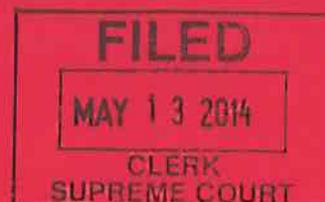


**Commonwealth of Kentucky  
Supreme Court**

No. 2013-SC-000141  
On Discretionary Review from  
Court of Appeals No. 2011-CA-001658



**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

v.

Appeal from Johnson Circuit Court  
Hon. John David Preston, Judge  
Indictment No. 10-CR-00145

**GARY GAMBLE SR**

**APPELLEE**

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**Brief for Commonwealth**

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**CERTIFICATE OF SERVICE**

I certify that the record on appeal was not checked out from the Clerk of this Court and that a copy of the Brief for Commonwealth has been served May 13, 2014 as follows: by mailing to the trial judge, Hon. John David Preston, Judge, Johnson County Judicial Center, 908 Third St., Suite 217, Paintsville, KY 41240; by sending electronic mail to Hon. Anna Melvin, Commonwealth Attorney; and by delivery through Kentucky Messenger Mail to Hon. Steven J. Buck, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

A handwritten signature in cursive script that reads "Bryan D. Morrow".

Bryan D. Morrow  
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## INTRODUCTION

This is a criminal case wherein the Appellee, Gary Gamble, Sr., was indicted for trafficking in a controlled substance second degree (TICS 2) and for being a persistent felony offender in the first degree (PFO 1). Gamble moved to dismiss the PFO count, which the trial court overruled. He entered a conditional guilty plea to TICS 2 and PFO 2; reserving the right to appeal the trial court's denial of his motion to dismiss. The Court of Appeals reversed. The Commonwealth moved for discretionary review which this Court granted.

## STATEMENT REGARDING ORAL ARGUMENT

The issue raised on appeal is a straight-forward application of the statutory text in question. Oral argument is not necessary to resolve this issue.

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## STATEMENT OF THE CASE

Gamble sold three hydrocodone<sup>1</sup> pills to an informant. (KSP Report, TR 1 at 39) (Lab Report, TR 1 at 71-72). The grand jury charged him with trafficking in a controlled substance in the second degree (TICS 2)<sup>2</sup> and for being a persistent felony offender (PFO) in the first degree. (Indictment, Appendix 1). At the time of his offense, the Legislature classified TICS 2 as a class D felony carrying a potential penalty range of one to five years.<sup>3</sup>

Almost a year after his indictment, House Bill (HB) 463 went into effect.<sup>4</sup> Section 10 amended KRS 281A.1413 to read:

(1) A person is guilty of trafficking in a controlled substance in the second degree when:

(a) He or she knowingly and unlawfully traffics in:

...

2. Twenty (20) or more dosage units of a controlled substance classified in Schedule III . . .

...

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<sup>1</sup>Hydrocodone is a Schedule III narcotic. (Lab Report, TR 1 at 71-72).

<sup>2</sup>At the time of his offense, KRS 218A.1413 (West 2009), read in part: (1) A person is guilty of trafficking in a controlled substance in the second degree when: (a) He knowingly and unlawfully traffics in a . . . or a controlled substance classified in Schedule III. . ."

<sup>3</sup>KRS 218A.1413(2) (West 2009) ("Any person who violates the provisions of subsection (1) of this section shall: (a) For the first offense be guilty of a Class D felony.")

<sup>4</sup>HB 463 went into effect June 8, 2011. CRIMINAL JUSTICE SYSTEM--SENTENCING GUIDELINES--VIOLATIONS, 2011 Kentucky Laws Ch. 2 (HB 463).

(c) Any quantity of a controlled substance specified in paragraph (a) of this subsection in an amount less than the amounts specified in that paragraph.<sup>5</sup>

Section 10 also amended the penalty provision of KRS 218A.1413 to read in part:

“Any person who violates the provisions of subsection (1)(c) of this section shall be guilty of: 1. A Class D felony for the first offense, except that KRS Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years. . . .”<sup>6</sup>

Pursuant to KRS 446.110<sup>7</sup>, Gamble filed notice of his unqualified consent to be sentenced under KRS 218A.1413, as amended by HB 463. (Notice, Appendix 2). Gamble also requested the PFO count be dismissed pursuant to KRS 218A.1413(2)(b)(1). The trial court granted Gamble’s sentencing request, but ordered additional briefing on the dismissal of the PFO count. (Order, TR 1 at 80-84, Appendix 3).

