controlled Substances Act



## Project Staff

Norman W. Lawson, Jr.  
Ray DeBolt  
Joanna Decker  
Jonathan Grate  
Christy May

Research Report No. 364

November 2009



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## **Research Report No. 364**

### **Legislative Research Commission**

Frankfort, Kentucky  
[lrc.ky.gov](http://lrc.ky.gov)

Accepted by the Interim Joint Committee on Judiciary November 6, 2009

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**MEMORANDUM**

**TO:**                      Legislative Research Commission

**FROM:**                Norman W. Lawson, Jr.  
                               Committee Staff Administrator  
                               Interim Joint Committee on Judiciary

**DATE:**                November 10, 2009

**SUBJECT:**           Transmittal of Subcommittee Report

As required by Senate Joint Resolution 12 from the 2009 Regular Session, the report of the Subcommittee on the Penal Code and Controlled Substances Act is hereby transmitted to the Legislative Research Commission.

The report was accepted by the Interim Joint Committee on Judiciary at its regular meeting on November 6, 2009, and the committee voted to transmit the report to the Legislative Research Commission.

NWL/rc

Attachment



## Foreword

The Subcommittee on the Penal Code and Controlled Substances Act of the Interim Joint Committee on Judiciary was created by 2009 Senate Joint Resolution 12 to study and report on recommended changes to the Kentucky Penal Code and the Controlled Substances Act. The subcommittee was reauthorized from the original 2008 Senate Joint Resolution 80.

The subcommittee held five meetings and heard from Commonwealth's attorneys, county attorneys, public advocates, judges, a University of Kentucky law professor, the Chair of the Kansas House Judiciary Committee, representatives of the Public Safety Performance Project of the PEW Charitable Trusts, and private citizens.

Staff would like to acknowledge the valuable assistance of those who provided testimony and expert insight.

Robert Sherman  
Director

Legislative Research Commission  
Frankfort, Kentucky  
November 6, 2009



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

## **Introduction**

The Subcommittee on the Penal Code and Controlled Substances Act of the Interim Joint Committee on Judiciary was created by 2009 Senate Joint Resolution 12 to study and report on recommended changes to the Kentucky Penal Code and the Controlled Substances Act. The subcommittee was reauthorized from the original 2008 Senate Joint Resolution 80.

The subcommittee activities were guided in part by language added to 2008 House Bill 406, the state budget bill, which contained the following provisions:

- reduced the time a Class D felon had to serve in prison prior to parole from the 20 percent required by administrative regulation to 15 percent or 2 months, whichever is greater;
- increased the amount of “good time” credit a prisoner could earn to 90 days for completion of educational or drug treatment programs;
- increased the amount of “meritorious good time” up to 7 days per month with an additional 7 days of credit for exceptional service;
- granted “street time” credit for time spent on parole as if it had been served in prison if the person returned to prison for a technical parole violation;
- permitted an inmate who had been released on parole to be discharged from parole at the minimum expiration date of the sentence; and
- permitted the Department of Corrections to release offenders from prison on home incarceration when they are 180 days away from their normal release date.

These actions of the General Assembly resulted in litigation filed by the Attorney General and by Commonwealth’s attorneys. The cases were resolved in favor of the General Assembly.

Activity in 2008 by the subcommittee and the interim joint committee resulted in legislation passed during the 2009 Regular Session of the General Assembly:

- HB 369 increased the misdemeanor/felony theft limit from \$300 to \$500 and increased the penalty for theft of more than \$10,000 from a Class D felony to a Class C felony.
- HB 372 statutorily implemented the 15 percent service of sentence or 2 months service of sentence for nonviolent Class D offenders, whichever is greater, prior to parole eligibility; amended KRS 439.344 to grant “street time” credit to nonviolent nonsexual offenders; amended KRS 439.354 to require a person who had been released on parole for a nonviolent nonsexual offense to be released from parole on the minimum expiration date for the prisoner’s sentence and to require a person who is a violent offender or sexual offender to be released from parole upon reaching the maximum expiration date from prison; and amended KRS 532.050 relating to presentence investigation reports to permit a defendant convicted in a criminal case to waive preparation of a presentence investigation report.

## 2009 Subcommittee Meetings

At the first meeting in June the subcommittee was divided into groups to study and report on six topics.

Group 1—Basic Philosophy of the Penal Code

Group 2—Bail/Pretrial Release/Speedy Trial

Group 3—Alternatives to Incarceration

Group 4—Reentry of Offenders Into Society

Group 5—Persistent Felony Offender Statutes

Group 6—Controlled Substances Act

The members of the subcommittee were asked to study various proposals that have been presented to the subcommittee and to make recommendations. These proposals are discussed in the next section.

## Study Groups: Topics for Consideration

### Group 1—Basic Philosophy of the Penal Code

#### Attributes/Problems

The Kentucky Penal Code was adopted to replace a series of old statutes with improved elements for crimes and a penalty structure based on seriousness of the offense. Some of the old statutes had no elements but just penalties, did not have proportionality of penalties, and contained numerous specific statutes. In the Penal Code, property offenses and minor assaults had lesser penalties; offenses that caused death, serious physical injury, or in which weapons were used received the higher felony penalties. Former specific statutes were replaced by general ones that covered many of the former specific statutes. The problem is that the Penal Code is now as old as the former statutes that it replaced, proportionality has been lost as penalties have been increased, and numerous new specific statutes frequently known as “custom crimes” have been enacted that sometimes are in conflict with existing statutes or existing penalties. For example, soliciting a child for sexual activity by electronic means or over the Internet brings a higher penalty than doing so in person.

#### Assignments

- Should a thorough examination of these new crimes be conducted to assess whether they are needed or whether an existing or amended general statute will suffice and return balance to the code’s penalties?
- In connection with the above listed assignment, should a thorough examination of enhancements to existing crimes be conducted to assess whether they are needed, how they fit in with the existing penalty scheme, or whether they are disproportionate?

