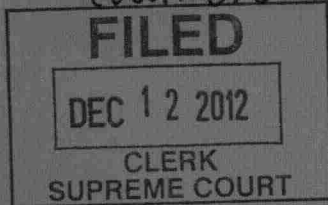
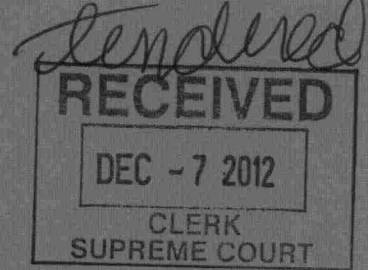


*pursuant to
court order*



COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2012-SC-000034-D



MICHELLE SMITH

APPELLANT

v.

APPEAL FROM CRITTENDEN CIRCUIT COURT
HON. C. RENE WILLIAMS, JUDGE
INDICTMENT NO. 09-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

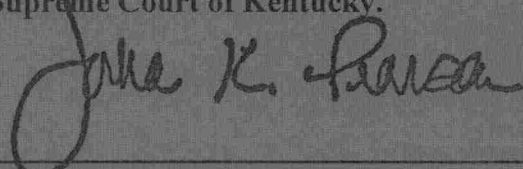
BRIEF FOR APPELLANT

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CERTIFICATE REQUIRED BY CR 76.12(b)

The undersigned does hereby certify that copies of this Brief for Appellant were served upon the following named individuals by United States Mail, postage prepaid, on this 7th day of December 2012: Hon. C. Rene Williams, Judge, Judicial Annex, 35 U.S. Highway 41AS, P.O. Box 126, Dixon, Kentucky 42409-0126; Hon. J. Zachary Greenwell, Commonwealth's Attorney, 215 N. Main Street, P.O. Box 341, Marion, Kentucky 42064-0341; Hon. Paul Sysol, Assistant Public Advocate, Department of Public Advocacy, 739 S. Main Street, P.O. Box 695, Henderson, Kentucky 42419-0695; and served by messenger mail to Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601. I hereby further certify that the record on appeal was returned to the custody of the Clerk of the Supreme Court of Kentucky.



Julia K. Pearson

INTRODUCTION

While Michelle Smith was under a diversion agreement after pleading guilty to Possession of Drug Paraphernalia, Second or Subsequent Offense, the General Assembly amended that crime to a Class A misdemeanor. Although Smith's attorney requested the mitigating benefits of the amendment under KRS 446.110, the trial court denied the motion. A panel of the Court of Appeals upheld the court's decision.

STATEMENT AS TO ORAL ARGUMENT

Ms. Smith welcomes oral argument if this Court believes it necessary for a just decision regarding the issues presented in this case.

STATEMENT AS TO THE RECORD

The record on appeal consists of one volume of Transcript of Record and four CDs. The Transcript of Record will be cited as TR page number. The four CDs each cover a particular day of proceedings. The CDs labeled as July 9, 2009 and September 10, 2009, are not cited within the Brief. The remaining two CDs are cited as follows:

VR 1	October 14, 2010	time stamp
VR 2	November 22, 2010	time stamp

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION	i
KRS 446.110	passim
STATEMENT AS TO ORAL ARGUMENT	i
STATEMENT AS TO THE RECORD	i
STATEMENT OF POINTS AND AUTHORITIES	ii
STATEMENT OF THE CASE	1
Ky. Acts 2010 c 149, § 14, eff. 4-13-10; 2010 c 160, § 14, eff. 4-26-10	1,5
KRS 532.020(2).....	1
<i>Smith v. Commonwealth</i> , opinion rendered December 16, 2011	3,4,7
KRS 446.080(3).....	3
<i>Commonwealth v. Phon</i> , 17 S.W.3d 106 (Ky. 2000)	3,9
<i>Elmore v. Commonwealth</i> , 236 S.W.3d 623 (Ky. App. 2007)	3
<i>Hensley v. Commonwealth</i> , 217 S.W.3d 885 (Ky. App. 2007)	3
ARGUMENT	4
I. Michelle Smith's diversion agreement contained an illegal possible sentence. The terms of her diversion were void	4

