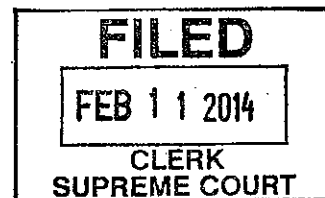


COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
FILE NO. 2013-SC-000004



COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT  
HON. DAVID A. TAPP, JUDGE  
INDICTMENT NO. 2010-CR-347

JOSEPH ANDREWS

APPELLEE

BRIEF FOR APPELLEE, JOSEPH ANDREWS

Submitted by:

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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. David A. Tapp, Judge, 100 North Main Street, Courthouse, P.O. Box 1324, Somerset, Kentucky 42502-1324; the Hon. Eddy F. Montgomery, Commonwealth Attorney's Office, 126 South Main Street, Suite 110, Somerset, Kentucky 42501; the Hon. Nathan Shirley, Department of Public Advocacy, 650 North Main Street, Suite 222, Somerset, Kentucky 42501; and to served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on February 11, 2014. The record on appeal was not checked out for the purpose of this Brief.

  
\_\_\_\_\_  
SHANNON DUPREE

## INTRODUCTION

This is a criminal case involving a probation revocation and the application of KRS 439.3106. The Kentucky Court of Appeals reversed the Pulaski Circuit Court's decision to revoke Joseph Andrews' probation. This Court granted the Commonwealth's motion for discretionary review.

**STATEMENT OF POINTS AND AUTHORITIES**

**INTRODUCTION**..... i

KRS 439.3106.....passim

**STATEMENT OF POINTS AND AUTHORITIES** ..... ii

**COUNTERSTATEMENT OF THE CASE** ..... 1

KRS 439.3106(1) ..... 3,12,13

House Bill 463 .....passim

**ARGUMENT** ..... 4

**KRS 439.3106 IS APPLICABLE TO TRIAL COURTS** ..... 4

*Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976). ..... 4

The Public Safety and Offender Accountability Act ..... 4

**A. The location of KRS 439.3106 in Chapter 439 does not mean the statute is only applicable to the Department of Corrections** ..... 5