- Should an examination of the code be conducted to eliminate obsolete crimes and crimes that are not used or that see little use? The Department of Kentucky State Police has been asked to provide arrest data to evaluate this situation.
- Many states have five or more felony classifications. It has been suggested that a Class E felony could be created for nonviolent and nonsexual Class D felony offenses, such as thefts. At present, a person who steals \$500 is eligible for 1 to 5 years in prison at a cost of \$20,000 per year for incarceration. Is placing a person who stole \$500 in prison even for 1 year at \$20,000 or 5 years at \$100,000 a wise use of resources? Is placing a person who stole \$10,000 in prison for a minimum of 5 years at a cost of \$100,000 or for a maximum of 10 years at \$200,000 a wise use of resources? The Class E felony proposals in past years would have called for a 1- to 3-year sentence for Class E felonies and a 3- to 5-year sentence for Class D felonies. Should Class E felonies be created, and which offenses should be identified as Class E felonies while retaining other Class D felonies under the new Class D felony penalty structure.
- Should the felony theft limit be increased, such as to \$1,000 or another amount? Under current law, increasing the felony theft amount would mean that more persons may be convicted of misdemeanor thefts, and the county would have to pay for their incarceration unless alternatives to incarceration are used.
- KRS Chapter 534's methods of imposing fines and responses to the nonpayment of fines are in line with decisions by the Supreme Court of the United States.
- Should the courts be required to use the provisions of the existing law as written so that indigent persons and others are not subject to fines but may be subject to other alternatives than incarceration?
- Should the amount of fines be increased so that the amounts more accurately reflect economic changes since 1974? The felony theft limit has been increased twice, but fines have never been adjusted. Does a \$500 fine really equate to 12 months in jail?
- In connection with the above listed assignment, should the amount of jail time for misdemeanors be reduced, for instance from 90 to 60 or 30 days for a Class B misdemeanor or from 12 months to 6 months or 90 days for a Class A misdemeanor? Such a measure would decrease the costs of incarceration whether paid by a county or by the state.
- Adoption of KRS 439.3401 relating to violent offenses as expanded by the addition of sexual offenses emphasizes that dangerous persons should serve longer times in prison for the protection of the public.
- Placing in KRS 439.3401 a requirement that violent offenders serve 85 percent of their sentences prior to parole eligibility.
- Should offenses that qualify as violent offenses be reassessed to ascertain whether new offenses should be added, existing offenses be retained, or existing offenses be reduced?

- Should the provision be reassessed that allows the service of 85 percent of sentence prior to parole eligibility, and should a different percentage be set?
- Credit and debit card crimes and computer crimes are not currently in the Penal Code but in the old “430” series chapters primarily because the original language and proposed penalties did not match those features in the Penal Code. The debit and credit card crimes were amended in 2009 to bring the felony theft limit and some of the penalties into line with penalties found in the Penal Code.
- It has been suggested that these crimes be moved to the Penal Code. The credit and debit card offenses are basically fraud and theft offenses that could easily be added to the existing theft offenses. Computer crimes could become a new chapter of the Penal Code. In each instance, the Penal Code format would be used for the elements of the offense, and the penalties could be integrated either into an existing offense or integrated into the Penal Code penalty structure in the event that a new statute or chapter is created.
- Should these crimes be moved as is into the Penal Code, or should they, particularly with reference to the credit card and debit card crimes, be fit into the elements of existing theft statutes in KRS Chapter 514 relating to other types of theft?

## **Group 2—Bail/Pretrial Release/Speedy Trial**

### **Attributes/Problems**

Kentucky was the first state to eliminate bail bondsmen and replace them with a statewide court-sanctioned and court-operated pretrial release program. The program was designed to provide release from jail in the least restrictive mode consistent with public safety for persons charged with crimes. Kentucky has also authorized pretrial diversion under statutorily controlled circumstances under the auspices of the Commonwealth’s attorney and the court. Over the years, the number of persons released prior to trial has decreased, and the number of persons remaining in jail until trial has increased, both for felonies and misdemeanors. Overcrowding of the courts and delays by attorneys have created a situation where it is not uncommon for a person charged with a felony to remain in jail for a year. High bail is sometimes used to keep minor offenders in jail until trial. The guarantee of a speedy trial is not being met in some circumstances. When persons are tried, the time they spent in jail prior to trial is credited against their sentences, and some persons are released from incarceration shortly after trial. One of the main costs counties must bear is the pretrial incarceration of prisoners.

### **Assignments**

- Should additions be made to the provisions of many specific statutes or categories of statutes to require the use of a citation rather than physical arrest to reduce the number of persons taken to jail? Such an action would relieve increased caseloads on pretrial release officers and judges, and would relieve the cost to county government that must pay for the jailing of

persons prior to trial. If this option is chosen, specific statutes need to be identified, and no options allowing arrest should be provided.

- Should a speedy trial act similar to that in the federal system be enacted, or should the Court of Justice be encouraged to do this by court rule?
- In some counties, a “rocket docket” is in use where prosecutors and defense attorneys confer early after the incarceration of a defendant, agree on a plea, and agree on a sentence that is then placed before the court on an accelerated docket for adjudication. This program can reduce the cost of pretrial incarceration for counties and can provide for swift punishment for persons pleading guilty. However, the program requires the cooperation of prosecutors, defense attorneys, and the courts for successful operation.
- Should bail provisions be eliminated that allow a court to exceed the amount of bail shown on the uniform schedule of bail?
- Should the courts be encouraged or mandated to release more persons, perhaps ones meeting statutory or court criteria, on their own recognizance?
- Should other techniques be used to ensure a speedy trial?
- Should the state pay counties for the pretrial incarceration of persons charged with a felony? Counties have proposed this on several occasions. The costs may not change but the state not the county would pay the costs.
- Should the state pay counties for the pretrial incarceration of persons charged with a misdemeanor? The costs may not change but the state not the county would pay the costs.

### **Group 3—Alternatives to Incarceration**

#### **Attributes/Problems**

Over the years, the General Assembly has authorized various programs that provide alternatives to incarceration, such as probation, shock probation, conditional discharge, pretrial release, home incarceration and parole. The General Assembly has set mandatory conditions and optional conditions for all of these programs. Conditions include drug and alcohol testing, attending treatment programs, and others deemed necessary by a judge. One of the newer programs that has shown a reduction in recidivism is the drug court program of the Court of Justice. These programs are not available to violent offenders and persistent felony offenders until certain minimum sentences or other conditions have been met.

Problems have arisen in the use of alternatives to incarceration because of public pressure on the courts and the Parole Board to require persons to go to prison rather than be seen as being “soft on crime.” Current statutes permit a court not to use otherwise semimandatory programs where an alternative might depreciate the seriousness of the crime or where the court decides that

incarceration is in the best interest of the convict. Other problems involve money and availability. Alternatives to incarceration, which may not cost as much as incarceration, do have costs associated with them. Programs that may be accessed easily in urban areas may not be available in rural areas. Additionally, persons whose driving privileges have been suspended may not be able to attend the programs because there is no public transportation and they cannot drive.

### **Assignments**

- Should the existing statutes be examined to reduce the number of cases in which judges can thwart the original intent that alternatives to incarceration be used in lieu of incarceration? This could be accomplished by eliminating provisions that permit not using the alternatives where to do so would unduly depreciate the seriousness of the crime or where the person would benefit from incarceration.
- Should it be determined which programs are in most need and how to deliver them in all areas of the state? If so how will these programs be funded?
- Should the use of community corrections programs be increased? The format for such programs is currently in the statutes. Do these statutes need changes? How should these community corrections programs be funded?
- In recent years the number of prisoners placed on parole by the Parole Board has decreased. Should standards for parole be created wherein a prisoner who meets the standards shall be paroled?
- One of the situations adding to the prison population is returning parole violators to prison. Should a set of conditions be created under which “minor” or “technical” violations of parole do not result in reincarceration but result in increased supervision or additional restrictions on the parolee?
- Should new alternatives to incarceration programs be established, such as mental health courts, cold check diversion programs, and other programs designed to target specific criminal behavior and set the parameters of these programs?