Preservation.....	4
Diversion agreements are constitutional contracts.....	4
<i>United States v. Robison</i> , 924 F.2d 612 (6th Cir. 1991).....	4
<i>Commonwealth v. Reyes</i> , 764 S.W.2d 62 (Ky. 1989).....	5
<i>Ricketts v. Adamson</i> 483 U.S. 1 (1987).....	5
<i>Alford v. North Carolina</i> , 400 U.S. 25 (1970)	5
KRS 533.250(1)(f).....	5
<i>Peeler v. Commonwealth</i> , 275 S.W.3d 223 (Ky. App. 2008).	5
KRS 218A.500(5).....	passim
KRS 532.020(2).....	5,11
U.S. Const. Amend XIV.....	6,15
Ky. Const. §§2 and 11.....	6,15
The terms of Michelle Smith's agreement were unenforceable under McClanahan v. Commonwealth	6
<i>McClanahan v. Commonwealth</i> , 308 S.W.3d 694 (Ky. 2010)	6,7,8
<i>S.J.L.S. v. T.L.S.</i> , 265 S.W.3d 804 (Ky. App. 2008).....	7
17A Am.Jur.2d Contracts § 239 (1991).....	7

Ky. Const. §§ 27 and 28.....	8
KRS 218A.550(5).....	8
This Court must apply the amended sentence structure of KRS 218A.500(5)	9
<i>Flynt v. Commonwealth</i> , 105 S.W.3d 415 (Ky. 2003)	9,12
<i>Lawson v. Commonwealth</i> , 53 S.W.3d 534 (Ky. 2001).....	9
<i>Bolen v. Commonwealth</i> , 31 S.W.3d 907 (Ky. 2000).....	10
KRS 532.080(8).	10
This Court must apply the law in effect at the time it renders a decision....	10
<i>Bradley v. School Board of Richmond</i> , 416 U.S. 696 (1974).....	10
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244 (1994)	11
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987).	11,12
The panel also ignored the plain language of <i>Lopez v. Commonwealth</i> and failed to consider the special circumstances present in this case	12
<i>Commonwealth v. Lopez</i> , 267 S.W.3d 685 (Ky. App. 2008).....	12
KRS 533.256	12
RCr 8.04.....	13
House Bill 463	13,14

Commonwealth of Ky. Legislative Research Commission, Report of the Task Force on the Penal Code and Controlled Substances Act, Research Memorandum No. 506 at 6 (2011).	13
KRS 532.007	13
KRS 196.003	13
KRS 196.286	14
KRS 218A.1415(2)	14
KRS 218A.1415(2)(b)	14
KRS 218A.14151	14
KRS 218A.1415(2)(c)	14
KRS 218A.14151(4)	14
Conclusion	15
CONCLUSION	16

STATEMENT OF THE CASE

On March 23, 2009, a Crittenden County grand jury indicted Appellant, Michelle Smith, for Possession of Drug Paraphernalia (PDP), Second Offense. Smith previously had been convicted of Possession of Drug Paraphernalia in 1999.¹

Ms. Smith pled guilty on July 9, 2009. On September 10, 2009, she was allowed to enter into diversion for five years.² At the time Smith entered into diversion, the penalty for Possession of Drug Paraphernalia³, Second Offense, a Class D felony, was from one to five years in prison. However, the Kentucky General Assembly amended the statute in April, 2010. 2010 c 149, § 14, eff. 4-13-10; 2010 c 160, § 14, eff. 4-26-10. Afterwards, a second or subsequent offense of PDP became a Class A misdemeanor, with a possible penalty of from ninety days to twelve months in the county jail. KRS 532.020(2).

At a diversion revocation hearing held on October 14, 2010, Probation and Parole Officer Chasidy Wolfe testified that Ms. Smith pled guilty to DUI, First in Carlisle County on September 15. Further, Wolfe testified, Smith had been in Carlisle County without permission.⁴

In her defense, Ms. Smith testified that she had been successfully completing drug treatment ordered as part of her diversion agreement, and that she would soon begin alcohol counseling ordered as part of her sentence

¹TR 9.

²TR 41-43.

³This crime will be referred to as Possession of Drug Paraphernalia or PDP in the Brief.

