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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

REPLY BRIEF FOR APPELLANT

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CERTIFICATE REQUIRED BY CR 76.12(b)

The undersigned does hereby certify that copies of this Reply Brief for Appellant were served upon the following named individuals by United States Mail, postage prepaid, on this March 5, 2013: 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 prior to the filing of this Reply Brief.

Julia K. Pearson

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PURPOSE OF THIS REPLY BRIEF

This Reply Brief responds to the Appellee's Brief. Any failure to respond should not be taken as waiver of an issue or allegation.

I. Michelle Smith received an illegal sentence.

The Appellee argues that "the present case involves a dynamic not involved in the analysis of [*Commonwealth v.*] *Phon,* [17 S.W.3d 106 (Ky. 2000) in that this was a sentencing following an unsuccessful pre-trial diversion pursuant to a plea agreement and it is upon this dynamic that the Court of Appeals held that the Commonwealth's consent was necessary." Brief for Appellee, at 2.

The Appellee misread the panel's holding. The panel did not hold that the government's consent was necessary. Rather, the panel found that "Kentucky case law supports Smith's contention that her consent was required as the 'party affected. . . ." *Smith v. Commonwealth,* slip opinion at 4 (rendered December 11, 2011). It also held that Ms. Smith was "precluded from requesting a lesser penalty under the amended statute because she had previously entered a plea agreement with the Commonwealth in which she agreed to the recommended sentence of five years." *Id.* In other words, Smith had "already received the benefit of her bargain by being granted pretrial diversion, i.e., an opportunity to avoid the felony charge in its entirety had she complied with the conditions of her diversion." *Id.*, at 5.

The government makes Ms. Smith's point when it argues that Smith was entitled to the benefits of her diversion/plea agreement "the same as any other contract to the extent they did not violate the applicable law at the time of the agreement." Brief for Appellee, at 3, citing *McClanahan v.*

Commonwealth, 308 S.W.3d 694 (Ky. 2010). Michelle Smith will not repeat the arguments made in the Brief for Appellant, save for one point. In *McClanahan*, this Court rejected the "she got what she bargained for" rubric 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." *McClanahan*, *supra*, 308 S.W.3d at 698.

The same logic applies here. At the time she was finally sentenced on November 22, 2010, Michelle Smith's five-year sentence for Possession of Drug Paraphernalia, subsequent offense, violated Kentucky law.

The Appellee argues "[t]he sentence agreed upon in this case was proper under KRS 218A.500(5) in effect in 2009 and it would be law applicable to any crime committed prior to its amendment or for any agreement executed likewise prior thereto." Brief for Appellee, at 4, citing *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

Lawson is inapposite. In that case, this Court did not "reach[] the issue of whether those statutory modifications definitely mitigate the existing penalty ranges" because Lawson "did not raise any issue in the trial court concerning the new provisions" and therefore, did not "consent to the application of the modified provisions." *Lawson v. Commonwealth*, 53 S.W.3d 534, 550-551 (Ky. 2001).

Unlike *Lawson, supra,* at the November 22 hearing, defense counsel informed the trial court that Possession of Drug Paraphernalia, Second Offense, the crime for which Ms. Smith was being sentenced, was now a misdemeanor. Counsel argued that pursuant to KRS 446.110, Michelle Smith was entitled to be sentenced under the new, mitigating statute. VR 2; 11/22/2010; 12:50:51. Thus, Michelle Smith consented to the application of the mitigated KRS 218A. 500(5).

Second, *Lawson* involved the application of amended statutes which capped the aggregate sentence in that case at 50 years instead of the 60 years the jury recommended. Lawson, *supra,* 53 S.W.3d at 550. The sentence in Lawson, unlike in this case, was nevertheless legal. Michelle Smith's was not.

Third, when a contract such as this one consists of several covenants and agreements (plead guilty to a crime; enter diversion for a prescribed number of years; agree to a possible sentence should diversion fail), and one of those covenants is illegal, one of two things can happen. If the illegal covenant can be removed without impairing the whole contract, then it will be removed and the contract enforced. If, however, "the good and bad are so interwoven that they cannot be separated without altering or destroying the general meaning and purpose of the contract, the good must go with the bad and the whole contract be set aside." *Edelson v. Edelson,* 179 Ky. 300, 200 S.W.625, 629 (1918), citing *Newport Rolling Mill Co. v. Hall,* 147 Ky. 598, 144 S.W. 760 (Ky. 1912). Thus, either Michelle Smith could be sentenced under

the new legal provisions, or the entire diversion agreement initially entered should be void.

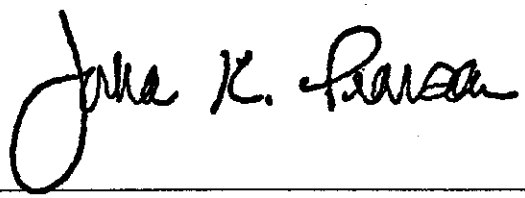
The government does not address the separation of powers violation. However, if the government's analysis that the statutory scheme in place when a person enters diversion but is not finally sentenced is correct, the Executive Branch, through guilty plea contracts, would render null the acts of the General Assembly.

Michelle Smith requests relief.

CONCLUSION

For the reasons stated in this Reply Brief and the Brief for Appellant, Michelle Smith requests relief.

Respectfully submitted,



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