KRS 439.310 ..... 5

KRS 439.250 to 439.560.....5,6

KRS Chapter 439 ..... 6

KRS 439.265 ..... 6

KRS 439.267 ..... 6

KRS 439.553 ..... 6,7

**B. KRS 439.3106 provides a new method for determining when it is appropriate to revoke probation**..... 6

*Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010) ..... 6

KRS 439.3108..... 7,8

KRS 439.3106 thru KRS 439.3108..... 8

KRS 439.3107..... 8

KRS 439.3106 and KRS 439.3107 ..... 9

501 KAR 6:250 .....	9
<i>Kentucky Dept. of Corrections v. McCullough</i> , 123 S.W.3d 130 (Ky.2003).....	9
<i>Grieb v. National Bond &amp; Inv. Co.</i> , 264 Ky. 289, 94 S.W.2d 612 (1936).....	9
<b>C. KRS 439.3106 controls when a trial court may revoke probation.....</b>	<b>9</b>
KRS 533.010 and KRS 533.020 .....	9
KRS 533.010.....	9,10
KRS 533.010(6).....	10
KRS 533.020(1).....	10
KRS 533.030.....	10
KRS 533.020.....	10
<i>Southwood v. Commonwealth</i> , 372 S.W.3d 882 (Ky. App. 2012).....	11
<i>Jarrell v. Commonwealth</i> , 384 S.W.3d 195 (Ky. App. 2012).....	12
<i>Kaletch v. Commonwealth</i> , 396 S.W.3d 324 (Ky.App. 2013).....	12
<b>D. The Pulaski Circuit Court abused its discretion. ....</b>	<b>12</b>
<i>Carter v. Commonwealth</i> , 2013 WL 645829 (Ky. App. Feb. 22, 2013) .....	12
<i>Downs v. Commonwealth</i> , 2013 WL 1867982 (Ky. Ct. App. May 3, 2013) .....	12
<i>Flink v. Commonwealth</i> , 2013 WL 1792511 (Ky. Ct. App. Apr. 26, 2013) .....	12
<i>Williams v. Commonwealth</i> , 2013 WL 2948491 (Ky. Ct. App. June 14, 2013) .....	12
<i>Gibson v. Commonwealth</i> , 2013 WL 192887 (Ky. Ct. App. Jan. 18, 2013) .....	12
<i>Cook v. Commonwealth</i> , 2013 WL 4710344 (Ky. Ct. App. Aug. 30, 2013) .....	12
<i>Council v. Commonwealth</i> , 2012 WL 5306278 (Ky. Ct. App. Oct. 26, 2012) .....	12
<i>Saulsberry v. Commonwealth</i> , 2013 WL 1932922 (Ky. Ct. App. May 10, 2013) .....	12
<i>Lee v. Commonwealth</i> , 2013 WL 4400513 (Ky. Ct. App. Aug. 16, 2013) .....	12
<i>Hunt v. Commonwealth</i> , 2013 WL 3968667 (Ky. Ct. App. Aug.2, 2013) .....	12
<i>Loewen v. Commonwealth</i> , 2013 WL 462082 (Ky. Ct. App. Feb. 8, 2013) .....	12

*Kidd v. Commonwealth*, 2013 WL 3968662 (Ky. Ct. App., Aug. 2, 2013) .....12  
*Hubbard v. Commonwealth*, 2013 WL 5305758 (Ky. Ct. App. Sept. 20, 2013) .....12  
*Lanham v. Commonwealth*, 2012 WL 6632779 (Ky. Ct. App. Dec.21, 2012) .....12  
*Burlingame v. Commonwealth*, 2013 WL 5886831 (Ky. Ct. App. Nov. 1, 2013) .....12  
KRS 439.3106(2) ..... 13  
KRS 218A.005 ..... 13  
KRS 196.286 ..... 13  
**CONCLUSION**..... 14

## COUNTERSTATEMENT OF THE CASE

Joseph Andrews pled guilty to Unlawful Possession of a Methamphetamine Precursor, second offense, in December of 2010. TR 24, 31. Andrews was sentenced to ten years imprisonment, and placed on supervised probation for a period of five years. TR 31. The terms of his probation required compliance with numerous conditions, including refraining from the use of any alcohol or drugs unless prescribed by a doctor. TR 32. At the time the trial court accepted the guilty plea, Andrews declined the offer of drug treatment. TR 33.

In June of 2011, the Commonwealth moved the trial court for revocation of Andrews' probation. At the hearing on the matter, probation officer David Rogers testified that Andrews reported on May 3 and was given a drug test. VR: 6/23/11; 10:40:33. The stick test revealed a positive result for the use of methamphetamine. TR 37. Andrews denied that he had used any methamphetamine and stated he had taken one of his wife's Adipex (weight loss) pills from her prescription. TR 37. The test was sent to the lab and later returned with a positive result of methamphetamine. TR 37.

Two days later on May 5, Andrews' wife called the probation officer on behalf of Andrews. She said that Andrews admitted to taking the meth, that he was sorry for lying, that he needed help, and that he had voluntarily checked himself into the Lake Cumberland Rescue Mission. TR 37. VR: 6/23/11; 10:40:54-10:41:08. Andrews continued to report as scheduled to his probation officer even while in treatment and even while knowing that he would probably be arrested. When Andrews reported on June 7, 2011, he was arrested. Id. 10:42:00.

At the probation revocation hearing, Andrews stipulated that he had violated the terms of his probation. Id. 9:15:00. He called Gary Warick, the director of the Lake Cumberland mission to testify. Id. 10:45:41. The Lake Cumberland Rescue Mission is a faith based, long-term residential treatment program for men with drug and alcohol addiction problems. Id. 10:46:25. The recommended stay is nine months to one year. Id. 10:46:40. Warick testified that Andrews checked into the Lake Cumberland program on May 5 and stayed until he was arrested on June 7, 2011. Id. 10:46:00.

