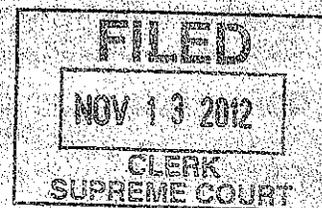


COMMONWEALTH OF KENTUCKY
SUPREME COURT
2012-SC-000144-DG



COMMONWEALTH OF KENTUCKY

APPELLANT

On Discretionary Review
Court of Appeals 2010-CA-002324

v.

Appeal from the Jefferson Circuit Court
Indictment No. 92-CR-001447

CHARLOTTE M. JONES

APPELLEE

**BRIEF FOR APPELLANT
COMMONWEALTH OF KENTUCKY**

Submitted by:

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CERTIFICATE OF SERVICE

Undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail or delivery on November 9, 2012: Hon. Mary M. Shaw, Judge, Jefferson Circuit Court, Division Five, 700 West Jefferson Street, Louisville, KY 40202; Hon. Jeffrey Skora, Counsel for Appellee, 600 West Main Street, Suite 300, Louisville, KY 40202; and Hon. Jack Conway, Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601. A copy of this brief was also mailed to the Clerk of the Court of Appeals. Undersigned does also certify that the record on appeal has been returned to the Clerk of the Kentucky Supreme Court on or before this date.

A handwritten signature in cursive script, appearing to read "Dorislee Gilbert", written over a horizontal line.
Dorislee Gilbert

INTRODUCTION

This Court granted the Commonwealth's motion for discretionary review to determine whether a conviction voided under KRS 218A.275 is dismissed with prejudice such that it is eligible for expungement under KRS 431.076. Because the Court of Appeals improperly added words to the plain language of KRS 218A.275, the Commonwealth requests that this Court reverse the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes the statutes in question speak clearly as further elaborated in this brief. Thus, the Commonwealth does not request oral argument. However, should the Court believe it will benefit from oral argument, the Commonwealth will gladly participate.

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hearing on her motion for expungement. TR 86-87. At the hearing, Appellee recognized that the expungement statute does not specifically apply to voided convictions, but invited the Court to apply it anyway or to grant expungement under CR 60.02(f). VR, 11/30/2010; 09:32:15 and following. The Commonwealth countered that the Court lacked authority to grant expungement because the expungement statutes do not allow for the expungement of a voided conviction and further emphasized the importance of maintaining records of voided convictions in order to ensure that only first-time offenders receive the benefit of voiding a conviction. VR, 11/30/2010; 09:33:55 and following. After hearing both arguments, the Circuit Court remarked that it agreed with the Commonwealth that expungement was unavailable under the expungement statutes. Nevertheless, the Circuit Court indicated that because Appellee had been a law abiding citizen since 1992, it would make a one-time exception and grant the motion for expungement under CR 60.02. VR, 11/30/2012; 09:36:3 and following. On December 1, 2012, the Circuit Court entered its written order granting expungement. TR 92. See Appendix 2.

The Commonwealth timely appealed the expungement order. TR 99. In the Court of Appeals, the Commonwealth argued that it was an abuse of the trial court's discretion to expunge Appellee's voided conviction because KRS 431.076 does not authorize the expungement of voided felony convictions and that the Circuit Court erred in relying on CR 60.02 as the basis of its authority to grant Appellee's motion because the power to expunge is derived exclusively from statute.

Appellee argued that her voided conviction was equivalent to a dismissal with prejudice; that CR 60.02 was a proper vehicle for granting expungement "despite the

limiting language of KRS 431.076(1)”; and that the Circuit Court had inherent authority to expunge Appellee’s criminal record.

In reply, the Commonwealth asserted that voiding a conviction is not equivalent to dismissing it with prejudice because there actually existed a conviction in the case that was later voided. The Commonwealth also argued that CR 60.02 cannot be used to circumvent the limits of expungement in KRS 436.076, and that the court lacked inherent authority to expunge Appellee’s voided conviction.