Gamble then filed a motion to dismiss the PFO count. (Motion, TR 1 at 85, Appendix 4). According to Gamble, the new language of KRS 218A.1413(2)(b)(1) – except that KRS Chapter 532 to the contrary

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<sup>5</sup>KRS 218A.1413(1) (West 2011).

<sup>6</sup>KRS 218A.1413(2)(b) (West 2011).

<sup>7</sup>KRS 446.110 (West 2010) read in part: “If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.”

notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years – meant that a TICS 2 could not be enhanced by a PFO. His maximum sentence could be no more than three years, so the PFO count had to be dismissed.

The trial court disagreed. (Order, TR 1 at 97-101, Appendix 5). According to the trial court, KRS 218A.1415 (first-degree possession of a controlled substance) contained a similar provision as KRS 218A.1413 (TICS 2). However, the PFO statute (KRS 532.080(8)(b)) specifically excluded an offense committed under the possession statute (KRS 218A.1415) from being the basis for an underlying felony enhancement by PFO. TICS 2 (KRS 218A.1413) contained no similar prohibition. (Order, TR 1 at 99-101). So, the trial court judge denied Gamble's motion to dismiss the PFO count of the indictment. (Order, TR 1 at 101).

Gamble then entered a conditional guilty plea to the amended charges of TICS 2 and PFO 2. (Motion to Enter Guilty Plea, TR at 103) (CD: 7/15/11; 10:36:10). Gamble reserved the right to appeal the trial court's ruling on the PFO issue. (Motion, TR at 103). At final sentencing, the trial court sentenced him to the agreed-upon sentence of one year, enhanced to five years, suspended after one year of service. (Sentencing, CD: 8/19/11; 10:13:00) (Judgment, TR 1 at 107, Appendix 6).

Gamble appealed his case to the Court of Appeals. There, he maintained that the most he could be sentenced to was three years and that

he was not eligible for PFO enhancement. (Gamble's Court of Appeals Br. at 2 - 8). At oral arguments, Gamble pressed the issue even further and insisted nothing in the entirety of chapter 532 applied to convictions under KRS 218A.1413.

The Court of Appeals agreed, in part, with Gamble. (*Gamble v. Commonwealth*, Slip Op. No. 2011-CA-001658, pp. 3-10 (Ky. App., Feb. 1, 2013), (Appendix 7). The court found "irrefutable proof" of the statutory intent of HB 463 from an article in the Bowling Green Daily News and from a Kentucky Court of Justice press release (Slip op., pp. 7-8). The court then construed the statute in light of this intent. It concluded that TICS 2 was categorically removed from the PFO statute. (Slip Op., pp. 3-10).

The Commonwealth moved this Court for discretionary review from that Decision which this Court granted on February 12, 2014.

## ISSUES PRESENTED

### I.

Nothing in the TICS 2 statute precludes PFO enhancement of a TICS 2 conviction. The Court of appeals held that the TICS 2 statute precluded PFO enhancement. Did the Court of Appeals properly interpret the TICS 2 statute to prohibit PFO enhancement?

### II.

A court must consider the bill as whole and reconcile all sections in that bill that may apply. The Court of Appeals held that Section 10 of HB 463 dealing with KRS 218A.1413(2)(b) (TICS 2) nullified PFO enhancement, but failed to consider and reconcile Section 26 of HB 463 which amended the PFO statute. Did the Court of Appeals consider and reconcile all sections in HB 463 that apply?

### III.

Relying on post-passage remarks by a bill's author is an improper method of statutory interpretation. The Court of Appeals relied on post-passage remarks by two authors of HB 463 in determining the intent of the bill. Did the Court of Appeals properly rely on post-passage comments of the authors of HB 463 as a method of statutory interpretation?

## ARGUMENT

### I.

Nothing in the TICS 2 statute or the PFO statute categorically removes a TICS 2 conviction from PFO enhancements.<sup>8</sup>

Section 10 of HB 463 amended the penalty provision of KRS 218A.1413 to read in part:

Any person who violates the provisions of subsection (1)(c) of this section shall be guilty of: 1. A Class D felony for the first offense, except that KRS Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years. . . .<sup>9</sup>

The PFO statute is in Chapter 532. The question before this Court is whether the language “except that KRS Chapter 532 to the contrary notwithstanding” prohibits the grand jury from indicting Gamble as a PFO. A plain reading of the statute demonstrates that KRS 218A.1413(2)(b)1 only relates to other provisions in Chapter 532 that provide for Class D felony punishment at one to five years. Any reading of the statute that prohibits PFO enhancement of a

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<sup>8</sup>This issue is preserved by the Commonwealth’s motion for discretionary review and this Court’s granting of the same. Even though the Commonwealth primarily responds to issues raised by the Court of Appeals’s Opinion, it may raise any argument that upholds the trial court’s denial of Gamble’s motion to dismiss. *McBeath v. Commonwealth*, 244 S.W.3d 22, 38 (Ky. 2007).