According to Warick,, Andrews was doing “great” and showed a “desire to change.” Id. 10:47:45-10:48:05. He had progressed steadily, was working, and was doing everything that was asked of him. Andrews would help out at Warick’s radiator and air conditioning business, work at the church, mow and do other yard work.. Id. 10:48:33. Warick said that Lake Cumberland still had a bed available and that Andrews could immediately re-enter the program if the court would let him. Id. 10:47:00.

Defense counsel argued that up until the time of his relapse on May 3, Andrews had been compliant. Upon relapse, Andrews did not fail to report, did not abscond, but, rather, checked himself into a drug treatment program where he was doing great and progressing steadily. Id. 10:49:52. Andrews continued to report to his probation officer even after the positive drug test, all the while knowing a warrant for his arrest was imminent. Counsel urged the court, pursuant to KRS 439.3106, to not revoke his probation. Id. 10:50:33. The Commonwealth argued that Andrews had two prior felonies and had been on probation before. Id. 10:57:13.

The judge emphasized that Andrews had been offered drug treatment at his sentencing but declined it. Id. 10:58:16. He noted that these services and options were

offered to individuals such as Andrews who declined to take advantage of them until they got caught and that Andrews knew the system and knew how to “play the game.” Id.

10:59:08. The judge concluded that Andrews posed a significant risk to the community at large and that he could not be appropriately managed in the community. Id. 11:00:06.

The trial court then proceeded to revoke his probation. Id. 11:01:33.

The Court of Appeals reversed the trial court, finding that a failure to comply with a condition of probation “is no longer sufficient to automatically justify revocation of probation.” Slip Opinion, 5. The Court of Appeals held that before a trial court can revoke probation, it must make two additional findings pursuant to KRS 439.3106(1):

(1) that the probationer’s failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community; and

(2) that the probationer cannot be managed in the community.

The Court of Appeals correctly determined that Mr. Andrews was doing well in a community-based treatment program since his one positive drug test. The Court noted that Mr. Andrews’ prior criminal history was an insufficient basis for revocation because the trial court had that information at the time it first sentenced Mr. Andrews. Andrews’ criminal history did not prevent his placement on probation at that time. The Court discussed House Bill 463 and its emphasis on using treatment to rehabilitate offenders and decrease overall costs. Slip Opinion, 4. The Court also held that Andrews should not be barred from accessing treatment now just because he previously denied he had a substance abuse problem or needed treatment.

“If we were to allow revocation of probation under these circumstances, it would negate the entire statutory change to the probation revocation process and the purposes



underlying House Bill 463.” Slip Opinion, 7. The Court found the trial court’s decision to revoke Andrews’ probation was arbitrary. The Commonwealth filed a motion for discretionary review.

## ARGUMENT

### **KRS 439.3106 IS APPLICABLE TO TRIAL COURTS**

The Appellant did not raise this issue before the trial court or the Court of Appeals. It is not preserved, and this Court should not consider Appellant’s argument. As this Court is more than aware, a party claiming error on appeal may not “feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

KRS 439.3106 provides:

Supervised individuals shall be subject to:

- (1) Violation revocation proceedings and possible incarceration for failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community; or
- (2) Sanctions other than revocation and incarceration as appropriate to the severity of the violation behavior, the risk of future criminal behavior by the offender, and the need for, and availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

KRS 439.3106 was part of a comprehensive overhaul of the criminal justice system that responded to the crisis of rapidly rising rates of incarceration and concurrent costs. The Public Safety and Offender Accountability Act, commonly referred to as House Bill 463, emphasizes treatment over incarceration to generate savings while reducing criminal risk factors. KRS 439.3106 restrains the discretion of trial courts to

revoke probation by requiring the trial court to find that the probationer poses a significant threat to prior victims or the community and cannot be managed in the community.