### **Group 4—Reentry of Offenders Into Society**

#### **Attributes/Problems**

Current statutes permit a court to order a prisoner to obtain an education while in prison. Kentucky prisons offer GED programs, educational programs, vocational education/prison industries programs, drug treatment, and other targeted programs that may aid a prisoner’s reentry into society. Sex offenders must successfully complete the sex offender treatment program prior to parole or application of good time credit. They cannot be released until expiration of their sentence if they do not complete the program. Under federal law, prison-made

goods cannot be sold in interstate and international commerce unless there is a federally approved prison industries program in place. Currently, all of Kentucky's institutions are not able to offer all programs; and most of the 1,500 prisoners confined in county jails under the Class D felon program that now includes some Class C felons have no educational, treatment, prison industries, or other programs available. At present, Kentucky does not offer a felony expungement program. The only method of removing a felony from one's record is a full pardon by the governor. The so-called restoration of rights is a limited pardon that only restores the right to vote and to hold public office. Numerous statutes limit the employment or licensing of felons thus making it impossible for a convicted felon to enter certain professions or employment.

### **Assignments**

- Should a felony expungement statute be enacted to permit a felon to have his or her record cleared?
- If a felony expungement statute were enacted, to what felonies should it apply? Should there be a time limit prior to application, and what other restrictions should be placed on such a statute?
- If a felony expungement statute were enacted, should it prohibit employers and licensing agencies from using an expunged felony against the former felon? Should sanctions be enacted against those licensing agencies and employers who fail to heed the terms of the expungement?
- How could inmate opportunities be expanded, both in prisons and in jails, for GED, postsecondary education, vocational, substance abuse, and other programs that may enable the released felon to obtain employment or a profession and become a taxpaying citizen? Such programs have been shown to reduce recidivism.
- Should KRS Chapter 335B be completely revised relating to employment and licensing of felons to reduce barriers to felons entering gainful employment?
- Successful implementation of barriers to employment of felons will require examining licensing and employment statutes to limit the use of felonies committed years ago or that do not relate specifically to the employment or profession sought. Should this be done along with changes to KRS Chapter 335B? Changing only KRS Chapter 335B will not impact these other specific statutes. Obtaining employment or a license has been shown to reduce recidivism and turn the offender into a taxpaying citizen.
- Should a federally approved prison industries enhancement program be created wherein inmates perform services and produce products for private industry in a situation that is determined not to undermine existing employment or displace existing workers? The state gains money for the programs by leasing the labor of the prisoners; the prisoners who earn wages contribute to crime victim restitution, and the income is taxed. The prisoner learns a trade that may be of use after release. This reduces recidivism and creates taxpaying citizens.

Unions and other groups fear that prisoners will take work from regular workers and prolong or increase unemployment.

- Prisoners reentering society face many obstacles to successful rehabilitation. They generally do not have jobs, and they may have substance abuse or mental health problems for which they cannot obtain treatment. They may be unable to pay for basic living expenses. Sex offenders face residency restrictions. At present, prisoner attendance is voluntary in existing programs that may aid reentry. In 2008, Congress passed the Second Chance Act to provide funding for prisoner reentry programs. The Act is in the process of being implemented.
- Should a viable and useful prisoner reentry program be implemented that prepares prisoners for active employment, pays for various prisoner expenses on leaving prison, provides employment counseling and other measures that are designed to aid reentry into society, reduces recidivism, and creates taxpaying citizens? The Legislative Research Commission's Program Review and Investigations Committee issued a research report in 2008 on felon reentry programs: *Reentry Programs for Felons Should Be Improved and Outcome Measures Should Be Developed*, Research Report No. 357.

### **Group 5—Persistent Felony Offender Statutes**

#### **Attributes/Problems**

The original Penal Code had a persistent felony offender statute designed to increase penalties for various repeat offenses but required actual incarceration on two occasions for separate felony offenses. Over the years, the requirements for prior incarceration and three felony offenses were dropped, probation was prohibited, and parole was eliminated for a persistent felony offender in the first degree until the offender had served a minimum of 10 years. The rate of incarceration increased significantly.

#### **Assignments**

- Because the present persistent felony offender laws apply to all felony offenses, should these laws be limited to violent offenders as specified in KRS 439.3401?
- Should the use of persistent felony offender laws be limited to offenses in the Penal Code only?
- Should a prosecutor be required to choose whether to use a sentence enhancement or to use the persistent felony offender law but not to use both?
- Should the persistent felony offender law be returned to its original 1974 language that required actual imprisonment?

- Should offenses other than violent offenses specified in KRS 439.3401 be added to a revision of the persistent felony offender statute but not apply the law to all offenses, or apply the law to Capital offenses, Class A felonies, Class B felonies, etc.?

## **Group 6—Controlled Substances Act**

### **Attributes/Problems**

The Controlled Substances Act was initially adopted in 1972 prior to the adoption of the Penal Code. Subsequent to the adoption of the Penal Code, the Controlled Substances Act was amended to use the Penal Code format for elements of offenses. At the same time, the penalty for each offense was placed at the end of each offense rather than the end of the chapter. As the “war on drugs” progressed, penalties for selected offenses such as methamphetamine, cocaine, and others were increased. This resulted in a discontinuity of the penalties for drug offenses that were originally envisioned in the adoption of penalties scaled to the schedule of controlled substance involved.

### **Assignments**

- Should penalties for selected offenses that have been enhanced over the years be eliminated and returned to the earlier format, where penalties related to the schedule of the drug?
- Should the entire penalty structure be revisited to scale penalties in a more organized fashion?
- Should elements be eliminated or added to certain offenses that currently do not have a culpable mental state to provide culpable mental state?
- Should statutes be examined that may adversely affect the elderly and others who take controlled substances, such as statutes that require prescription drugs to be kept in their original containers? Many people put their medications into daily reminder dispensers or into smaller containers for convenience or so that they may be less likely targets of theft.
- Should the elements of various drug offenses be reviewed to identify which statutes may be overly broad or in which the elements may be vague and correct these problems through more precise language?
- Should use of existing enhancements for controlled substance offenses be required? Should use of the persistent felony offender law for controlled substance offenses be eliminated?
- Should existing controlled substances offense enhancements be reexamined to see if they are necessary and effective?

