

## An Explanation of Kentucky's Persistent Felony Offender Laws and Their Unintended Impact by Olivia Amlung



Although frequently and heavily debated amongst legal scholars, the three main goals of the criminal justice system are: 1) retribution, 2) deterrence, and 3) rehabilitation. But we often find that rehabilitation falls to the wayside, pushing retribution and deterrence to the forefront as the legislature creates our penal code.

Kentucky's Persistent Felony Offender laws are the perfect example. These laws embody the tough-on-crime mentality that has swept the nation over the last few decades. However, many individuals are left blissfully unaware of the unintended consequences that these laws have on not just our criminal justice system, but on every tax-paying Kentuckian, as well.

### What is a Persistent Felony Offender?

Kentucky Revised Statute 532.080 authorizes a prosecutor to seek additional punishment for a defendant solely based on his or her criminal history. This enhanced punishment may be sought against a defendant who: 1) is currently charged with a felony (referred to as the "underlying offense"); 2) is at least twenty-one (21) years old; and 3) has been previously convicted of one or more felonies within a certain time period. Qualifying individuals are charged as "persistent felony offenders," or "PFOs," under the law. The PFO charge serves as an enhancement to the punishment they will receive if convicted of the underlying felony for which they are currently charged. A PFO conviction affects many aspects of sentencing, including the length of an individual's prison sentence and whether or not the individual may be eligible for probation or parole.

PFO charges come in two classifications: First Degree Persistent Felony Offenders, which incur a more severe punishment, and Second Degree Persistent Felony Offenders.

### When can a defendant be charged as a Persistent Felony Offender?

A prosecutor may seek persistent felony offender in the first degree status for a defendant facing felony charges if he or she:

- has 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

- was over the age of 18 years old at the time the prior felonies were committed; and
- the most recent of said convictions, or release from punishment as a result, occurred within the previous five (5) years from the commission of the underlying offense.

A prosecutor may seek persistent felony offender in the second degree status for a defendant facing felony charges if he or she:

- has previously been convicted of one (1) felony; and
- was over the age of 18 years old at the time the prior felony was committed; and
- said conviction, or release from punishment as a result, occurred within the previous five (5) years from the commission of the underlying offense.

It is important to note, however, a few things which are critical to the assessment of whether someone qualifies as a persistent felony offender:

1. An individual whose sole underlying felony offense is for drug possession *may not* be charged as a persistent felony offender in any degree. KRS 532.080(8). However, a felony possession charge can be used as a "previous felony conviction" for PFO consideration with an eligible underlying charge. *Boone v. Commonwealth*, 412 S.W.3d 883 (Ky. Ct. App. 2013).
2. The law defines a "previous felony conviction" as one designated as a felony in this state or conviction of a crime in any other jurisdiction where the defendant was sentenced to a term of imprisonment of one (1) year or more. KRS 532.080(2)(a).
3. If an individual was sentenced to more than one (1) year of prison time, but was alternatively probated for any number of years, that conviction may still be used for PFO consideration. KRS 532.080(2)(c)(2-3).
4. If a defendant was convicted and sentenced six years prior to the underlying offense, but was released from custody or probation within the five (5) year look back period, that conviction may be used for PFO consideration. KRS 532.080(2)(c)(3).
5. Any sentences that run concurrently or as one, uninterrupted consecutive sentence only count as one, singular prior felony conviction for PFO consideration. KRS 532.080(4).

### What is the punishment for someone found to be a Persistent Felony Offender?

The enhanced punishment that an individual faces when charged as a persistent felony offender depends on two factors: the PFO degree, and the nature of the underlying felony charge. However, it is also important to remember that the defendant must be found guilty of the underlying charge in order to incur PFO punishment enhancements.

When an individual is sentenced as a Persistent Felony Offender in the First Degree, he or she shall be sentenced as follows:

***If the underlying offense is a Class A or Class B 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 twenty (20) years nor more than fifty (50) years, or life imprisonment.***

***If an offender is charged with a second felony sex crime against a minor as defined in KRS 17.500, meaning that both the underlying and prior felony conviction fall in this category, 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 without parole for twenty-five (25) years.***

***If the underlying offense 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 years nor more than twenty (20) years.***

Furthermore, a PFO designation can impact an individual's ability to be released on probation or parole. A person who is found to be a persistent felony offender in the first degree is not eligible for probation, shock probation, or conditional discharge, unless *all* of the underlying offenses 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. If the underlying offense is a Class A, B, or C felony, the individual will not be eligible for parole until he or she has served a minimum term of incarceration of at least ten years.