<sup>9</sup>Criminal Justice System--sentencing Guidelines--violations, 2011 Kentucky Laws Ch. 2 (HB 463). See also KRS 218A.1413(2)(b) (West 2011).

trafficking second conviction violates numerous canons of statutory construction.

“The construction and application of statutes is a matter of law and may be reviewed *de novo*.”<sup>10</sup> “All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . . .”<sup>11</sup> The “plain meaning of the statutory language is presumed to be what the legislature intended”.<sup>12</sup> “[I]f the meaning is plain, then the court cannot base its interpretation on any other method or source.”<sup>13</sup> This Court “ascertain[s] the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed.”<sup>14</sup>

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<sup>10</sup>*Bob Hook Chevrolet Isuzu, Inc. v. Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

<sup>11</sup>KRS 446.080(1). See also *Cosby v. Commonwealth*, 147 S.W.3d 56, 60 (Ky. 2004) (The purpose of statutory construction "is to give effect to the intent of the legislature.")

<sup>12</sup>*Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (quoting Ronald Benton Brown & Sharon Jacobs Brown, *Statutory Interpretation: the Search for Legislative Intent* § 4.2, at 38 (NITA, 2002)).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 819.

- A. The contradiction between the up-to-three-years language of KRS 218A.1413(2)(b)1 and KRS Chapter 532 is the one-to-five-years language of KRS 532.060(2)(d), not the PFO statute.

“We start, of course, with the statutory text.”<sup>16</sup> The phrase under examination is “except that Chapter 532 to the contrary notwithstanding”. Superordinating language like *notwithstanding* “merely shows which provision prevails in the event of a clash”.<sup>16</sup> Scalia and Garner explain, “A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers.”<sup>17</sup>

In this case, the dependant phrase is “Chapter 532 to the contrary notwithstanding”. The main clause is: “Any person who violates the provisions of subsection (1)(c) of this section shall be guilty of [a] Class D felony for the first offense”. So, the question becomes, what in KRS

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<sup>16</sup>*BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006). See also *Mississippi ex rel. Hood v. AU Optronics Corp.*, — U.S. —, —, 134 S.Ct. 736, 741 (2014); *Sebelius v. Cloer*, 569 U.S. —, —, 133 S.Ct. 1886, 1893 (2013); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976), (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

<sup>16</sup>Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012).

<sup>17</sup>*Id.*

218A.1413(2)(b)1 is in derogation of Chapter 532? Or, as the statute puts it, what in KRS 218A.1413(2)(b)1 is contrary to Chapter 532?

The term “contrary” is a one of contradiction. In order for two terms to contradict one another, they have to reference the same subject-matter. The contradiction between KRS 218A.1413(2)(b)(1) and Chapter 532 is KRS 532.060, not the PFO statute.

KRS 532.060(2)(d) provides the maximum term of imprisonment for a Class D felony is “not less than one (1) year nor more than five (5) years.” KRS 218A.1413(2)(b)(1) provides the maximum term of imprisonment for a Class D felony under that statute is “no greater than three (3) years”. These two provisions are the ones that are contrary to one another. They reference the same subject-matter. And because they clash, KRS 218A.1413(2)(b)1 controls over KRS 532.060(2)(d).

The PFO statute cannot be considered contrary to KRS 218A.1413(2)(b)(1) because it is not dealing with the same subject-matter. The PFO statute deals with the enhancement of classes of penalties. If a person is found guilty of a Class D felony and of being a PFO in the second degree, that person is sentenced as if he was convicted of a Class C felony.<sup>18</sup> If a PFO 1, that person convicted of a Class D felony is sentenced as if he had

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<sup>18</sup>KRS 532.080(5).

been convicted of a Class B felony.<sup>19</sup> So, a person convicted of a Class D felony, is actually sentenced as something other than a Class D felon under the PFO statute. This prevents the PFO statute from being contrary to KRS 218A.1413(2)(b)(1). This reading gives effect to the entirety of HB 463, prevents sections of HB 463 from being rendered superfluous, and uses terms found in HB 463 consistently.

