

KACDL

Kentucky Association of Criminal Defense Lawyers
PO Box 910369, Lexington, KY 40591-0369

A Message from Our New President

Dear Members,

I am a native of eastern Kentucky, a Corbin High School, Davidson College (1981), and Wake Forest University School of Law (1984) graduate. I returned to Corbin after school and served as assistant County Attorney for Whitley County from 1984 to 1986. Since 1987 I have been in private practice, and now practice almost exclusively criminal defense. My practice is divided equally between state and federal court.

I've been a member of KACDL since 1987 and I am now a life member of both KACDL and NACDL. KACDL was instrumental in my development as a trial lawyer, and I look forward to learning more and helping other lawyers learn to be the best advocates they can be.

David Hoskins
KACDL 2012 president

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David Hoskins
KACDL President

HOUSE BILL 463 DRUG LAW CHANGES

By Erwin Lewis

The 2012 General Assembly continues to meet. The Task Force that produced HB 463 reported in mid-December and it was clear from their report that there would be no Son-of-463 this session. While continued reform is needed, it appears that the legislators will take a deep breath and assess what they've done. Whether they will pick up the reform mantle begun by HB 463 remains to be seen.

In our first articles, we reviewed the overall philosophy of the bill, examined the efforts to reform the arrest statute, followed by a look at the pretrial release changes. Let's turn our attention to some of the biggest changes made by HB 463: changes in our drug laws.

The War on Drugs, begun under President Nixon, exploded during the so-called crack epidemic of the 1980's. Across the United States, this led to an exponential increase in the

number of persons incarcerated. In Kentucky, we increased our prison population from a little over 3000 in the 70's to a little over 20,000 by 2010. Nowhere was this felt more than in the African American community. In her stunning book, *The New Jim Crow*, Michelle Alexander details the effects of the drug war on her community: "The racial bias inherent in the drug war is a major reason that 1 in every 14 black men was behind bars in 2006, compared with 1 in 106 white men. For young black men, the statistics are even worse. One in 9 black men between the ages of twenty and thirty-five was behind bars in 2006, and far more were under some form of penal control—such as probation or parole. These gross racial disparities simply cannot be explained by rates of illegal drug activity among African Americans."

Please see *HB 463* on page 4

KACDL Website: Check it Out

The KACDL website is a source of information and a way to steer potential clients to KACDL members. The KACDL website is at: <http://www.kacdl.net> The Members Section of the site includes manuals, expert lists and sample pleadings contributed by members. If you have a question about the site, or if you would like to submit a litigation tip, expert recommendation or pleading for other members to access, please contact Michael Healy at: mbhealy@metrodefender.org



KACDL Names New Officers

The Kentucky Association of Criminal Defense Lawyers (KACDL), the Commonwealth of Kentucky's largest statewide association of criminal defense lawyers, has new officers leading the organization in 2012. The new KACDL Officers for 2012 are:

David S. Hoskins, (606) 526-9009 <http://www.davidhoskinsatty.net/>, is the new **KACDL President**. He has over 25 years of experience with criminal defense and other legal services in the Corbin area, and a reputation as an aggressive defense attorney who fights for the rights of clients. David chairs the KACDL Rules Committee. He is a graduate of Davidson College and Wake Forest University School of Law. Taking over, David said, "I am excited to lead this group of criminal defense experts and to continue to advance justice for Kentuckians and lead this organization as it advocates on key liberty issues."

Larry D. Simon, 502-589-4566, <http://www.larrysimonlaw.com/larry-simon.html> a Louisville criminal defense lawyer, is the new

KACDL President-Elect. Simon has served on the Committee on Professional Responsibility and has been the Chair of Criminal Practice Section for the Louisville Bar Association. In 1992, he received the Pro Bono Service Award. Prior to forming his own law practice in 1985, Mr. Simon served as a Felony Court Prosecutor for the Jefferson County Circuit Court for five years. He received his Bachelor of Arts (B.A.) from the University of Louisville in 1975 and his Juris Doctorate (J.D.) from University of Louisville School of Law in 1980.

Please see *New Officers* on page 5



KACDL President-Elect, Larry Simon

Prerelease Advocacy Tip No. 1

By Scott West

When arguing for a client's release under the new provisions of HB 463, don't forget the *Abraham* case, an oldie but a goodie. While HB 463 allows a judge to deny to defendants bonds which are unsecured or on their "own recognizance" -- even where the defendants are classified by the AOC's Pretrial Services Division to be "low" or "moderate" risks to flee, not appear in court, or be a danger to the public -- the decision to do so must be based upon something other than the bare "nature of the offense," and this has long been the law.