Understanding the sentencing scheme for Persistent Felony Offenders in the Second Degree, however, requires an understanding of the sentencing ranges set forth in

KRS 532.060(2). Under this statute, individuals convicted of a Class D felony will be sentenced to a term of imprisonment anywhere between one (1) to five (5) years. Those convicted of a Class C Felony are given a sentencing range of five (5) to ten (10) years, Class B Felonies are sentenced to a term between ten (10) to twenty (20) years, and those convicted of Class A Felonies are sentenced to a minimum of twenty (20) years imprisonment.

When an individual is sentenced as a Persistent Felony Offender in the Second Degree, he or she will be sentenced to a term of imprisonment pursuant to the sentencing scheme described above for the next highest degree than the offense for which convicted. For example, let's say that a young man named Bob is a bit short on cash. Planning to take a trip to the pawn shop, Bob shoplifted a \$600 tool from the hardware store and has now been found guilty of Theft by Unlawful Taking, Over \$500, Under \$10,000, which is a Class D Felony. Normally, this charge would carry a penalty of one (1) to five (5) years imprisonment. However, since the Bob was also found to be a Persistent Felony Offender in the Second Degree because he was convicted of possessing narcotics four years ago, he will be sentenced anywhere from five (5) to ten (10) years in prison—the sentencing range for Class C felonies. However, he will still be eligible for probation, shock probation, or conditional discharge; only second degree PFOs found guilty of a Class C, B, or A felony are ineligible.

*continued on page 22*



## The Unintended Impact of PFO Laws

Kentucky's PFO laws are the poster child for the tough-on-crime movement. Forget three strikes—you're basically out after two. For this reason alone, many people support the PFO laws. However, many do not realize that these laws can have serious unintended impacts on Kentucky's criminal justice system and, more importantly, on their own taxpayer dollars.

Take Bob, for example. Since he is a PFO in the second degree, he is now facing up to *double* the amount of jail time to which he previously could have been sentenced—this adds up. His \$600 shoplifting incident could cost him five to ten years in a state prison. While many whole-heartedly support the tough on crime movement, we must be reminded that Bob's stay in the slammer isn't free.

According to statistics provided by the Kentucky Department of Public Advocacy, Kentucky's prison population is growing annually despite a consistent decline in the crime rate.<sup>1</sup> According to the Kentucky Department of Corrections, the cost to incarcerate one (1) inmate ranges from an average

of \$52.94 to \$102.25 each day, depending on which of the twelve facilities the inmate is being housed.<sup>2</sup> The average from all twelve facilities comes to \$71.14 per day, per inmate.

So let's look back at Bob's situation. Being a nonviolent offender convicted of a Class D Felony, Bob must serve 15% of his sentence before he will be eligible for parole. If he is sentenced to the minimum amount of jail time *without* the PFO enhancement (one year), he will have to serve a minimum of 55 days incarcerated, bringing his incarceration cost to a total of approximately \$3,912.70. If he is sentenced to the minimum amount of jail time *with* the PFO enhancement (five years), the total comes to a whopping \$19,492.36 for the minimum of 274 days he is expected to serve. And if he had been a PFO in the First Degree, that number would double. Under PFO standards, Bob is the *best case scenario*—and the least expensive.

So, instead of saying "don't do the crime if you can't do the time," maybe Kentuckians should think about an alternative maxim: "don't over-punish crime because it's all on the taxpayers' dime."

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<sup>1</sup> *The Advocate Newsletter*, Kentucky Department of Public Advocacy (February 2017 ed.), found at: [https://dpa.ky.gov/Public\\_Defender\\_Resources/The%20Advocate/Feb%202017%20revised%203.13.17.pdf](https://dpa.ky.gov/Public_Defender_Resources/The%20Advocate/Feb%202017%20revised%203.13.17.pdf). <sup>2</sup> Kentucky Department of Corrections Cost to Incarcerate Report for the 2018 Fiscal Year, found at: <https://corrections.ky.gov/about/Documents/Research%20and%20Statistics/Annual%20Reports/FY18%20COST%20TO%20INCARCERATE%20new.pdf>

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