Following oral argument at which both parties defended their respective positions, the Court of Appeals affirmed the Circuit Court. The Court recognized that KRS 431.076 and KRS 431.078 govern expungement and that “[n]either statute expressly grants Courts the authority to expunge a criminal record after a felony conviction has been voided.” App. Op. P. 3, see Appendix 1. The Court characterized the issue before it as whether a voided conviction amounts to dismissal of the charges. App. Op. P. 3. The Court found that KRS 218A.275 “equates voiding with dismissal,” and under KRS 431.076, a dismissed conviction could be expunged. App. Op. 4.

The Court of Appeals relied on the last sentence of KRS 218A.275(9), which provided: “Voiding of a conviction under the subsection and dismissal may occur only once with respect to any person.” App. Op. P. 4. The Court found “legislative intent to equate the voiding of a conviction with its concomitant dismissal.” App. Op. P. 4. The Court further concluded: “No one can seriously contend but that under the circumstances the dismissal of Jones’s offense is with prejudice.” App. Op. P. 5. The Court disapproved of the Circuit Court’s granting relief under CR 60.02 but affirmed the expungement. Slip Op. P. 5.

The Commonwealth sought and this Court granted discretionary review to consider whether the Court of Appeals erred in concluding that having a conviction voided under KRS 218A.275 constitutes a dismissal with prejudice for purposes of expungement under KRS 431.076. Appellee did not file a cross motion for discretionary review concerning the Court of Appeals' finding that CR 60.02 does not provide authority for expungement in this case, and this issue (which was correctly decided by the Court of Appeals) is not before this Court.

ARGUMENT

This Court is called upon to consider the proper interpretation and intersection of two separate statutes: KRS 218A.275 and KRS 431.076. In particular, this Court must determine whether voiding a conviction under KRS 218A.275 equals dismissing a charge with prejudice, thereby making the charge available for expungement under KRS 431.076. For the reasons stated below, this Court should recognize that voiding a conviction under KRS 218A.275 is a separate and distinct process from dismissing a charge with prejudice for purposes of expungement. This Court should reverse the Court of Appeals and hold that a conviction voided under KRS 218A.275 is not dismissed with prejudice for purposes of KRS 431.076 and is not subject to expungement under that statute.

I. Preservation for review.

The Commonwealth properly preserved the issue before this Court by objecting to the Circuit Court's expungement of Appellee's voided conviction and by timely filing a notice of appeal from the order granting expungement. TR 83-88, 99. This appeal is

properly before this Court after the Court granted the Commonwealth's motion for discretionary review of the Court of Appeals' opinion affirming expungement.

II. Standard of review.

This Court is asked to interpret two statutes and determine if and how they intersect with one another. These are questions of law, and this Court's review should be *de novo* with no deference to the opinion of the Court of Appeals. *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011); see also *Commonwealth v. McBride*, 281 S.W.3d 799, 803 (Ky. 2009) ("The construction and application of statutes is a matter of law. Therefore, this Court reviews statutes *de novo* without deference to the interpretations adopted by lower courts.").

"The seminal duty of a court in construing a statute is to effectuate the intent of the legislature." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). In ascertaining legislative intent, the court must first look to the words used by the legislature in enacting the statute. *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2004). Those words are decisive if they are clear. *Commonwealth v. Gaitherwright*, 70 S.W.3d 411, 414 (Ky. 2002). The statute "must be given a literal interpretation unless [it is] ambiguous." *Plowman*, 86 S.W.3d at 49. It is not this Court's job to "guess what the legislature may have intended but did not express." *Gaitherwright*, 70 S.W.3d at 414 quoting *Gateway Construction Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962). The Court "is not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used. Further, it is neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has not put there." *Id.* at 413 (internal citations omitted). "An appellate court

is bound by the words chosen by the General Assembly.” *Commonwealth v. Garnett*, 8 S.W.3d 573, 576 (Ky. App. 1999). The court should “assume that the “[Legislature] meant exactly what it said, and said exactly what it meant.” *O’Daniel*, 153 S.W.3d at 819. “If the plain words chosen by the legislature do not effectuate its purpose, it is for the General Assembly, not the courts, to re-write the statute, even when the statute as written produces an unsatisfying result.” *Kentucky Unemployment Ins. Com’n v. Hamilton*, 365 S.W.3d 450, 454 (Ky. 2011).