- Should the use of drug court, 2009 SB 4 drug treatment programs, and other alternatives to incarceration that are found in KRS Chapters 532 and 533 be required for controlled substances offenses, and should the scope of these programs be expanded?
- Since many nondrug offenses, such as theft and failure to pay child support, are nonviolent, should substance abuse programs be expanded to include offenses that may be the result of substance abuse because current programs are limited to drug offenses? Violent offenses and sexual offenses could be excluded.

### **Other Subcommittee Meetings**

The subcommittee held five meetings and heard from Commonwealth's attorneys, county attorneys, public advocates, judges, a University of Kentucky law professor, the Chair of the Kansas House Judiciary Committee, representatives of the Public Safety Performance Project of the PEW Charitable Trusts, and private citizens.

The presentation by the Chair of the Kansas House Judiciary Committee included information on how Kansas has successfully approached problems with prison overcrowding and prison costs. In addition, he compared the strategies of containment and risk reduction.

According to chair, containment is highly effective as an immediate strategy; however, it is not future oriented. In addition, it is expensive and not effective in reducing recidivism. For example, the recidivism rate in Kansas is high for offenders. Each year, 36 percent of those admitted to prison are probation revocations and 29 percent are parole revocations. The cost of housing prisoners in Kansas is \$53 million per year (Kinzer).

Alternatively, "risk reduction" is an approach that is effective in reducing recidivism and is a more effective long-term strategy. It focuses on reducing the chances of an offender returning to prison after being released. One of the approaches taken was to create a state grant program to local governments to reduce probation violations by 20 percent. The programs incentivized offender participation through the use of reduced supervision time. The strategies were based on best practices, and continued funding was contingent upon performance. The program was estimated to save \$80 million in projected reductions in the prison population for 2007.

Another action Kansas has taken is to increase the use of alternatives to incarceration for drug offenders in order to reserve prison space for serious, violent offenders. This action has been purported to have saved \$7.4 million in avoided incarceration costs from 2004 to 2008 (Kinzer).

The subcommittee also heard a presentation on the Public Safety Performance Project, part of the PEW Center for the States of the PEW Charitable Trusts. The presenters said that prison growth has not been caused by increased crime; instead, it has been caused by state policy choices. Therefore, better policy choices should be implemented that will reduce crime and preserve funds for other state budget priorities.

The PEW representatives also suggested that states develop strategies to get a “better return on their investment” in public safety. They discussed the ways in which they have assisted other states in developing strategies by analyzing key factors that have driven the increased incarceration rates and by tailoring policies to meet a state’s needs.

The PEW representatives compared Kentucky to the national average on many public safety rankings, which are listed below:

<b>National Average</b>	<b>Kentucky (rank)</b>
1 in 45 adults are on probation or parole	1 in 57 adults are on probation or parole (28 <sup>th</sup> )
1 in 99 adults are incarcerated	1 in 92 adults are incarcerated (16 <sup>th</sup> )
1 in 31 adults are under correctional supervision	1 in 35 adults are under correctional supervision (26 <sup>th</sup> )
Incarceration rate increased by 14 percent from 1997-2007	Incarceration rate increased by 38 percent from 1997-2007
From 1997-2007, the overall crime rate decreased by 24 percent	From 1997-2007, the overall crime rate decreased by 10 percent

Source: Gelb and Horowitz.

They reported that results have shown promise in a sampling of states that have used justice reinvestment programs. From 1997-2007, in Maryland, the incarcerations rate dropped by 2 percent, while the crime rate decreased by 28 percent. In New Jersey, the incarceration rate dropped by 12 percent, while the crime rate decreased by 37 percent. During the same time period, the U.S incarceration rate increased by 14 percent, while the crime rate decreased by 24 percent (Gelb and Horowitz).

They presented the following recommendations:

- Advanced risk assessment tools
- Advanced cognitive-behavioral treatment programs
- Alternatives to incarceration programs
- Evidence-based practices: Require a timetable for adoption of evidence-based practices (75 percent of offenders within 4 years)
- Earned compliance credits for offenders: Move concept of earned time from prison to community (15 days per month off term of supervision)
- Administrative sanctions: Boost the swiftness and certainty of sanctions for violations by providing supervision agencies with greater administrative authority
- Performance incentive funding: Create fiscal incentives for agencies to reduce recidivism/revocation of supervision violators (keep 45 percent of prison savings)
- Performance measurement: Require corrections agencies to track and report rates of recidivism, employment, positive drug test results, and victim restitution collection rates, and make funding contingent upon performance

### Subcommittee Recommendations

1. The subcommittee does not recommend that any specific action be taken based on the information and recommendations by Kansas and the PEW Public Safety Performance Project.
2. The subcommittee commends the forward thinking and effective programs instituted by the Court of Justice which include the Drug Court, Mental Health Court, pretrial diversion, and other programs. Furthermore, the subcommittee recognizes that under the separation of powers doctrine contained in the Constitution of Kentucky, the General Assembly and the Court of Justice must cooperate. Therefore, the subcommittee recommends to the Court of Justice the following items for consideration:
  - a. Study the imposition of fines, in light of current financial conditions, that may impede the ability of a defendant to pay child support and restitution. Instead of incarceration, the courts should consider community corrections alternatives.
  - b. The subcommittee believes that certain actions should be taken by courts to reduce incarceration costs for counties, relieve jail overcrowding, and enable those charged with crimes to remain employed. First, courts should increase the number of persons granted pretrial release without financial conditions. However, public safety should be ensured by requiring supervision terms such as electronic monitoring, reporting, drug testing, and other accountability measures. When bail is imposed for a nonviolent misdemeanor, bail should not exceed the amount of the fine and court costs.
  - c. Increase the use of pretrial diversion programs and alternatives to incarceration such as community corrections programs, Drug Court, Mental Health Court, and Teen Court. These programs have played a role reducing recidivism, reducing corrections costs, and reducing crime.
  - d. Implement procedures recommended by Commonwealth's attorneys and county attorneys to expand the use of current court programs in a few courts that provide for a speedy trial for incarcerated persons who are charged with felony offenses. The defense bar should be encouraged to cooperate in these programs. If these actions are followed, the subcommittee believes it will substantially alleviate the costs counties that bear for pretrial incarceration.
  - e. Continue the cooperative effort among the Court of Justice, courts, and the General Assembly to improve the criminal justice system, reduce costs, reduce crime, and improve outcomes for criminal defendants and the public. The subcommittee also recommends that the General Assembly continue a creative and meaningful dialogue with the Court of Justice to reinvest savings from actions by the courts that reduce corrections costs into court programs and court costs.
3. The subcommittee recognizes that the executive branch, particularly the Justice and Public Safety Cabinet, has been given the power to promulgate administrative regulations. The

subcommittee recognizes that statutes do not necessarily contain the flexibility to adapt to changing conditions and needs. However, these changes can be addressed through the creative use of administrative regulations. Therefore, the subcommittee recommends the following potential solutions for the secretary of the Justice and Public Safety Cabinet to address Kentucky's criminal justice problems:

- a. The Justice and Public Safety Cabinet and the Parole Board should promulgate administrative regulations containing a mechanism increasing the likelihood that the inmate shall be paroled. The likelihood is contingent upon the inmate meeting certain criteria.
  - b. Given that 28 percent of Kentucky's prison population consists of parole violators, the Parole Board should design a progressive sanctions program to ensure that measures other than immediate reincarceration are taken to address probation and parole violations. Programs in other states have successfully used sanctions such as intensified supervision, electronic monitoring, drug testing, day reporting, counseling, and community corrections resources to address minor or technical violations. These actions can be taken while ensuring that immediate reincarceration is reserved for those who commit new crimes or serious violations.
  - c. A counseling model for probation and parole officers should be adopted that uses community resources and other alternatives to incarceration. Emphasis should be placed on providing high-risk probationers and parolees counseling and supervision programs. These actions have been taken in other states to reduce reincarceration rates and decrease crime while saving money on incarceration costs.
  - d. The number of counseling, educational, and treatment programs should be increased for prisoners confined in county jails. Community and other resources should be used to provide these needed programs. To increase the incentive for participation, those in county jails should be awarded good time, educational, and meritorious good time opportunities.
  - e. The Justice and Public Safety Cabinet and the Parole Board should continue working with the General Assembly to implement these programs and to promote the successful reintegration of prisoners into society as productive citizens, not as criminals. Also, the cabinet should work with the General Assembly to reduce incarceration costs so that funds will be available for programs that have been shown to save money and reduce recidivism. This can be partially achieved through promulgation of administrative regulations. In addition, statutory changes should be recommended to the General Assembly and to the Interim Joint Committee on Judiciary.
4. The subcommittee recommends that the General Assembly form a Criminal Justice Task Force consisting of five members in order to build on the foundation laid by the subcommittee. The task force should work with the executive branch, the judicial branch, and outside organizations such as the PEW Public Safety Project, the Council of State

Governments Justice Center, universities, and organizations to provide substantive recommendations for justice reinvestment programs suitable for use in Kentucky.

- a. The subcommittee recommends that the task force consist of the chair of the Senate Judiciary Committee, the chair of the House Judiciary Committee, the chief justice of the Supreme Court of Kentucky or his or her designee, the secretary of the Justice and Public Safety Cabinet or his or her designee, and a law professor from a public university in Kentucky. The final membership of the task force is subject to the approval of the Legislative Research Commission.
- b. The chair of the Senate Judiciary Committee and the chair of the House Judiciary Committee shall serve as co-chairs of the task force. Should the chair of the House or Senate Judiciary Committee be unable to serve, the Legislative Research Commission shall appoint a member of the appropriate chamber to serve as co-chair of the task force.
- c. If a named officer in the executive or judicial branch names a designee, then that person shall continue to represent the appointing authority for the duration of the task force.
- d. The task force shall use the staff of the Legislative Research Commission to assist it in its duties and may use the staff of executive branch or judicial branch agencies with the permission of those agencies.
- e. The resolution shall require that the task force report to the Legislative Research Commission a bill draft with supporting material and such other information as it deems necessary not later than October 1, 2010.
- f. The resolution shall contain provisions required by the Rules of the House of Representatives and the Rules of the Senate that specify:  
Provisions of this resolution to the contrary notwithstanding, the Legislative Research Commission shall have the authority to alternatively assign the issues identified herein to an interim joint committee or subcommittee thereof and to designate a study completion date.

Copies of recommendations of the individual study groups are included in Appendix A. The subcommittee recommends adoption of these reports. Two study groups did not issue reports at this time, with the expectation of continued work on assigned topics if the Criminal Justice Task Force is formed pursuant to recommendation 4.

## Works Cited

Gelb, Adam, and Jake Horowitz. "The Changing Landscape of Sentencing and Corrections Policy." The Pew Charitable Trusts Public Safety Performance Project. Presentation. Meeting of the Subcommittee on the Penal Code and Controlled Substances Act. Louisville. Oct. 19, 2009.

Kinzer, Lance. Chair. Kansas House Judiciary Committee. "Kansas Example: Ways to Improve Criminal Statutes, Decrease Corrections Costs, and Reduce Recidivism While Maintaining Public Safety. Presentation. Meeting of the Subcommittee on the Penal Code and Controlled Substances Act. Louisville. Oct. 19, 2009.



# **Appendix A**

## **Study Group Reports and Bill Draft Proposals**



**SENATE MEMBERS**

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**David Floyd**  
Minority Whip

**MEMORANDUM**

To:    Members of the Penal Code Subcommittee  
  
From: Senator Stivers  
      Representative Yonts  
  
Date:    October 19, 2009  
  
Re:    Basic Philosophy of the Penal Code Workgroup

The basic philosophy workgroup offers the following for the consideration of the subcommittee for use as potential recommendations for inclusion in the final report of the subcommittee or for use as guidelines in the drafting of proposed criminal justice legislation by the subcommittee.

Proportionality Across All Offenses – The punishments authorized for criminal offenses, whether in the Penal Code or elsewhere, should be proportionate and comparable with each other, accounting for the dangerousness of the offenses to society, the mental states of the offenders, the harm actually caused to the victims of the offenses, and other reasonable, objective factors.

Crimes of General Applicability – The current code’s practice of utilizing crimes of general applicability should be favored over the contrary practice of creating newer, more numerous specific offenses that carve out and criminalize conduct already covered by an existing offense.

Enhancements – The practice of adding enhancements to offenses should be used carefully and judiciously in light of the existing enhancement opportunities offered by the state’s PFO statute and in light of the possibility of creating a disproportionate punishment when the enhanced offense is no longer comparable to other offenses having a similar degree of dangerousness, culpability, and harm to the victim.

Accessibility and Usability– The Code and other criminal provisions should be written in a manner that is understandable by the public. Thought should be given to examining the possibility of consolidating, as much as practicable, Kentucky’s criminal statutes into one area

within the Kentucky Revised Statutes. Also, benefit may be had from examining the actual usage data for all of our criminal offenses as a means of identifying unused offenses which may need to be examined for possible retention or deletion from the statutes.

Objective Criteria and Systemic Discretion – The subcommittee should explore ways to establish objective, measurable criteria by which to measure the success of the code in protecting the public. In examining the utility of establishing additional objective criteria, absolute care should be given to preserving the appropriate amount of discretion within the system, with the goal being to establish a balance between the two. The objective should be the production of results that are consistent, fair, and reasonable.