**B. The Commonwealth’s reading of the statute gives effect to all of HB 463 and does not render parts of Sections 12 and 26 superfluous.**

“The presumption is that the Legislature intends an Act to be effective as an entirety.”<sup>20</sup> “[W]ords cannot be meaningless, else they would not have been used.”<sup>21</sup> So court “must ‘give effect . . . to every clause and words’ of the Act.”<sup>22</sup>

When the Legislature amended the TICS 2 statute, it also amended the penalty provision of the first-degree possession statute to read:

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<sup>19</sup>KRS 532.080(6).

<sup>20</sup>*George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961). See also *Wilkins v. Kentucky Retirement Systems Bd. Of Trustees*, 276 S.W.3d 812, 814 n. 3 (Ky. 2009) (“The Court of Appeals reasoning would render the words ‘a legal holiday’ superfluous.”); *Cosby v. Commonwealth*, 147 S.W.3d 56, 59 (Ky. 2004).

<sup>21</sup>*United States v. Butler*, 297 U.S. 1, 65 (1936).

<sup>22</sup>*Setser v. United States*, — U.S. —, —, 132 S.Ct. 1463, 1470 (2012).

Possession of a controlled substance in the first degree is a Class D felony subject to the following provisions:

(a) The maximum term of incarceration shall be no greater than three (3) years, notwithstanding KRS Chapter 532.<sup>23</sup>

Section 26 of HB 463 amended the PFO statute to read: "A conviction, plea of guilty, or Alford plea under Section 12 [possession in the first degree] of this Act shall not trigger the application of this section . . ."<sup>24</sup> Therefore, possession crimes under KRS 218A.1415 are categorically removed from the PFO statute, not because KRS 218A.1415 says "notwithstanding KRS Chapter 532", but because the PFO statute says so.

When the Legislature enacted Section 10 of HB 463, it knew about Sections 12 and 26. It knew Section 12 amended first-degree possession to say "notwithstanding Chapter 532". But the Legislature did not believe that language categorically removed first-degree possession from the PFO statute. So, in Section 26, it explicitly removed first-degree possession from the PFO statute. Given this, had the Legislature wished to categorically remove TICS 2 from the PFO statute, it would have done so explicitly. It did not.

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<sup>23</sup>See Section 12 in Criminal Justice System--sentencing Guidelines--violations, 2011 Kentucky Laws Ch. 2 (HB 463).

<sup>24</sup>See Section 26 in Criminal Justice System--sentencing Guidelines--violations, 2011 Kentucky Laws Ch. 2 (HB 463).

Reading the first-degree possession statute the way the Court of Appeals read the TICS 2 statute renders Section 26 of HB 463 superfluous. By the Court of Appeals' rationale, the language "notwithstanding Chapter 532" removes the first-degree possession statute from the PFO enhancements. But if that is correct, then there was no need for the Legislature to enact Section 26 of HB 463 to amend the PFO statute to remove first-degree possession from its enhancements. That rationale makes Section 26 of HB 463 superfluous because the "notwithstanding Chapter 532" language in the first-degree possession statute would remove first-degree possession from the PFO statute. Section 26 would not be needed. But the presumption is that the Legislature intended Section 26 of HB 463 to be given effect. *George*, 346 S.W.2d at 789.

**C. The Commonwealth's reading of the statute uses terms throughout HB 463 consistently.**

It is a "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning."<sup>25</sup> HB 463 used "Chapter 532 to the contrary notwithstanding" language in Section 10 (TICS 2); Section 11 (TICS 3); Section 12 (possession

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<sup>25</sup>*Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995). See also *Taniguchi v. Kan Pacific Saipan, Ltd.*, — U.S. —, —, 132 S.Ct. 1997, 2004-05 (2012); *Powerex Corp. V. Reliant Energy Services, Inc.*, 551 U.S. 224, 233 (2007); *IBP, Inc. V. Alvarez*, 546 U.S. 21, 34 (2005); *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 342 (1994); *Soreson v. Secretary of Treasury of U.S.*, 475 U.S. 851, 860 (1986); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).

in the first degree)<sup>26</sup>; Section 16 (possession of marijuana); Section 17 (possession of synthetic cannabinoid); and Section 18 (possession of salvia). Despite using similar language to amend the trafficking and possession charges, HB 463 only excluded possession in the first degree from the PFO statute. And it did this specifically.<sup>27</sup> So, the language “Chapter 532 to the contrary notwithstanding”, used consistently, means something other than “exclusion from the PFO statute”, because possession in the first degree which uses similar language is specifically excluded from the PFO statute.