Further, the Court should “look to the provisions of the whole statute and its object and policy.” *Cosby v. Commonwealth*, 147 S.W.3d 56, 58 (Ky. 2004) quoting *County of Harlan v. Appalachian Reg’l Healthcare, Inc.*, 85 S.W.3d 607, 11 (Ky. 2002). “No single word or sentence is determinative, but the statute as a whole must be considered.” *Id.* at 59. The Court should strive to effectuate the legislature’s intention and must presume that the legislature did not intend an absurd result. *Id.* at 59. “[S]ignificance and effect shall, if possible, be accorded to every part” of an Act. *Id.* at 59. Moreover, the court should presume that “the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes” *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

III. The plain language of KRS 218A.275 does not provide for a dismissal with prejudice.

Nothing in the plain language of KRS 218A.275 suggests that voiding a conviction is equivalent to dismissing it with prejudice. In its entirety, the version of KRS 218A.275 in effect when Appellee filed her motion to void her conviction and her motion for expungement provided:

- (1) Any person found guilty of possession of a controlled substance pursuant to KRS 218A.1416 or 218A.1417 may for a first offense, be ordered to a facility designated by the secretary of the Cabinet for Health and Family Services where a program of treatment and rehabilitation not to exceed one (1) year in duration may be prescribed. The person ordered to the designated facility shall present himself for registration and initiation of a treatment program within five (5) days of the date of sentencing. If, without good cause, the person fails to appear at the designated facility within the specified time, or if at any time during the program of treatment prescribed, the authorized clinical director of the facility finds that the person is unwilling to participate in his treatment and rehabilitation, the director shall notify the sentencing court. Upon receipt of notification, the court shall cause the person to be brought before it and may continue the order of treatment and rehabilitation, or may order confinement in the county jail for not more than one (1) year or a fine of not more than five hundred dollars (\$500), or both. Upon discharge of the person from the facility by the secretary of the Cabinet for Health and Family Services, or his designee, prior to the expiration of the one (1) year period or upon satisfactory completion of one (1) year of treatment, the person shall be deemed finally discharged from sentence. The secretary, or his designee, shall notify the sentencing court of the date of such discharge from the facility.
- (2) The secretary of the Cabinet for Health and Family Services, or his designee, shall inform each court of the identity and location of the facility to which such person is sentenced.
- (3) Transportation to the facility shall be provided by order of the court when the court finds the person unable to convey himself to the facility within five (5) days of sentencing by reason of physical infirmity or financial incapability.
- (4) The sentencing court shall immediately notify the designated facility of the sentence and its effective date.
- (5) The secretary for health and family services, or his designee, may authorize transfer of the person from the initially designated facility to another facility for therapeutic purposes. The sentencing court shall be notified of termination of treatment by the terminating facility.
- (6) Responsibility for payment for treatment services rendered to persons pursuant to this section shall be as under the statutes pertaining to payment of patients and others for services rendered

by the Cabinet for Health and Family Services, unless the person and the facility shall arrange otherwise.

- (7) Prior to the imposition of sentence upon conviction of a second or subsequent offense, the court shall obtain a report of case progress and recommendations regarding further treatment from any facility at which the person was treated following his first conviction. If such material is not available, the court shall notify the secretary of the Cabinet for Health and Family Services, and the secretary shall cause the person to be examined by a psychiatrist employed by the cabinet to evaluate his mental condition and to make recommendations regarding treatment and rehabilitation. The psychiatrist making the examination shall submit a written report of his findings and recommendations regarding treatment and rehabilitation to the court which shall make the report available to the prosecuting attorney and the attorney for the defendant. The court shall take such records into consideration in determining sentence. The secretary may decline to cause such examination to be made if the number of psychiatrists on duty in the cabinet is insufficient to spare one from his regular duties or if no such service may be purchased at regular cabinet rates, in such event the secretary shall notify the clerk of the court to that effect within three (3) days after receipt of notification by the court.
- (8) None of the provisions of this section shall be deemed to preclude the court from exercising its usual discretion with regard to ordering probation or conditional discharge.
- (9) 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 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 the subsection and dismissal may occur only once with respect to any person.

Of particular concern in this case is subsection nine.