Rehabilitation – The Penal Code does and should continue to serve the legitimate purpose of protecting society by punishing offenders for committing crime, and by deterring potential offenders through the threat of punishment. In addition, treating the underlying causes of many offender's criminality (such as addiction), offering an inmate a relevant and marketable education in a job skill or trade, and successfully reintegrating a released offender into society all can reduce the number of crimes committed against Kentuckians, and the Code and related criminal justice statutes should recognize and utilize effective and efficient rehabilitation as a means of protecting Kentuckians from future crime. These rehabilitation efforts should not be used to lessen the sanctions faced by serious, violent offenders and predators who prey upon the public.



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Majority Whip

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TO:                      Sen. Gerald Neal – Co-Chair  
                             Rep. John Tilley – Co-Chair  
                             Subcommittee on the Penal Code and  
                             Controlled Substances Act.

FROM:                  Sen. John Schickel  
                             Rep. Jeff Hoover

Date:                    August 25, 2009

Subject:                Bail/Pretrial Release/Speedy Trial

With regard to bail/pretrial release, we have reviewed the information provided by staff and the Administrative Office of the Courts and, after discussion, submit the attached draft language amending KRS 431.015 to provide that, with certain exceptions, persons charged with the commission of Class B misdemeanor offenses shall be issued misdemeanor citations versus being physically arrested. While this amendment will have no impact on our prison population, these offenses are non-violent offenses and the incarceration of this class of offender places a significant financial burden on our fiscal courts.

With regard to speedy trials, we submit an amendment to KRS 500.110 providing that persons in custody for a misdemeanor offense shall be tried within ninety (90) days of their arrest or shall be released from custody, on that misdemeanor offense, pending their trial. Ninety days is the maximum penalty that can be imposed upon conviction for a Class B misdemeanor offense. This amendment will not cause the release of a person in custody on another charge, but will ensure that offenders do not spend more time in jail than necessary and also reduce detention costs for our counties.

We will continue to review these subject areas for additional modification and welcome comments or concerns from the subcommittee members.



AN ACT

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

1       ➔Section 1. KRS 431.015 is amended to read as follows:

2       (1) (a) A peace officer may issue a citation instead of making an arrest for a  
3                Class A misdemeanor committed in his or her presence, if there are  
4                reasonable grounds to believe that the person being cited will appear to  
5                answer the charge. The citation shall provide that the defendant shall appear  
6                within a designated time.

7       (b) A peace officer may issue a citation instead of making an arrest for a Class  
8                B misdemeanor committed in his or her presence but may not make a  
9                physical arrest unless there are reasonable grounds to believe that the  
10              defendant, if a citation is issued, will not appear at the designated time or  
11              unless the offense charged is a violation of KRS 177.230, 186.640,  
12              189A.090, 257.050, 508.050, 510.130, 510.150, 511.070, 512.040, 523.100,  
13              525.050, 525.060, 525.080, 525.140, 525.150, 525.155, 525.160, 528.070,  
14              529.020, or 529.070 committed in his or her presence. The citation shall  
15              provide that the defendant shall appear within a designated time.

16       (2) A peace officer may issue a citation instead of making an arrest for a violation  
17               committed in his or her presence but may not make a physical arrest unless there  
18               are reasonable grounds to believe that the defendant, if a citation is issued, will not  
19               appear at the designated time or unless the offense charged is a violation of KRS  
20               189.223, 189.290, 189.393, 189.520, 189.580, 235.240, 281.600, 511.080, or  
21               525.070 committed in his or her presence or a violation of KRS 189A.010, not  
22               committed in his or her presence, for which an arrest without a warrant is permitted  
23               under KRS 431.005(1)(e).

1 (3) If the defendant fails to appear in response to the citation, or if there are reasonable  
2 grounds to believe that he or she will not appear, a complaint may be made before a  
3 judge and a warrant shall issue.

4 (4) When a physical arrest is made and a citation is issued in relation to the same  
5 offense the officer shall mark on the citation, in the place specified for court  
6 appearance date, the word "ARRESTED" in lieu of the date of court appearance.

7 ➔Section 2. KRS 500.110 is amended to read as follows:

8 (1) Whenever a person has entered upon a term of imprisonment in a penal or  
9 correctional institution of this state, and whenever during the continuance of the  
10 term of imprisonment there is pending in any jurisdiction of this state any untried  
11 indictment, information or complaint on the basis of which a detainer has been  
12 lodged against the prisoner, he or she shall be brought to trial within one hundred  
13 and eighty (180) days after he or she shall have caused to be delivered to the  
14 prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction  
15 written notice of the place of his or her imprisonment and his or her request for a  
16 final disposition to be made of the indictment, information or complaint; provided  
17 that for good cause shown in open court, the prisoner or his or her counsel being  
18 present, the court having jurisdiction of the matter may grant any necessary or  
19 reasonable continuance.

20 (2) Except as provided in subsection (1) of this section, if a person is in custody  
21 awaiting trial for the commission of a misdemeanor offense, he or she shall be  
22 brought to trial within ninety (90) days after arrest or the person shall be released  
23 from custody on the misdemeanor offense pending his or her trial.

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TO: Subcommittee on the Penal Code and Controlled Substances Act

FROM: Sen. Katie Stine  
Rep. Joseph Fischer

DATE: August 7, 2009

RE: Alternatives to Incarceration

Group 3 of the Subcommittee on the Penal Code and Controlled Substances Act is responsible for studying alternatives to incarceration. This study is a work in progress and will include the issues below.

### **Probation and Parole Violations**

Offenders who are incarcerated as a result of breaking the rules of their community supervision while on probation or parole are referred to as “technical violators,” and they contribute significantly to the increase in incarceration and the costs associated with that increase. Nationally, offenders who violated their parole and returned to prison for these violations accounted for approximately 35% of state prison admissions in 2006.<sup>1</sup> In Fiscal Year 2007-2008, 28% of all new prison admissions in Kentucky were offenders who were returned to incarceration for parole violations.<sup>2</sup> Probation violations also contribute significantly to the number of offenders incarcerated in state and local facilities.<sup>3</sup>

One method for dealing with technical violators is progressive or graduated sanctions. In lieu of automatic revocation of the offender’s probation or parole, the offender may receive other sanctions. These sanctions may include substance abuse testing, substance abuse treatment,

<sup>1</sup> William J. Sabol and Heather Courture, *Prison Inmates at Midyear 2007* (Bureau of Justice Statistics Bulletin NCJ 221944) (Washington, D.C.: Bureau of Justice Statistics, June 2008), 5.

<sup>2</sup> Statistic compiled from Thompson, Ruth. “Re: Southern Conference Stats.” E-mail to Joanna Decker. Aug. 6, 2009 and Aug. 7, 2009 and Kristy Gary, *Adult Correctional Systems: A Report Submitted to the Fiscal Affairs and Government Operations Committee*, S. LEGIS. CONF. at 9, 26. 2008. available at [http://www.slcatlanta.org/Publications/cdrs/2008/2008\\_CDR\\_CORRECTIONS/2008\\_CDR\\_Corrections\\_SUMMARY.pdf](http://www.slcatlanta.org/Publications/cdrs/2008/2008_CDR_CORRECTIONS/2008_CDR_Corrections_SUMMARY.pdf).