Reading the statutes the way the Court of Appeals did, makes the words “Chapter 532 to the contrary notwithstanding” mean different things in different parts of the Act. And the rules of statutory construction do not allow this.

**D. The Court of Appeals improperly relied on post-passage comments by the Bill’s authors in determining legislative intent.**

The Court of Appeals found “firm evidence of the General Assembly’s intent in the statements of those who helped draft those amendments.”<sup>28</sup> The court then quoted from a press release from the Administrative Office of the

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<sup>26</sup>Section 12, amending KRS 218A.1415 reads “notwithstanding KRS Chapter 532”.

<sup>27</sup>See Section 26 of HB 463 and KRS 532.080(8)(b) (excluding possession in the first degree from triggering the PFO statute).

<sup>28</sup>Slip op. at 8.

Courts and quoted a story from the Bowling Green Daily News. The purpose: reduce prison cost by lessening penalties.<sup>29</sup> The Court of Appeals concluded: “Such a clear statement by those who sought and secured HB 463’s changes is difficult to refute and provides clear insight when attempting to resolve a question of legislative intent and statutory construction”.<sup>30</sup> With the supposed legislative intent in mind, the Court then construed KRS 218A.1413 in a way to carry out that intent.

The Court of Appeals should not have relied on post-passage comments by anyone in ascertaining the intent of the statute. Courts soundly reject a resort to post-passage comments by those who help draft the bill as a method of interpretation.<sup>31</sup> So the Court of Appeals should not have relied on those post-passage comments, much less make those comments irrefutable proof of legislative intent.

Besides that was not the stated purpose of HB 463. “What the legislative intention was, can be derived only from the words they have used; and [the Court] cannot speculate beyond the reasonable import of these

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<sup>29</sup>Slip op. at 8.

<sup>30</sup>Slip op. at 8.

<sup>31</sup>*Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577 n. 3 (1982); *Quern v. Mandley*, 436 U.S. 725, 736 n. 10 (1978) (“*post hoc* observations by a single member of Congress carry little if any weight”); *City of Los Angeles, Dept. Of Water and Power v. Manhart*, 435 U.S. 702, 713-14 (1978).

words.”<sup>32</sup> Sections 1 and 2 of HB 463 state that the purpose of the Bill was to “maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders”. While cost reduction may necessarily flow from many of the provisions of HB 463, the stated purpose that the legislators voted on was to “hold offenders accountable”, something the Court of Appeals’s interpretation fails to do. So the Court of Appeals erred when looking beyond the text to find a different purpose.

In any event, the quotations from the Bill’s authors support the Commonwealth’s position, not the Court of Appeals’. The Court of Appeals quoted Chief Justice Minton as an author of the Bill saying, “that HB 463’s changes were ‘intended to reduce prison costs by lessening penalties for certain drug possession offenses . . .’”<sup>33</sup> This would be evidenced by possession in the first degree being categorically removed from the PFO statute.<sup>34</sup> But Gamble was charged with trafficking, not simple possession. So, even assuming it is proper to find legislative intent from post-passage comments

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<sup>32</sup>*University of Texas Southwestern Medical Center v. Nassar*, — U.S. —, —, 133 S.Ct. 2517, 2528-29 (2013), (quoting *Gardner v. Collins*, 2 Pet. 58, 93, 7 L.Ed. 347 (1829)). See also *O’Daniel*, 153 S.W.3d at 819 (“We ‘ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed.’”).

<sup>33</sup>Slip op. at 8.

<sup>34</sup>KRS 532.080(8)(b).

from the Bill's authors, at least one of those authors believed that the Court of Appeals's logic only extended to possession cases.<sup>35</sup>

**E. The Court of Appeals improperly added words to the text.**

Once the Court of Appeals came up with the intent, it then added words to the text of Section 10 in surmising what the Legislature intended. It is improper to add words to a statute to conform the statute to a court's determination of legislative intent. The statute simply reads: "A Class D felony for the first offense, except that Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years."