**A. The location of KRS 439.3106 in Chapter 439 does not mean the statute is only applicable to the Department of Corrections.**

The Commonwealth argues that KRS 439.3106 applies to the Department of Corrections, not to trial courts. The Commonwealth bases this argument on KRS 439.310, which provides as follows:

The commissioner, with the approval of the secretary and the Governor, shall appoint a person charged with the administration of probation and parole laws, who, with the approval of the commissioner, shall appoint a number of probation and parole officers and other employees sufficient to administer the provisions of KRS 439.250 to 439.560; but no employee shall be appointed except in the manner hereinafter provided. The person charged with the administration of probation and parole laws shall have attained at least a bachelor's degree from an accredited college, and, in addition, shall be a person with training and experience in probation, parole or other related form of welfare work.

The Commonwealth states, "KRS 439.310 makes clear that the provisions of KRS 439.250 to 439.560, including KRS 439.3106, were intended to create a framework in which the Department of Corrections supervises probations and parolees." Appellant's brief, p. 5. The Commonwealth contends that based upon the location of KRS 439.3106 (falling between KRS 439.250 and 439.560), KRS 439.3106 is applicable only to the Department of Corrections and therefore the trial courts do not have to consider the factors enumerated in KRS 439.3106 prior to revoking probation.

Mr. Andrews contends that the mere location of the statute in Chapter 439 in no way signifies that the General Assembly intended it to apply to the Department of Corrections. There are other statutes that fall within KRS 439.250 to 439.560 that are directly applicable to the trial courts. For example, KRS 439.265 deals with shock probation in felony convictions. KRS 439.267 pertains to shock probation in misdemeanor convictions. These two statutes set out the procedure for shock probation for the *trial courts*. Also, KRS 439.553-“judicial determination of conditions of community supervision”- applies directly to trial courts. To this end, the Commonwealth’s argument that KRS 439.3106 must apply to the DOC as opposed to the trial courts simply because of its location in Chapter 439 (between the provisions of KRS 439.250 to 439.560) is without merit.

**B. KRS 439.3106 provides a new method for determining when it is appropriate to revoke probation.**

Probation is to be considered by the trial court at the time of sentencing:

and starts with the process of probation or conditional discharge, moving toward imprisonment only if certain justifications exist to deny probation or conditional discharge.” With probation, the trial court (judicial branch) first decides on a sentence of imprisonment, but then imposes conditions for release and supervision—in lieu of implementation of incarceration—at sentencing. Probation is the suspension of the imposition of a sentence of incarceration. Supervision, however, is turned over to the Division of Probation and Parole (the executive branch). The terms of probation and supervision are authorized by statute and implemented by the court at the time of sentencing. Upon breach of a condition of probation, the probation officer seeks revocation. A hearing is held before the sentencing court, with appeals proceeding through the judicial branch.

*Jones v. Commonwealth*, 319 S.W.3d 295, 297 (Ky. 2010).

The terms of probation are implemented by the trial court. KRS 439.553 provides:

For supervised individuals on probation, the court having jurisdiction of the case shall determine the conditions of community supervision and may impose as a condition of community supervision that the department supervising the individual shall, in accordance with KRS 439.3108, impose graduated sanctions adopted by the department for violations of the conditions of community supervision.

As such, at the time the trial court probates an individual, the court has the option of making one of the conditions the requirement that the DOC impose graduated sanctions for any violation. If a trial court were to utilize KRS 439.553, and the defendant violated a term of his probation, then the DOC would impose graduated sanctions.