⁴VR 1; 10/14/2010; 11:10:15.

for DUI.⁵ She also said that she had been gainfully employed before her arrest for DUI and she would remain so should she be allowed to remain on diversion.⁶ Finally, Smith said, she had been fighting drug and alcohol addiction for about twenty years.⁷

Defense counsel asked the court to consider continuing Ms. Smith's diversion, while also considering a citation for contempt of court for her actions in Carlisle County. Counsel cited the fact that Smith had been in classes for her drug addiction; that she would now be adding classes regarding alcohol addiction at the Pennyryle Center; and that she had been working while on diversion and could continue with that job.⁸ The government argued that the issue had changed from Smith's history of drug and alcohol abuse to a "public safety issue." The court found it "obvious" that Smith's out-patient treatment was not working and set aside the terms of her diversion.⁹

At the sentencing hearing on November 22, defense counsel asked the trial court to continue Ms. Smith's diversion because Possession of Drug Paraphernalia, Second Offense, the crime for which she was being sentenced, was now a misdemeanor.¹⁰ Citing KRS 446.110, counsel argued that if the punishment for a crime changed, as the punishment in this case had, one

⁵*Id.*, 11:16:01.

⁶*Id.*, 11:15:41.

⁷*Id.*, 11:18:53.

⁸*Id.*, 11:19:46.

⁹*Id.*, 11:22:11.

¹⁰VR 2; 11/22/2010; 12:41:24.

sentenced under the older, harsher statute received the benefit of the newly mitigated sentence.¹¹ The government had a different take on the matter. It argued that Ms. Smith had pled guilty prior to the change in the law and should be sentenced to felony time in accordance with the prior law.¹²

On appeal, a panel of the Kentucky Court of Appeals cited the “general rule” that “[n]o statute shall be construed to be retroactive, unless expressly so declared” and the KRS 446.110 exception that if the amended provision “is “certainly” or “definitely mitigating,” and the defendant consents to its application, then the amended provision applies. *Smith v. Commonwealth*, slip opinion at 5, citing KRS 446.080(3); KRS 446.110. *Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000). Further, the panel noted that plea bargains were “binding contracts between the government and defendants” and that plea bargains/plea contracts were to be “interpreted according to ordinary contract principles.” *Smith v. Commonwealth*, opinion at 5, citing *Elmore v. Commonwealth*, 236 S.W.3d 623, 626 (Ky. App. 2007) (citing *Hensley v. Commonwealth*, 217 S.W.3d 885, 887 (Ky. App. 2007). However, the opinion was remarkably devoid of analysis as to how the holding was supported by case or statutory law.

The panel simply found that “a defendant is precluded from consenting to the imposition of a lesser penalty pursuant to KRS 446.110 where she has already entered a valid plea agreement” and “received the benefit of the

¹¹*Id.*, 12:50:51.

¹²*Id.*, 12:51:45.

bargain” by, as in this case, Ms. Smith being allowed to enter into diversion and thus avoid a felony conviction had she successfully completed that diversion. *Smith*, slip opinion, at 5. Thus, the panel found, the trial court had not abused its discretion when it sentenced Smith under the old, felony terms for PDP, Second or Subsequent Offense.

Michelle Smith moved this Court for Discretionary Review of the panel’s opinion. This Court granted her motion on August 15, 2012.

ARGUMENT

- I. **Michelle Smith’s diversion agreement contained an illegal possible sentence. The terms of her diversion were void.**

Preservation

Counsel orally moved for the court to apply the mitigating benefits of KRS 446.110 to Michelle Smith’s sentence.¹³ The Court of Appeals considered the trial court’s denial of counsel’s motion. *Smith v. Commonwealth*, 2011 WL 6260371 (rendered December 16, 2011).

Diversion agreements are constitutional contracts

It is a well-established legal principle that plea agreements are considered contractual in nature. Therefore, “[i]n interpreting and enforcing them, we are to use traditional principles of contract law.” *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991). Plea agreements are also “constitutional contracts” which “must be construed in light of the rights and obligations created by the constitution.” *Commonwealth v. Reyes*, 764 S.W.2d

¹³VR 2; 11/22/2010; 12:41:24.

62, 64-66 (Ky. 1989), quoting *Ricketts v. Adamson* 483 U.S. 1 (1987), Brennan, J., dissenting.

As a condition of pretrial diversion, a criminal defendant is required to enter an *Alford* plea or guilty plea. KRS 533.250(1)(f). Thus, her diversion agreement is a constitutional contract governed by both contract law and the constitution. If the defendant fails to abide by the terms of and complete her diversion agreement, she “has the same right to a sentencing hearing as if he or she had pled guilty without the diversion agreement.” *Peeler v. Commonwealth*, 275 S.W.3d 223, 225 (Ky. App. 2008).