The Court of Appeals properly recognized that the statute does not expressly grant a court "the authority to expunge a criminal record after a felony conviction has been voided." App. Op. P. 3. It then proceeded to decide what effect the voiding of a

conviction has and whether it amounts to a dismissal of the charges. App. Op. P. 3. The Court of Appeals relied on the last sentence of KRS 218A.275, and held that “a clear reading of KRS 218A.275(9), addressing the voiding of a conviction **and its dismissal**, shows a legislative intent to equate the voiding of a conviction with its concomitant dismissal.” App. Op. P. 4. The Court then concluded: “Thus, the trial court’s voiding and dismissing Jones’s conviction under KRS 218A.275(9) brought that offense within the parameters of KRS 431.076, which permits the expungement of a charge dismissed with prejudice.” App. Op. Pps. 4-5. The Court of Appeals improperly added the phrase “with prejudice” to the plain language of the statute.

As noted above, this Court should not add to the legislative language.

Undoubtedly, the legislature could have used the words “dismissed with prejudice” in KRS 218A.275 if it had so intended. In fact, the General Assembly has enacted various statutes using the phrase “dismissed with prejudice” or some derivative of it. See *e.g.*, KRS 510.300 (providing for expungement of Chapter 510 offenses by an accused spouse if the charge was dismissed with prejudice); KRS 440.450 (Articles III, IV, and V all provide for dismissal with prejudice if the time constraints of the interstate agreement on detainers are not followed). Similarly, the legislature could have referenced KRS 431.076 in KRS 218A.275 if its intent had been to allow expungement of voided convictions under that statute. In fact, the legislature has referenced this statute when its intent has been for that statute to be applied. See *e.g.*, KRS 610.300(2) (“Except for fingerprint records, all records and physical evidence so obtained shall be surrendered to the court upon motion for good cause shown. All records, including fingerprint records, shall be subject to expungement in the manner provided in KRS 431.076 for

circumstances specified therein.”); KRS 17.142(4) (“Records subject to the provisions of KRS 431.076 or 431.078 shall be sealed as provided in those statutes.”).

The plain language of KRS 218A.275 says that charges may be voided and dismissed only once. Had the General Assembly intended this dismissal to be with prejudice, it could have clearly identified it as such. It chose not to do so, and this Court cannot now insert language omitted by the Legislature. Compare *Commonwealth, Finance and Admin. Cabinet, Dept. of Revenue v. St. Joseph Health System, Inc.*, ___ S.W. 3d ___, 2010-CA-001086-MR, 2010-CA-001159-MR, 2011 WL 4633108 (Ky. App. Oct. 7, 2011, final Oct. 24, 2012) (“KRS 160.613(1) contains everyday words that are plain, usual, ordinary and free of ambiguity. Had the General Assembly intended the utility tax to apply only to regulated utilities, it certainly could have said so, but it did not draw such a distinction and it is neither our duty nor our prerogative to create one.”); *Simmons v. Commonwealth*, 746 S.W.2d 393, 398-399 (Ky. 1988) (rejecting Appellant’s invitation to read statutory term multiple deaths as “simultaneous deaths” because those words were not used by the legislature).

Importantly, there is no indication that the language “with prejudice” was inadvertently omitted. Rather, it seems intentional. Voiding and dismissal is permitted on only one occasion. By not making the dismissal with prejudice and preventing expungement under KRS 431.076, the legislature allowed for continued access to court records to ensure that the statute’s purpose of providing one chance for a drug user to get treatment and turn from his illegal ways. Even if omission of the phrase “with prejudice” was an omission by the legislature, “the courts are not at liberty to supply words or make additions which amount, as sometimes stated to providing *casus omissus*, or cure an

omission, however just or desirable it might be to supply an omitted provision. It makes no difference that it appears the omission was mere oversight.” *Garnett*, 8 S.W.3d at 576 quoting *Commonwealth v. Allen*, 980 S.W.2d 278, 280 (Ky. 1998).

It is also indicative of the legislature’s intent regarding the effect of voiding a conviction that the statute provides that upon voiding a conviction, the court should issue a certificate indicating that the conviction has been voided. If the legislature intended voided convictions to be eligible for expungement, there would be no need to provide for a certificate of voiding. On the other hand, if the intent was that the record not be expunged but that there be clear evidence that the conviction had been voided, the provision of a certificate from the court makes sense. If the voided conviction was eligible for expungement, the statute’s certificate requirement would be rendered unnecessary.