But what if the trial court's order of probation is silent as to graduated sanctions and the defendant violates a condition of probation? There are two options. KRS 439.3108 allows the DOC to modify the conditions of probation in order to impose graduated sanctions. KRS 439.3108 provides in relevant part:

- (1) Notwithstanding any administrative regulation or law to the contrary, including KRS 439.340 (3)(b), the department or board may:
  - a. Modify the conditions of community supervision for the limited purpose of imposing graduated sanctions; and
  - b. ...
- (2) ...
- (3) The impositions of a graduated sanction or sanctions by a probation and parole officer shall comport with the system of graduated sanctions adopted by the department under KRS 439.3107....
- (4) If the supervised individual objects to the imposition of the sanction or sanctions then:
  - a. ...
  - b. If the supervised individual is on probation, then the provisions of KRS 533.050 shall apply.
- (5) ...
- (6) ...
- (7) Upon successful completion of a graduated sanction or sanctions, a court may not revoke the term of community supervision or impose additional sanctions for the same violation.
- (8) ...

As a result, if the trial court itself does not impose graduated sanctions as a term of probation, the DOC has the ability to modify that probation order to impose graduated sanctions on its own.

But what if the order of probation is silent as to graduated sanctions and the DOC does not utilize KRS 439.3108 to modify the conditions of community supervision for the limited purpose of imposing graduated sanctions? It is for this reason that the General Assembly enacted KRS 439.3106. In an effort to “curb the cost of incarceration without compromising public safety” the trial court must then consider the factors in KRS 439.3106 before revoking probation.

The Commonwealth argues that “in cases which the court has made graduated sanctions a condition of probation, KRS 439.3106 thru KRS 439.3108 provide a framework for the Department of Corrections to manage supervised individuals.”

Appellant brief, p. 8.

KRS 439.3107 directs the DOC to set up a system of graduated sanctions for violations of community supervision:

Notwithstanding KRS Chapter 533, the system shall set forth a menu of presumptive sanctions for the most common types of supervision violations....[T]he system of sanctions shall take into account factors such as **the severity of the current violation**, the supervised individual’s previous criminal record, the number and severity of any previous supervision violations, **the supervised individual’s assessed risk level** and the extent to which graduated sanctions were imposed for previous violations.”

KRS 439.3107. As such, the graduated sanctions authorized by KRS 439.3107 have already taken the factors listed in KRS 439.3106 into account. If, as the Commonwealth argues, KRS 439.3106 is applicable to the DOC, then there is redundancy between KRS

439.3106 and KRS 439.3107. If the DOC already has a menu of presumptive sanctions (see 501 KAR 6:250 for the list of presumptive sanctions), why would the DOC need KRS 439.3106? This Court must endeavor to read statutes so as to avoid redundancy. This approach to statutory construction is necessary because the “result [of allowing the redundancy] violates the ‘universal rule ... that in construing statutes it must be presumed that the Legislature intended *something* by what it attempted to do.’” *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 140 (Ky.2003) (quoting *Reyes v. Hardin County*, 55 S.W.3d 337, 342 (Ky.2001), in turn quoting *Grieb v. National Bond & Inv. Co.*, 264 Ky. 289, 94 S.W.2d 612, 617 (1936)) (emphasis and omission in original).

The Appellant argues that “[i]n the event of a violation of supervision, the system of graduated sanctions allows the department to impose alternate sanctions on a supervised individual, in lieu of initiating revocation proceedings.” Appellant brief, p. 8-9. However, the very first part of KRS 439. 3106 provides that supervised individuals shall be subject to violation revocation proceedings . Only the trial court can revoke probation.

**C. KRS 439.3106 controls when a trial court may revoke probation.**

The Commonwealth argues that KRS 533.010 and KRS 533.020 provide the trial courts with authority and discretion in revoking probation. KRS 533.010 mandates that the trial court must consider probation, probation with alternative sentencing plan or conditional discharge at the time of sentencing (unless sentenced to death). This statute provides that probation or conditional discharge shall be granted unless the court finds that imprisonment is necessary for the protection of the public. The statute then mandates that the court must consider probation with an alternative sentencing plan if probation is

not appropriate. KRS 533.010(6) sets out options for probation with alternative sentencing. KRS 533.010 essentially instructs the trial court that it has to consider probation at final sentencing, sets out factors that the court must consider in the initial granting of probation, and also factors it must consider in denying probation. It does not address what factors the court should consider in revoking probation.