Michelle Smith was allowed to enter a five-year diversion program on September 10, 2009. At that time, the sentencing range for Possession of Drug Paraphernalia, Second Offense, was from one to five years in prison. KRS 218A.500(5). The terms of her diversion, including that Class D felony sentence should Smith’s diversion be revoked, were legal from September 10, 2009 until April of 2010, some seven months later.

However, in April, one of the key terms of her constitutional contract with the government, that of the possible sentence should Ms. Smith’s diversion be revoked, changed when the General Assembly amended the PDP statute to state that a subsequent offense of PDP would be a Class A misdemeanor, with a possible penalty of from ninety days to twelve months in the county jail. 2010 c 149, § 14, eff. 4-13-10; 2010 c 160, § 14, eff. 4-26-10; KRS 532.020(2). At that point—April 26, 2010 and beyond—both traditional

rules of contract law and fundamental considerations of fairness and due process, as embodied in the Fourteenth Amendment to the United States Constitution and §§2 and 11 of the Kentucky Constitution, required the circuit court to impose the misdemeanor, not felony, terms of sentence upon Michelle Smith, should she fail to meet the terms of her diversion.

Not quite six months later, on October 14, 2010, the trial court heard evidence regarding whether Ms. Smith's diversion should be revoked. Probation and Parole Officer Chasidy Wolfe testified that Smith had pled guilty to DUI, First in Carlisle County on September 15. Wolfe also testified that Smith had been in Carlisle County without permission from Probation and Parole.¹⁴

At the sentencing hearing on November 22, defense counsel argued that if the punishment for a crime changed—as the punishment in this case had—one sentenced under the older, harsher statute received the benefit of the newly mitigated sentence. The trial court disagreed and sentenced Ms. Smith to felony time. That sentence, however, was contrary to the law as it began to exist after April 26, 2010.

The terms of Michelle Smith's agreement were unenforceable under *McClanahan v. Commonwealth*

In *McClanahan v. Commonwealth*, this Court noted the “widely recognized principle of contract law” “that agreements that run contrary to law, or are designed to avoid the effect of a statute, are illegal and will not

¹⁴VR 1; 10/14/2010; 11:10:15.

be enforced.” 308 S.W.3d 694, 701 (Ky. 2010), citing *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 821 (Ky. App. 2008); and, 17A Am.Jur.2d Contracts § 239 (1991); emphasis added.

In the *McClanahan* case, the government argued that even though McClanahan’s sentence ran contrary to law, he was not entitled to relief because he received the benefit of the bargain he made. In this case, the government made the same argument. And in its opinion, the panel agreed: “[Michelle] Smith has already received the benefit of her bargain by being afforded pretrial diversion, i.e., an opportunity to avoid the felony charge in its entirety had she complied with the conditions of her diversion.” *Smith v. Commonwealth*, *supra*, at 5. Concerning that logic, however, in *McClanahan*, this Court said,

[t]he Commonwealth urges this Court to uphold Appellant’s sentence on the basis that, having agreed to serve a forty-year prison sentence if he violated the conditions of his release, Appellant simply ‘got what he bargained for,’ citing *Myers v. Commonwealth*, 42 S.W.3d 594, 597 (Ky.2001) for the principle that a defendant in a criminal action may waive the statutory maximum sentence and agree to a sentence beyond the legal range of punishment. *See also Johnson v. Commonwealth*, 90 S.W.3d 39, 44 (Ky.2002).

McClanahan, *supra*, 308 S.W.3d at 698. This Court “reject[ed] the argument” the government made in *McClanahan* because McClanahan’s sentence “exceeded the lawful range of punishment established by the General Assembly” and because “the trial court’s imposition of such a sentence is a

violation of the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution, and is an abuse of discretion.” *Id.*

Whether recommended by an errant jury or by the parties through a plea agreement, a sentence that is outside the limits established by the statutes is still an illegal sentence. . . . It is error for a trial jury to disregard the sentencing limits established by the legislature, and no less erroneous for a trial judge to do so by the acceptance of a plea agreement that disregards those statutes.

....

A sentence that lies outside the statutory limits is an illegal sentence, and the imposition of an illegal sentence is inherently an abuse of discretion.

McClanahan, 308 S.W.3d at 701.

This Court should find the same here, for two reasons. First, this Court’s analysis in *McClanahan* commands the same result. Second, in this case, Michelle Smith went one step further than *McClanahan*: she explicitly **did not** agree with imposition of the illegal, one to five year felony time. Rather, through her counsel, she asked the trial court to apply KRS 446.110 and impose the Class A misdemeanor time called for in the amended KRS 218A.550(5).¹⁵ The trial court refused to do so and sentenced Smith to felony time. In doing so, the court exceeded the sentencing limits the General Assembly set in April 2010 and abused its discretion.