<sup>3</sup> Lauren E. Glaze and Thomas P. Bonczar, *Probation and Parole in the United States, 2006* (Bureau of Justice Statistics Bulletin NCJ 220218) (Washington, D.C.: Bureau of Justice Statistics, December 2007), 2.

community service, fines, electronic monitoring, home detention, and increased supervision. The “graduated sanctions are designed to:

- Hold offenders accountable for breaking the rules;
- Address the issues causing violations;
- Minimize interruption to the offender’s work and family life; and
- Minimize the cost of incarceration to the state.”<sup>4</sup>

Other states have used graduated sanctions with a great deal of success. Ohio has reduced its reliance on revocation of probation or parole for technical violators by using a progressive sanctions grid. The sanctions grid takes into account the risk level of the offender, the number of violations, and the severity of the violation to determine how many and what type of sanctions are warranted. As the number and severity of violations increase, the number of sanctions decrease, making a revocation hearing more likely. A study of the sanctions grid showed many promising results, including:

- “Costly revocation hearings — and the even more costly option of reincarceration — were significantly reduced.
- Hearings that did occur were more efficient, and resources were concentrated on those releasees who presented a higher risk of reoffending.
- There was greater proportionality between the risk of reoffending and the sanctions imposed.
- Sanctions increased in severity for each reoffense or violation.”<sup>5</sup>

### **Community Corrections Program**

Group 3 will also be studying the Community Corrections Program, an intense supervision pilot project, instituted by Campbell County ten years ago. The first phase of the program:

- Is funded by grants from the Department of Corrections and by services rendered by the agencies providing services for the program;
- Serves targeted offenders and provides training, counseling, outpatient treatment, aftercare treatment, drug and alcohol testing, and other services to prevent incarceration for their offenses; and
- Requires offenders to have or obtain a GED, remain employed, pay restitution, pay child support, pay taxes, report weekly to the court, and maintain a daily curfew and call-in schedule.

Personnel from the program monitor the participants, thus saving probation and parole officers this duty, which is a savings to the state. Presently, there are 13 clients in various stages of the program. According to Ms. Christine Vissman of the Campbell County Community Corrections Program, results of the program include:

- 10 clients pay child support, 3 clients pay restitution, and 1 client is paying fines and court costs, while 5 clients are subject to random drug tests;
- Of the nonsupport clients, only 2 persons in 10 years have reoffended for nonsupport;

---

<sup>4</sup> Allison Lawrence, *Probation and Parole Violations: State Responses*, NAT’L. CONF. STAT. LEGIS., at 2 Nov. 2008. available at <http://www.ncsl.org/documents/cj/violationsreport.pdf>.

<sup>5</sup> David Fialkoff, *Standardizing Parole Violation Sanctions*, NIJ Journal, Issue No. 263, at 19.

- 10 clients were facing revocation of probation and would have been sent to the penitentiary if not enrolled in the program;
- Approximately 30 people have graduated from the program;
- Since the program's inception \$253,803 has been collected in child support, \$18,893 has been collected in restitution, and \$5,491 has been collected in fines and court costs;
- If the program was not in operation during the third quarter of this grant year alone, its clients would have spent 896 days in prison at a cost of \$37,464, versus the cost of operation of the program for this period which was \$6,350; and
- Since the inception of this program, there has been a savings to the state of \$1,743,276.

There is a second phase of this pilot program that began in July 2009. This program will focus on people who are in jail or prison and are waiting for a bed date for a drug inpatient treatment center. These people are given home incarceration, and they receive intensive outpatient treatment while they wait for an opening in a treatment center. They are monitored with ankle bracelets and must submit to regular drug testing. This program is too new to have any quantifiable results.

Group 3 of the Subcommittee will be studying these and other potential alternatives to incarceration. Maintaining public safety will be the most important factor in these deliberations. None of the alternatives to incarceration will be considered for the most serious or violent offenders.





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TO:            Sen. Gerald Neal – Co-Chair  
                  Rep. John Tilley – Co-Chair  
                  Subcommittee on the Penal Code and  
                  Controlled Substances Act.

FROM:        Sen. Jerry Rhoads  
                  Rep. Johnny Bell

Date:         September 4, 2009

Subject:      PFO Law

### Balance Is Needed

We understand that protecting our citizens from criminals is a fundamental obligation of government. Traditional concepts of punishment, deterrence and incarceration help achieve this objective. We also understand that incarceration comes with a very real cost, with each dollar spent on imprisonment being money that cannot be spent on other fundamental obligations of government such as education, healthcare, building and maintaining infrastructure, and providing essential services. Two inmates housed at a state institution take a teacher out of the classroom. An instructional assistant position can be funded for the cost of housing a single inmate. We believe that proper balance is essential for the General Assembly to properly discharge its role as steward of the taxpayer's money.

Kentucky has built, maintained, and staffed additional prison space to accommodate the longer sentences given to repeat offenders. From 1987 to 2007, our felony inmate population grew 250%. We now know that our rate of incarceration has placed us among the states with the fastest growing prison populations, a dubious fiscal honor. While many areas of society support the drive for increased incarceration, we also hear calls from Kentuckians lamenting the diversion of tax dollars from public programs such as education into increased prison space. Ironically, the need for vastly increased prison space eats into available funds for the rehabilitation of the inmates, increasing the chance that former inmates will not successfully

reintegrate into society but will instead reoffend. We also hear the painful stories of drug abuse that affects so many Kentuckians from all walks of life. Drug crimes and drug driven crimes are prevalent and pernicious, with addicted offenders reoffending. Funds for drug treatment remain low while our prisons remain quite full.

We believe our proposal should protect public safety while balancing competing needs to achieve a result that is both tough on crime and smart on crime as well.

### **Punishment of the Repeat Offender**

Punishment of repeat offenders has traditionally been the role of the PFO law alone. A newer trend, particularly with drug crimes, has been to enhance punishment if a person commits the same offense two or more times. A crime, such as drug trafficking, would be punishable as a Class D felony for a first offense and a Class C felony for a second or subsequent offense. No provision is made to prohibit the simultaneous use of the PFO law. A fusion between the underlying enhanced crime and the PFO law means that an offender gets punished twice for repeating his or her crime. For example, a Class D drug felony may become a Class C felony for a second offense as provided in the drug crime statute itself, and then become a Class B felony under the PFO 2<sup>nd</sup> statute. A Class B felony, with 10 to 20 years in prison, is a costly option for conduct that originally was thought to warrant a 1 to 5 year sentence. If the offender had a firearm another separate penalty enhancement would enhance this example to a Class A felony, allowing incarceration for life.