KRS 533.020(1) provides that “conditions of probation shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.” The Commonwealth relies on this statute as the trial court’s sole authority and discretion with regard to probation revocation. Notably, KRS 533.020 was enacted in 2002. KRS 439.3106 was enacted in 2011, and gives more specific guidance to the trial court before revocation of probation is allowed. The enactment of KRS 439.3106 in 2011 impliedly amended KRS 533.020 (1) by restraining a trial court’s discretion in revoking probation. Specifically, KRS 439.3106 now **requires** the trial court to find that the probationer’s failure to comply constitutes a significant risk to prior victims or the community at large, AND that the probationer cannot be appropriately managed in the community before it may revoke probation.

As stated by the Court of Appeals:

In 2011, the General Assembly embarked on a comprehensive overhaul of the criminal justice system to respond to a crisis of rapidly rising rates of incarceration and concurrent costs through the adoption of the Public Safety and Offender Accountability Act, commonly referred to as House Bill 463. *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). The General Assembly's adoption of new purpose statutes indicate that the primary objective of sentencing and 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. A particular emphasis is placed on using treatment to rehabilitate offenders and decrease overall costs. The General Assembly found that "[s]uccessful, community-based treatment can be used as an effective tool in the effort to reduce criminal risk factors...[and appropriate treatment plans] offer a potential alternative to incarceration in appropriate circumstances and shall be used accordingly.: KRS 218A.005. The General Assembly encouraged the use of treatment over incarceration to generate savings while reducing criminal risk factors. KRS 196.286. However, it restrained the discretion of trial courts to revoke probation. KRS 439.3106.

*Court of Appeals Slip Opinion, p. 3-4.*

KRS 439.3106 clearly refers to revocation of probation proceedings. It is the trial court that has the authority to revoke probation—not the Department of Corrections.

Once a probationer violates a term of probation, the Department of Corrections may seek revocation. The trial court must then hold a hearing, wherein the factors set out in KRS 439.3106 must be considered. Based on current case law, the trial court does not have to specifically list out the factors in KRS 439.3106 in its findings, but it must consider the factors.

The two published opinions issued by the Court of Appeals since the enactment of KRS 439.3106 have made clear that the statute is applicable to the trial courts. In *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012), the Court of Appeals found that although KRS 439.3106 does not require the trial court to make specific findings of fact, the court's decision to revoke probation must still be consistent with the factors set out in KRS 439.3106.



In *Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky. App. 2012), the Court of Appeals found the trial court appropriately considered the General Assembly's wishes, as espoused in KRS 439.3106, in deciding to revoke Jarrell's probation. See also the dissent in *Jarrell* ("Notably, the legislature expressly declared that even if a probation violation is found, **the court** must make two findings before revoking the offender's probation and imposing the sentence of incarceration. Specifically, **the court** must find that the violation constitutes a significant risk to prior victims or the community, and the probationer cannot be managed in the community. KRS 439.3106(1).") (emphasis added)). See also *Kaletch v. Commonwealth*, 396 S.W.3d 324, 329 (Ky.App. 2013) (the Court of Appeals found that the trial court did not err in revoking probation under KRS 439.3106).

There have been numerous unpublished opinions involving KRS 439.3106. In all of these cases, the Court of Appeals has interpreted KRS 439.3106 as being applicable to the trial court.<sup>1</sup> Counsel is unaware of any case—published or unpublished—that has held KRS 439.3106 applies only to the Department of Corrections.