KRS 218A.275 does not describe a voided conviction as equivalent to a dismissal with prejudice. In so ruling, the Court of Appeals improperly added words to the plain text of the statute. This Court should not fall prey to the same error. A voided conviction plainly is not equivalent to a dismissal with prejudice, and the Court of Appeals should be reversed.

IV. The treatment of voided convictions elsewhere in Chapter 218A evidences the legislative intent that they not be eligible for expungement.

KRS Chapter 218A governs controlled substances in Kentucky. The legislature must be assumed to have intended all the statutes therein to harmonize with one another. Since 1992, KRS 218A.010 has defined “[s]econd or subsequent offense” for purposes of Chapter 218A as not including “a conviction voided under KRS 218A.275 or 218A.276.”

KRS 218A.010(41).¹ If voided convictions were eligible for expungement, there would be no need to specify that they should not be considered for determining whether a second or subsequent offense has occurred under Chapter 218A. The voided convictions could simply be expunged, and there would be no usable record of them. However, because the legislative intent was that they not be expunged, voided convictions must be exempted as primary offenses for purposes of determining whether a second or subsequent offense has occurred. Otherwise, an essential benefit of the availability of voiding a conviction would be lost. This treatment of voided convictions within Chapter 218A expresses the legislative intent that voided convictions not be eligible for expungement.

V. The legislature provided a proper remedy for minimizing the prejudice of voided convictions.

The legislature's selection of the single word "dismissal" rather than the phrase "dismissal with prejudice" should be considered purposeful rather than accidental as the legislature has provided different remedies for dealing with dismissed cases and cases dismissed with prejudice. KRS 431.076—the statute the Court of Appeals used to justify expungement in this case—states as follows:

- (1) A person who has been charged with a criminal offense and who has been found not guilty of the offense, or against whom charges have been *dismissed with prejudice*, and not in exchange for a guilty plea to another offense, may make a motion, in the District or Circuit Court in which the charges were filed, to expunge all records including, but not limited to, arrest records, fingerprints, photographs, index references, or other data, whether in documentary or electronic form, relating to the arrest, charge, or other matters arising out of the arrest or charge.

¹ When originally added to KRS 218A.010, this provision was contained in subsection 21, but the statute has been renumbered several times since then.

- (2) The expungement motion shall be filed no sooner than sixty (60) days following the order of acquittal or dismissal by the court.
- (3) Following the filing of the motion, the court may set a date for a hearing. If the court does so, it shall notify the county or Commonwealth's attorney, as appropriate, of an opportunity for a response to the expungement motion. In addition, if the criminal charge relates to the abuse or neglect of a child, the court shall also notify the Office of General Counsel of the Cabinet for Health and Family Services of an opportunity for a response to the expungement motion. The counsel for the Cabinet for Health and Family Services shall respond to the expungement motion, within twenty (20) days of receipt of the notice, which period of time shall not be extended by the court, if the Cabinet for Health and Family Services has custody of records reflecting that the person charged with the criminal offense has been determined by the cabinet or by a court under KRS Chapter 620 to be a substantiated perpetrator of child abuse or neglect. If the cabinet fails to respond to the expungement motion or if the cabinet fails to prevail, the order of expungement shall extend to the cabinet's records. If the cabinet prevails, the order of expungement shall not extend to the cabinet's records.
- (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.

(7) This section shall be retroactive.

(Emphasis added). As noted, this statute provides a remedy when charges have been dismissed with prejudice.

The legislature provided a similar yet different remedy for dismissed cases. KRS 17.142 provides a remedy when charges have been dismissed, without any requirement that such dismissal be with prejudice. *Commonwealth v. Smith*, 354 S.W.3d 595, 597 (Ky. App. 2011) That statute provides:

- (1) Each law enforcement or other public agency in possession of arrest records, fingerprints, photographs, or other data whether in documentary or electronic form shall upon written request of the arrestee as provided herein segregate all records relating to the arrestee in its files in a file separate and apart from those of convicted persons, if the person who is the subject of the records:
 - (a) Is found innocent of the offense for which the records were made;
or
 - (b) Has had all charges relating to the offense *dismissed*; or
 - (c) Has had all charges relating to the offense withdrawn.
- (2) A person who has been arrested and then has come within the purview of subsection (1) of this section may apply to the court in which the case was tried, or in which it would have been tried in the event of a dismissal or withdrawal of charges, for segregation of the records in the case. Upon receipt of such application the court shall forthwith issue an order to all law enforcement agencies in possession of such records to segregate the records in accordance with the provisions of this section.
- (3) Each law enforcement agency receiving an order to segregate records shall forthwith:
 - (a) Segregate the records in its possession in a file separate and apart from records of convicted persons;
 - (b) Notify all agencies with which it has shared the records or to which it has provided copies of the records to segregate the records; and
 - (c) All records segregated pursuant to this section shall show disposition of the case.

(4) Records subject to the provisions of KRS 431.076 or 431.078 shall be sealed as provided in those statutes.

(Emphasis added). The statute allows a defendant “to have the records held by any public agency segregated and removed from the public record. This statute does not, however, apply to judicial records. While this remedy does not rise to the level of an expungement, it does provide for some relief.” *Smith*, 354 S.W.3d at 598 (internal citation omitted).

As highlighted, KRS 17.142 specifically references KRS 431.076 and acknowledges that some dismissed records are eligible for relief under KRS 431.076. As specifically provided in KRS 431.076, these are records that were dismissed with prejudice. In KRS 17.142, the General Assembly specifically provided a remedy for dismissed cases that were not dismissed with prejudice or that do not otherwise meet the requirements of KRS 431.076.

The legislature’s choice to void and dismiss rather than void and dismiss with prejudice evinces the legislative intent that such convictions not be eligible for expungement under KRS 431.076. Instead, the legislature has made them eligible for segregation under KRS 17.142. Even if this Court believes expungement is the more just remedy as a result of a voided conviction, it is not this Court’s prerogative to amend the statute through interpretation.

VI. Recent amendments to KRS 218A.275 confirm that the legislative intent was not to make voided convictions dismissed with prejudice and eligible for expungement.

In the time since Appellee filed her motions for voiding and expungement in this case, KRS 218A.275 has twice been amended. In the current version of the statute,

subsection 9 has been renumbered as subsection 8 and subsections 9-12 have been added.

These subsections of the statute read:

(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.

(11) Inspection of the sealed records may thereafter be permitted by the court pursuant to KRS 27A.099 or upon a motion by the person who is the subject of the records and only to those persons named in the motion or upon a motion of the prosecutor to verify a defendant's eligibility to have his or her conviction voided under subsection (8) of this section.

(12) A person who has previously had a charge of possession of controlled substances dismissed after completion of a deferred prosecution under Section 9 of this Act shall not be eligible for voiding of conviction under this section.

The amendments confirm that the legislative intent was not that a voided conviction be dismissed with prejudice so as to be eligible for expungement. The statute now provides for the sealing of records of a voided conviction. This procedure differs in at least two significant aspects from expungement. First, unlike expunged records, these sealed records of a voided conviction may be used against a defendant in the future “for the purposes of determining the person’s eligibility to have” another conviction voided. KRS 218A.275(10). Second, KRS 431.076(5) specifically provides that “[a]fter the expungement, the proceedings in the matter shall be deemed never to have occurred,” while KRS 218A.275’s procedure specifically omits such a statement.

These differences further affirm the legislature’s intent that voided convictions not be eligible for expungement as dismissals with prejudice. If voided convictions were eligible for expungement, there would be no need to provide an entirely separate procedure for the sealing of the records. It would have been sufficient for a person with a voided conviction to move for expungement. Because a voided conviction is not eligible for expungement and the legislature never intended it to be, it created this separate remedy of sealing records for voided convictions.

Additionally, it is worth noting that in 2005 both KRS 218A.275 and KRS 431.076 were amended by the same act. 2005 Kentucky Laws Chapter 99 (SB 47). Yet, neither statute was amended to incorporate the other. This is further evidence that the legislative intent has always been that expungement under KRS 431.076 is not available for convictions voided under KRS 218A.275.

VII. Voided convictions need not be dismissed with prejudice because they involve a guilty plea and completion of sentence.

