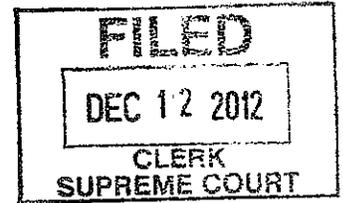


**SUPREME COURT OF KENTUCKY  
CASE NO. 2012-SC-00144-DG**



**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

**VS.**

On Discretionary Review from  
Kentucky Court Of Appeals  
Case No. 2010-CA-002324

Appeal from Jefferson Circuit Court, Division Five  
Indictment No. 92-CR-001447

**CHARLOTTE M. JONES**

**APPELLEE**

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**BRIEF *AMICUS CURIAE*  
OF THE KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
IN SUPPORT OF APPELLEE**

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Respectfully submitted,

KENTUCKY ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
LARRY D. SIMON, President-Elect  
510 West Broadway, Suite 805  
Louisville, Kentucky 40202  
(502) 589-4566

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was this 27 day of November, 2012, mailed to Dorislee Gilbert, Special Assistant Attorney General, 514 West Liberty Street, Louisville, KY 40202; Jeffrey B. Skora, 600 West Main Street, Suite 300, Louisville, KY 40202; Honorable Mary Shaw, Jefferson Circuit Judge, 700 West Jefferson Street, Louisville, KY 40202; and Honorable Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601.

A handwritten signature in black ink, appearing to read "Larry D. Simon".

LARRY D. SIMON

## ARGUMENT

### **THIS COURT SHOULD REMAND THIS CASE TO THE CIRCUIT COURT WITH DIRECTIONS TO APPLY THE CURRENT VERSION OF KRS 218A.275.**

The Commonwealth argues strenuously that this Court should overrule the Circuit Court and the Court of Appeals and forbid the expungement of Ms. Jones' conviction. The Commonwealth, in fact, cites the current version of KRS 218A.275 as evidence that the legislative branch never intended to make drug convictions expungeable as such. However, the current text of KRS 218A.275—to which the Commonwealth cites--illustrates quite clearly that the legislature intended to extend protections which are functionally identical to the procedures for expungement established in KRS 431.076(4), (5), and (6).

KRS 431.076 provides in pertinent part:

(4) If the court finds that there are no current charges or proceedings pending relating to the matter for which the expungement is sought, the court may grant the motion and order the sealing of all records in the custody of the court and any records in the custody of any other agency or official, including law enforcement records. The court shall order the sealing on a form provided by the Administrative Office of the Courts. Every agency, with records relating to the arrest, charge, or other matters arising out of the arrest or charge, that is ordered to seal records, shall certify to the court within sixty (60) days of the entry of the expungement order, that the required sealing action has been completed. All orders enforcing the expungement procedure shall also be sealed.

(5) After the expungement, the proceedings in the matter shall be deemed never to have occurred. The court and other agencies shall reply to any inquiry that no record exists on the matter. The person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application.

(6) Inspection of the expunged records may thereafter be permitted by the court only upon a motion by the person who is the subject of the records and only to those persons named in the motion.

By comparison, the relevant sections of KRS 218A.275 provide:

(8) Except as provided in subsection (12) of this section, in the case of any person who has been convicted for the first time of possession of controlled substances, the court may set aside and void the conviction upon satisfactory completion of treatment, probation, or other sentence, and issue to the person a certificate to that effect. A conviction voided under this subsection shall not be deemed a first offense for purposes of this chapter or deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Voiding of a conviction under this subsection and dismissal may occur only once with respect to any person.

(9) If the court voids a conviction under this section, the court shall order the sealing of all records in the custody of the court and any records in the custody of any other agency or official, including law enforcement records, except as provided in KRS 27A.099. The court shall order the sealing on a form provided by the Administrative Office of the Courts. Every agency with records relating to the arrest, charge, or other matters arising out of the arrest or charge that is ordered to seal records, shall certify to the court within sixty (60) days of the entry of the order that the required sealing action has been completed.

(10) After the sealing of the record, the proceedings in the matter shall not be used against the defendant except for the purposes of determining the person's eligibility to have his or her conviction voided under subsection (8) of this section. The court and other agencies shall reply to any inquiry that no record exists on the matter. The person whose record has been sealed shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application.

There are only two functional differences between the two statutes: (1) the terminology “voiding...and dismissal” in the current KRS 218A.275(8), and (2) the recordkeeping requirement under KRS 218A.275(9), which simply directs courts and attorneys to use KRS

27A.099 to keep track of persons ineligible for deferred prosecution or relief from sentence under KRS 218A. The Administrative Office of the Courts has addressed the amended KRS 218A.275 and promulgated a form to be used in ordering the records sealed. AOC-334 (copy appended as Exhibit 1).

This remedy was not available to Ms. Jones, her counsel, the Commonwealth, or the Circuit Court at the time Ms. Jones filed her motion for expungement. The current amendments to the statute did not take effect until after the original expungement order had been entered. KRS 218A.275, *as amended*, 2011 Ky. Acts ch. 2, sec. 22, effective June 8, 2011.

Retroactive application of the statute is not mandated by law. KRS 446.080(3) provides that "No statute shall be construed to be retroactive, unless expressly so declared." However, KRS 446.110 provides in pertinent part that "(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." (Emphasis added). That being the case, if Ms. Jones consents, this Court may remand this case to the Circuit Court with directions to apply the law as it now stands. *Commonwealth v. Phon*, Ky., 17 S.W.3d 106, 107-108 (2000); *see also Rodgers v. Commonwealth*, Ky., 285 S.W.3d 740 (2009) (comparison between substantive/prospective and procedural/retroactive aspects of self-defense law).

### CONCLUSION

It is abundantly clear that the General Assembly did in fact intend that certain first-time drug offenders would have an opportunity to clear their records for purposes of employment, education, and public benefits. It set up a procedure for sealing records almost identical to expungement under KRS Chapter 431, with the difference of a separate recordkeeping structure

using KRS 27A.099. This Court should remand this matter to the Jefferson Circuit Court with directions to utilize the current provisions of KRS 218A.275 so that Ms. Jones' criminal records can be sealed, as allowed for voided convictions.

Respectfully submitted,

KENTUCKY ASSOCIATION OF  
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LARRY D. SIMON, President-Elect  
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Louisville, Kentucky 40202  
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