**D. The Pulaski Circuit Court abused its discretion.**

In this case, Mr. Andrews failed one drug test. He then checked himself into a long term drug treatment program and was doing great. He was working. He was

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<sup>1</sup> *Carter v. Commonwealth*, 2013 WL 645829 (Ky. App. Feb. 22, 2013); *Downs v. Commonwealth*, 2013 WL 1867982 (Ky. Ct. App. May 3, 2013); *Flink v. Commonwealth*, 2013 WL 1792511 (Ky. Ct. App. Apr. 26, 2013); *Williams v. Commonwealth*, 2013 WL 2948491 (Ky. Ct. App. June 14, 2013); *Gibson v. Commonwealth*, 2013 WL 192887 (Ky. Ct. App. Jan. 18, 2013); *Cook v. Commonwealth*, 2013 WL 4710344 (Ky. Ct. App. Aug. 30, 2013); *Council v. Commonwealth*, 2012 WL 5306278 (Ky. Ct. App. Oct. 26, 2012); *Saulsberry v. Commonwealth*, 2013 WL 1932922 (Ky. Ct. App. May 10, 2013); *Lee v. Commonwealth*, 2013 WL 4400513 (Ky. Ct. App. Aug. 16, 2013); *Hunt v. Commonwealth*, 2013 WL 3968667 (Ky. Ct. App. Aug. 2, 2013); *Loewen v. Commonwealth*, 2013 WL 462082 (Ky. Ct. App. Feb. 8, 2013); *Kidd v. Commonwealth*, 2013 WL 3968662 (Ky. Ct. App., Aug. 2, 2013); *Hubbard v. Commonwealth*, 2013 WL 5305758 (Ky. Ct. App. Sept. 20, 2013); *Lanham v. Commonwealth*, 2012 WL 6632779 (Ky. Ct. App. Dec. 21, 2012); *Burlingame v. Commonwealth*, 2013 WL 5886831 (Ky. Ct. App. Nov. 1, 2013).

making progress. . He continued to report to his probation officer while in the drug treatment program. The director of the program told the court a bed was still available for Mr. Andrews if the court would let him come back. Mr. Andrews was doing exactly what HB 463 envisioned. That is, until the trial court revoked his probation and sent him to prison for ten years.

The trial court's revocation of Mr. Andrews' probation contravened the requirements of KRS 439.3106. In 2011, the General Assembly spoke clearly through the enactment of House Bill 463. These changes included a new method for determining when it was appropriate to revoke probation under KRS 439.3106. Here, the trial court revoked Mr. Andrews' probation and imposed sentence without making any findings that Andrews' failure to abide by the conditions of his probation constituted a significant risk to his prior victims or the community at large or that he could not be appropriately managed in the community as required by KRS 439.3106(1). There is no evidence that this drug addicted defendant who was charged with possession of a methamphetamine precursor, and violated his probation by using drugs again, was a significant risk to the community or could not be appropriately managed in the community. In fact, it was obvious he could be appropriately managed in the community as evidenced by his successful progress in a drug treatment program.

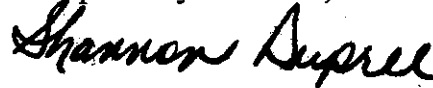
Even though HB 463 emphasizes that treatment is an appropriate way to reduce recidivism, no attempt was made to follow KRS 439.3106(2) and the spirit of HB 463 to determine whether Andrews could be rehabilitated through community-based drug treatment. *See* KRS 218A.005, KRS 196.286. The trial court instead focused on punishing Andrews for his violation by sending him to serve his ten-year sentence. The

trial court's decision to revoke probation in this case and impose the ten year sentence nullified the effort of House Bill 463.

### CONCLUSION

The Kentucky Court of Appeals properly decided that the Pulaski Circuit Court abused its discretion in revoking Andrews' probation and Mr. Andrews respectfully requests this Honorable Court affirm that decision.

Respectfully submitted,

A handwritten signature in black ink that reads "Shannon Dupree". The signature is written in a cursive style with a large initial 'S'.

Shannon Dupree

**APPENDIX**

<b><u>Tab Number</u></b>	<b><u>Item Description</u></b>	<b><u>Record Location</u></b>
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7	<i>Council v. Commonwealth</i> , 2012 WL 5306278 (Ky. Ct. App. Oct. 26, 2012)	
8	<i>Saulsberry v. Commonwealth</i> , 2013 WL 1932922 (Ky. Ct. App. May 10, 2013)	

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