The workgroup believes that punishing and deterring people from committing repeat offenses is a legitimate objective of the criminal justice system. Our goal is to find a means of balancing the need to punish and deter with the costs involved.

### **Work Process and Revision Options**

The group has engaged in numerous discussions on this subject, reviewed Professor Lawson's writings, and examined similar laws from other states to see how they are addressing this problem. We have sought the input of the Justice Cabinet, Judges and Prosecutors, and we look to expand that call for input in the future. The group has looked at several options but has not decided upon a final recommendation. The final recommendation of the group may include some, all, or none of the following concepts:

- 1) The restoration of the original penal code's requirement that the defendant have served some period of time of incarceration for a previous felony conviction for that conviction to count as a prior strike under the PFO law. This condition was originally used as a screening mechanism to help ensure that felonies used to enhance a repeat offender's sentence were at least serious enough to warrant actual prison time initially. If the group adopts this idea, consideration is being given as to the question of how to deal with offenders who receive time credit for pretrial jail incarceration at sentencing, but who are then immediately probated.
- 2) Limiting felonies that would count as a triggering PFO offense to only those felonies that could be said to be serious offenses. One area where this has already been done is the violent

offender statute (KRS 439.3401). In considering this idea, an examination is being made as to whether the violent offender list should be used in its entirety, and whether certain additional specific offenses (i.e. individually named crimes) or classes of offenses (all Class B felonies, all Class C felonies, etc.), should be added.

- 3) Examining the utility of continuing the offense of PFO 2<sup>nd</sup>, a crime that provides for a one penalty degree increase upon a person's second conviction for any felony offense. Many felonies already carry an increased penalty for a second offense. The broad sentencing range allowed under our present felony classifications allows a judge to sentence at the high end of the range based upon the fact the person is a repeat offender.
- 4) Requiring a prosecutorial election between available enhancements when a person commits a repeat offense. The concept here is that there should be one punishment for repeating, not two. Under this idea, if a defendant has a prior offense and is then charged with a crime that increases the penalty by one level for a second or subsequent offense, the prosecutor would have to elect whether to proceed with either charging someone as a second time offender under the underlying criminal statute and not using a PFO charge, or charging the person as a first time offender but also charging the person as a PFO. The objective is to prevent a double enhancement. In examining this option, thought is being given as to the crimes to which it might apply, with the group being cognizant of the fact that some offenses only become a felony after several repeats, such as with domestic violence related assault and fourth offense DUI.

### **Kentucky's Current PFO Law—KRS 532.080**

Kentucky punishes a habitual felon as a Persistent Felony Offender (PFO), a charge that has both a first and second degree level. If a person is convicted of being a PFO 2<sup>nd</sup> or later, as a PFO 1<sup>st</sup>, the person will receive a longer sentence than would otherwise be allowed for their present offense. PFO 2<sup>nd</sup> and PFO 1<sup>st</sup> have significant commonality, with the differences being in the number of prior felonies needed to support the charge, and the alternative punishment allowed for each offense level.

#### **PFO 2<sup>nd</sup> Elements and Punishment:**

1. Requires ONE prior felony.
2. The sentence for the current offense is increased by one level.
3. Probation or parole eligibility is restricted unless all felonies are non-violent Class D felonies.

#### **PFO 1<sup>st</sup> Elements and Punishment:**

1. Requires TWO prior felonies, although ONE felony sex crime against a minor can substitute for the two prior felonies.
2. Where the current offense is a Class D or C, the person is punished comparable to a Class B offender.
3. Where the current offense is a Class B or A, the person is punished comparable to a Class A offender.
4. Probation or parole eligibility is restricted unless all felonies are non-violent Class D felonies.

#### **Points of Commonality between PFO 1<sup>st</sup> and PFO 2<sup>nd</sup>:**

1. Either charge requires that a person be convicted of at least one prior felony.
2. The prior felony can be for any felony offense.
3. The prior felony must have been committed when the offender was 18 or older.
4. The person must be 21 or older when the PFO charge is brought.
5. The person must have received a sentence of at least 1 year for the prior felony.
6. There is no requirement that the person have served any prison time on the sentence for the previous felony(s).
7. If there is more than a five year break between the current offense and the finishing of the sentence for the prior offense (including serving time on probation or parole), the prior felony offense has gone stale and cannot be used.

**532.080 Persistent felony offender sentencing.**

- (1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (5) or (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (5) or (6) of this section shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.
- (2) A persistent felony offender in the second degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
  - (a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and
  - (b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and
  - (c) That the offender:
    1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted; or
    2. Was on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or
    3. Was discharged from probation, parole, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted; or
    4. Was in custody from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or
    5. Had escaped from custody while serving any of the previous felony convictions at the time of commission of the felony for which he now stands convicted.
- (3) A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies, or one (1) or more felony sex crimes against a minor as defined in KRS 17.500, and now stands convicted of any one (1) or more felonies. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
  - (a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and

- (b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and
- (c) That the offender:
  - 1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted; or
  - 2. Was on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or
  - 3. Was discharged from probation, parole, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted; or
  - 4. Was in custody from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or
  - 5. Had escaped from custody while serving any of the previous felony convictions at the time of commission of the felony for which he now stands convicted.
- (4) For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.
- (5) A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted. A person who is found to be a persistent felony offender in the second degree shall not be eligible for probation, shock probation, or conditional discharge, unless all offenses for which the person stands convicted are Class D felony offenses which do not involve a violent act against a person, in which case probation, shock probation, or conditional discharge may be granted. A violent offender who is found to be a persistent felony offender in the second degree shall not be eligible for parole except as provided in KRS 439.3401.
- (6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:
  - (a) If the offense for which he presently stands convicted is a Class A or Class B felony, or if the person was previously convicted of one (1) or more sex crimes committed against a minor as defined in KRS 17.500 and presently stands convicted of a subsequent sex crime, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty (20) years nor more than fifty (50) years, or life imprisonment, or life imprisonment without parole for twenty-five (25) years for a sex crime committed against a minor;

- (b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.
- (7) A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, unless all offenses for which the person stands convicted are Class D felony offenses which do not involve a violent act against a person or a sex crime as that term is defined in KRS 17.500, in which case, probation, shock probation, or conditional discharge may be granted. If the offense the person presently stands convicted of is a Class A, B, or C felony, the person shall not be eligible for parole until the person has served a minimum term of incarceration of not less than ten (10) years, unless another sentencing scheme applies. A violent offender who is found to be a persistent felony offender in the first degree shall not be eligible for parole except as provided in KRS 439.3401.
- (8) No conviction, plea of guilty, or Alford plea to a violation of KRS 218A.500 shall bring a defendant within the purview of or be used as a conviction eligible for making a person a persistent felony offender under this section.
- (9) The provisions of this section amended by 1994 Ky. Acts ch. 396, sec. 11, shall be retroactive.