¹⁵VR 2; 11/22/2010; 12:41:24; 12:50:51.

This Court must apply the amended sentence structure of KRS 218A.500(5)

At the time Michelle Smith entered diversion, KRS 218.500(5) read that a person convicted of Possession of Drug Paraphernalia, second or subsequent offense could be sentenced to Class D time. However, because Smith was on diversion, her case was not finally disposed of; rather, it was in a state of “interruption.” *Flynt v. Commonwealth*, 105 S.W.3d 415, 424 (Ky. 2003) (pretrial diversion not “simply a sentencing alternative,” but an “interruption of prosecution prior to final disposition” of the case). The case was interrupted throughout the remainder of 2009, throughout January through March of 2010, and in April of that year, when the General Assembly amended PDP, second or subsequent offense to a Class A misdemeanor. The case remained interrupted until Smith was finally sentenced in November 2010, **after** the amended sentencing provision took effect.

In *Lawson v. Commonwealth*, this Court made clear that “amendments to penalty provisions—provisions pertaining to punishment, such as those creating terms of imprisonment, periods of probation or parole, fines, or forfeitures” may have retroactive application “if the defendant ‘specifically consents to the application of the new law which is “certainly” or “definitely” mitigating.” 53 S.W.3d 534, 550 (Ky. 2001); *Commonwealth v. Phon*, *supra*. The new sentencing provision in this case was mitigating---the possible sentence went from one to five years in prison to 90 days to twelve months in the county jail. See *Bolen v. Commonwealth*, 31 S.W.3d 907, 908-909 (Ky.

2000) (conviction for Possession of Drug Paraphernalia could not be used in PFO proceedings under KRS 532.080(8). The lesser sentence is “definitely mitigating”).

KRS 446.110 makes two things clear: 1) “proceedings” held after the new law takes effect “shall conform, so far as practicable to the laws in force at the time of such proceedings”; and 2) [i]f 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.” *Id.*

In this case, the “proceeding” held after the new law took effect was Michelle Smith’s sentencing hearing in November 2010, some seven months after the General Assembly decreased the penalty for PDP second or subsequent offense. Ms. Smith consented to application of the mitigated PDP sentence in her case—she asked the court to apply it.

This Court must apply the law in effect at the time it renders a decision

The United States Supreme Court has held that an appellate court must “apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974). The “law in effect” at the time this Court renders its decision is that a sentence for second or subsequent Possession of Drug

Paraphernalia is from 90 days to twelve months in the county jail. KRS 218A.500(5); KRS 532.020(2).

Generally, a court should not apply a new statute to conduct arising before passage of the legislation if the "new provision attaches new legal consequences to events completed before enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994). There is a similar prohibition to applying the new statute when the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 245.

But in this case, the new statute did not "impair rights [Michelle Smith] possessed when [she] acted." The new statute did not "increase [Smith's] liability for past conduct." The new statute did not "impose new duties with respect to transactions already completed." Michelle Smith still had the right to ask for diversion or to request a jury trial. The change was to the sentence she might receive if her diversion was revoked; the change **decreased** her liability for past conduct. The change imposed no new duties upon Smith's diversion agreement.

In *Griffith v. Kentucky*, the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" 479 U.S. 314, 328 (1987). The Court explained, "[b]y 'final,' we mean a case in which a judgment

of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” *Id.* at 321 n. 6.

This case was not final in April of 2010; it was “interrupted”. *Flynt, supra*, 105 S.W.3d at 424. The court did not enter a judgment of conviction until November 2010. Therefore, under *Griffith*, this Court should apply the mitigated sentencing provisions of KRS 218A.500(5).

The panel also ignored the plain language of *Lopez v. Commonwealth* and failed to consider the special circumstances present in this case

In *Commonwealth v. Lopez*, Lopez pled guilty and entered a pre-trial diversion program for two counts of Sexual Abuse in the First Degree. 267 S.W.3d 685, 685-686 (Ky. App. 2008). However, after Lopez was unable to complete the Sex Offender Treatment Program requirement, his diversion was revoked. *Id.* Lopez was unable to do so because according to SOTP personnel, “he failed to admit to his involvement in the offenses for which he had been indicted and . . . failed to successfully complete a ‘therapy task’ within the allotted ninety-day period.” *Id.*

In that case, a separate panel of the Court of Appeals found that while “our case law is sparse in construing KRS 533.256,” this Court had held in *Flynt, supra*, the general rule that “the trial court will enter final judgment in accordance with the defendant’s guilty plea” is “not universal in its application.” *Id.*, citing *Flynt*, 105 S.W.3d at 418. Rather, based upon the

“special conditions” of the case, the trial court may elect not to void the diversion, but to amend it in some fashion.