When an indictment is dismissed prior to trial or resolution of the case, it becomes necessary to determine whether the dismissal is with or without prejudice because a case dismissed with prejudice prior to resolution cannot be reindicted. See *e.g.*, *Commonwealth v. Baker*, 11 S.W.3d 585, 591 (Ky. App. 2000) (dismissal with prejudice . . . precludes any further prosecution.). In this case, the voiding and any dismissal occurred long after resolution of the case and completion of Appellee's sentence. In all cases eligible for voiding, the final sentence must be imposed and completed. There is no need for the dismissal of a voided conviction to be with prejudice because double jeopardy principles—rather than the nature of the dismissal—prevent reindictment. See *Jordan v. Commonwealth*, 703 S.W.2d 870, 872 (Ky. 1985) quoting *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) (“The Double Jeopardy Clause ‘protections against a second prosecution for the same offense after conviction.’”). Thus, even if the legislature's choice of language was ambiguous, there is no need to read the word “dismissal” as dismissal with prejudice.

VIII. Differing treatment of dismissed diverted charges and voided convictions is logical.

In *Commonwealth v. Shouse*, 183 S.W.3d 204 (Ky. App. 2006), the Court of Appeals considered a somewhat similar issue as the one now before this Court. In that case, the Court considered “whether a defendant who has successfully completed a felony diversion program may have the records of his case expunged under KRS 431.076.” *Id.* at 204. The Court recognized that dismissed cases are eligible for segregation under KRS 17.142, while expungement under KRS 431.076 requires that a case first be dismissed with prejudice. *Id.* at 205. The Court then examined the statutes and rules surrounding

diversion and found that while KRS 433.258 provided only that successful diversion would result in a case being “dismissed diverted,” RCr 8.04(5) specifically denominated such dismissals as dismissals with prejudice. *Id.* at 205-206. Accordingly, the Court found no error in the determination that the dismissed diverted case was dismissed with prejudice and subject to expungement. *Id.* at 206.

To the contrary, KRS 218A.275 nor any court rule specifically provides that voided convictions are dismissals with prejudice. The difference between the treatment of voided convictions and dismissed diverted cases is logical. A defendant eligible for voiding of his conviction under KRS 218A.275 has been convicted, finally sentenced for his crime, and completed his sentence. A defendant placed in the diversion program, however, obtains “deferred sentencing for a specified period of time.” *Peeler v. Commonwealth*, 275 S.W.3d 223, 224 (Ky. App. 2008); see also *Flynt v. Commonwealth*, 105 S.W.3d 415, 417 (Ky. 2003). If the defendant on diversion successfully completes diversion, the charges against him are dismissed. *Peeler*, 275 S.W.3d at 224. If the defendant on diversion is unsuccessful and the court voids the diversion agreement, the defendant may be sentenced pursuant to his guilty plea. *Id.* at 225. These differences are substantial. Yet despite these significant differences between diversion and voiding, the Court of Appeals essentially treated the programs the same. It erred in doing so, and this Court should reverse.

CONCLUSION

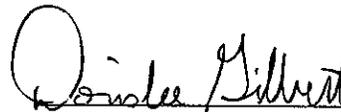
The plain language of KRS 218A.275 does not equate a voided conviction with a dismissal with prejudice. KRS 431.076 and KRS 218A.275 use different words in describing the final resolution of a case. Certainly, the legislature was aware of KRS

431.076's requirement of a dismissal with prejudice when it created voiding under KRS 218A.275. The distinction between phrases used in the two statutes cannot be considered a mistake. The legislature did not intend convictions voided pursuant to KRS 218A.275 to be eligible for expungement. The legislature has provided separate remedies for dismissed cases and cases dismissed with prejudice. Recent amendments to KRS 218A.275 highlight the legislative intent behind excluding voided convictions from being expunged. The differences between voiding a conviction and pretrial diversion support finding that a voided conviction is not a conviction dismissed with prejudice.

For all these reasons, this Court should find that a voided conviction is not a conviction that has been dismissed with prejudice. Thus, it is not eligible for expungement under KRS 431.076. The Court of Appeals' opinion finding otherwise should be reversed, as should the Circuit Court's order of expungement.

Respectfully submitted,

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APPENDIX

Court of Appeals Order affirming expungementAppendix 1

Order granting expungement (TR 92).....Appendix 2

Order voiding conviction (TR 71)Appendix 3