But the Court of Appeals added to this:

Read as a whole, we interpret KRS 218A.1413(2)(b)(1) to say that violation of the statute constitutes a Class D felony for the first offense and the maximum sentence to be imposed for a first offense is three years, despite those portions of KRS 532 which would enhance that sentence.<sup>36</sup>

The statute says nothing about enhancements. But the Court of Appeals had to insert that into the statute because it had already determined that the purpose of HB 463 was to reduce prison cost. Therefore KRS 218A.1413 had

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<sup>35</sup>Of course one does not have to go outside the words HB 463 to find this intent. It was express when the Legislature categorically removed possession in the first degree from the PFO statute. KRS 532.080(8)(b)

<sup>36</sup> Slip op., p. 9.

to be read in a way to reduce prison costs. That could only be done by categorically removing it from the PFO statute. Of course it is not proper “to say that since the overall purpose of the statute is to achieve *x*, any interpretation of the text that limits the achieving of *x* must be disfavored.”<sup>37</sup> Simply put, reading the word “enhancement” into KRS 218A.1413 was completely improper.

**F. Gamble is not entitled to a dismissal of the PFO count.**

Lastly, the relief Gamble requested and the relief provided by the Court of Appeals was dismissal of the PFO count of the indictment. Gamble did not request dismissal based on a speedy trial violation; gross prosecutorial misconduct; or a double jeopardy violation,<sup>38</sup> so the only way Gamble could have obtained a dismissal of his indictment in this case would be if the indictment failed to charge a public offense.<sup>39</sup>

Charging a public offense is satisfied by naming the offense.<sup>40</sup> Here, the grand jury indicted Gamble with the public offense of being a PFO 1.

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<sup>37</sup>Scalia and Garner, *supra*, at 168.

<sup>38</sup>See *Keeling v. Commonwealth*, 381 S.W.3d 248, 253 (Ky. 2012); *Gibson v. Commonwealth*, 291 S.W.3d 686, 687-88 (Ky. 2009); *Hoskins v. Maricle*, 150 S.W.3d 1, 12-13 (Ky. 2004); *Flynt v. Commonwealth*, 105 S.W.3d 415, 426 (Ky. 2003)

<sup>39</sup>*Taulbee v. Commonwealth*, 465 S.W.2d 51, 52 (Ky. 1971).

<sup>40</sup>*Parker v. Commonwealth*, 291 S.W.3d 647, 656 (Ky. 2009).

This satisfied the naming-a-public-offense requirement. Gamble is not entitled to a dismissal of the indictment.

It is important that prosecutors be allowed to keep the PFO charge in these types of cases, even if Gamble is right and his sentence cannot be enhanced. Not only does the PFO statute enhance the penalty, but it has a host of other benefits for prosecutors. For example, PFO status affects a convicted criminal's probation, shock probation, conditional discharge, parole status, and minimum parole eligibility.<sup>41</sup> All these benefits will be barred from prosecutors if the Court of Appeals's Opinion is permitted to stand.

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<sup>41</sup>KRS 532.080(5), (7).

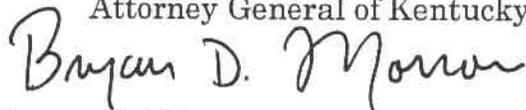
## CONCLUSION

The trial court properly denied Gamble's motion to dismiss the PFO count of the indictment. Nothing in HB 463 categorically removed TICS 2 from the PFO statute. Another statute which used similar language was categorically removed from the PFO statute. But the Legislature did this expressly. Had the Legislature wanted to remove TICS 2 from the PFO statute it would have done so expressly as well. The Court of Appeals's interpretation to the contrary fails to take seriously the plain meaning of the text, renders parts of HB 463 superfluous, and uses terms in HB 463 inconsistently. So, this Court must reverse the Court of Appeals and affirm the trial court's denial of Gamble's motion to dismiss.

Respectfully Submitted

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## APPENDIX

<u>Description</u>	<u>Appendix No.</u>
Indictment (TR at 1) .....	1
Notice file 6/9/11 (TR at 64) .....	2
Order entered 7/6/11 (TR at 80) .....	3
Motion to Dismiss filed 7/7/11 (TR at 85) .....	4
Order denying Motion to Dismiss entered 7/13/11 (TR at 97) .....	5
Judgment and Sentence on a Plea of Guilty entered 8/19/11 (TR at 107) ...	6
<i>Gamble v. Commonwealth</i> , Slip Op. No. 2011-CA-001658 (Ky. App., Feb. 1, 2013) .....	7