“Special conditions” existed in this case. First, RCr 8.04 makes clear that a diversion agreement “may not specify a period longer than could be imposed on probation after conviction of the crime charged.” As was demonstrated *supra*, Michelle Smith’s one to five year, felony sentence became void in 2010. Thus, “the period [no] longer than could be imposed on probation” was from ninety days to twelve months at the time Michelle Smith was finally sentenced.

Second, in 2011, the General Assembly considered and ultimately passed a piece of legislation known as House Bill 463, in order to respond to rapidly rising rates of incarceration and the resulting costs to the citizens of Kentucky. See Commonwealth of Ky. Legislative Research Commission, Report of the Task Force on the Penal Code and Controlled Substances Act, Research Memorandum No. 506 at 6 (2011). New statutes note that the primary objective of sentencing and the purpose of the Department of Corrections is to “maintain public safety and hold offenders accountable, while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced.” KRS 532.007; KRS 196.003. Special emphasis is placed upon using treatment to rehabilitate drug offenders and decrease the overall cost of corrections. In fact, the General Assembly

encouraged the use of treatment over incarceration to generate savings while reducing criminal risk factors. KRS 196.286.

As part of House Bill 463, KRS 218A.1415(2) was amended to change the possible penalty from one to five to one to three years. Under subsection (2)(b), if the offense is a defendant's first or second, "he or she may" receive 1) "[d]eferred prosecution pursuant to KRS 218A.14151"; or 2) "presumptive probation". *Id.* Deferred prosecution is the "preferred alternative" sentence for first offense Possession of a Controlled Substance. KRS 218A.1415(2)(c). If a defendant entered in the deferred prosecution program violates the terms of that program, the trial court has the following options: 1) continue her participation in the program; 2) amend the terms and conditions of her participation in the program; or 3) order her removed from the program and "proceed with ordinary prosecution for the offense charged." KRS 218A.14151(4).

Michelle Smith does not argue that the benefits of HB 463 should apply retroactively to her. She argues that given the stated public policy of treatment rather than punishment, especially for non-violent drug offenders, she should be given the benefit of the amended PDP sentencing provisions. Second, Smith possessed no drug; rather, she possessed paraphernalia. If a defendant who commits second offense simple possession of a controlled substance may gain deferred prosecution or probation, then Smith should

also be granted the benefit of misdemeanor sentencing for possessing not a drug, but drug paraphernalia.

By her own admission, Ms. Smith had been battling drug and alcohol abuse for about twenty years. She was enrolled in classes for both. She did not become an addict overnight; she was not going to recover from it overnight either. She was also gainfully employed—until her diversion was revoked and she was imprisoned. In other words, until her diversion was revoked and her placement in prison began to take corrections dollars, Smith was a taxpaying citizen. Without testimony from counselors and other persons, there was simply not enough evidence for the court to find it “obvious” Smith’s treatment was not working.

Michelle Smith was entitled to be sentenced under the amended provisions of KRS 218A.500(5). The trial court abused its discretion when it did not apply those provisions. The panel erred when it found the trial court had not abused its discretion and that Smith had the benefit of her plea bargain.

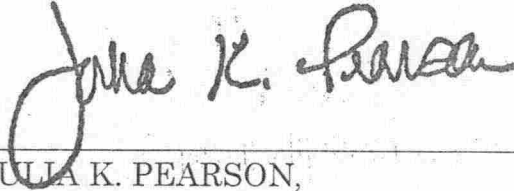
Conclusion

Ms. Smith’s constitutional rights to fundamental fairness and due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and §§2 and 11 of the Kentucky Constitution, were violated. Therefore, this Court must remand this case for proper enforcement of the diversion agreement.

CONCLUSION

Michelle Smith requests relief.

Respectfully submitted,

A handwritten signature in cursive script, reading "Julia K. Pearson". The signature is written in dark ink and is positioned above a horizontal line.

JULIA K. PEARSON,
Counsel for Appellant, Michelle Smith