In *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977), the trial court considered only the nature of the offenses which the defendant was facing, set a very high bond, and refused to make findings, as required by KRS 431.520 and RCr 4.10 that releasing Abraham on his own recognizance or upon an unsecured bail bond would not reasonably assure his appearance at trial.



Scott West, General Counsel, DPA

In finding the bond unreasonable, the Court of Appeals held that "[t]he record should demonstrate that the circuit judge did in fact exercise the discretion vested in him under the statutes and rules. In the present case, the record shows only that the circuit judge *always sets the bond at \$25,000.00 on every theft charge*. This does not constitute the exercise of judicial discretion [emphasis added]."

Thus, *Abraham* should be cited and an objection lodged every time the Court automatically sets the same bond for the same charge regardless of the particular facts of the case. Read *Abraham* in its entirety; you may be surprised at what else the case has to say regarding judicial discretion, and the refusal to consider all the factors set by the General Assembly!

KACDL Litigation Bank

By Nicholas Summe

KACDL is starting Litigation Bank. It will consist of Motions, Orders, Correspondence, a list of Experts, research on legal and evidentiary issues as well as any other document our membership submits which is beneficial to the practice of criminal defenses.

Currently, an outline is being formed for review of all members. All members are encouraged to review the draft outline and make comments or suggestions. Nicholas Summe of Covington will be organizing the Litigation Bank and putting it together, however, it is viewed as a collective project that will continue to grow and change with the law and our collective practice. The Litigation Bank will only be as good as the members who take the time to submit their work and help build this resource for the benefit of our organization and profession.

After the outline is complete and members submit documents to the Litigation Bank, it will be compiled,

organized and posted on the KACDL website for the benefit of all members. We are asking that each and every member spend some time reviewing their personal files for motions and documents that they feel are beneficial to other members who are looking for examples, templates and information on a particular area of the law.

Send ideas, suggestions or documents to nsummehlaw@yahoo.com Dickman Law Offices, P.S.C. 19 West 11th Street, Covington, KY 41011-3003, Phone: 859-757-1736 Fax: 859-491-7998



Nicholas Summe

HB 463 from page 1

So it's about time that at least some progress was made. Let's review some of the changes made in HB 463 to our drug laws.

Enhancer eliminated for obtaining controlled substances through misrepresentation, using a false name, making false statements, and the like. These offenses remain Class D felonies. However, the previous enhancer allowing for a second offense to be a Class C felony is no longer possible.

Enhancer eliminated for misdemeanor drug offenses. The prior law allowed for a misdemeanor possession of drugs to be enhanced a felony upon a second occurrence. KRS 218A.1404(4) now eliminates this enhancer, while maintaining the enhancer for a second or subsequent felony possession.

1000 yards from a school changed to 1000 feet. One of the most nonsensical provisions of prior law was KRS 218A.1411 which allowed for any trafficking of a Schedule I, II, III, IV, or V controlled substance to be a Class D felony when it took place within 1000 yards of a school. We soon realized that virtually no place in urban or semi-urban Kentucky was outside the 1000 yard distance. It also led to abuses such as police officers arranging for under-cover sales within the proscribed distance. Nor was there a nexus requirement in previous law. A modest change was effected by HB 463, changing the 1000 yards to 1000 feet.

Trafficking 1st defined as 4 grams of cocaine, 2 grams of heroin or meth, or 10 dosage units of Schedule 1 or 2 narcotic. Most states have long featured quantity thresholds to differentiate between small sellers and serious traffickers. Kentucky, on the other hand, has punished the seller of a quarter gram of cocaine equally to the trafficker of several kilos. This has changed. Trafficking 1st now has two levels. When the quantity of the drug sold is 4 grams or more of cocaine, 2 grams or more of heroin or meth, or 10 dosage units or more of a Schedule 1 or 2 narcotic, the crime is a Class C felony for a first offense and Class B for a second or subsequent offense. When, on the other hand, the quantity is below the threshold, the offense is classified as a Class D felony for the first offense and a Class C for the second or subsequent offense.

Trafficking 2nd defined as 10 dosage units of Schedule 1 & 2 non-narcotic or 20 dosage units of Schedule 3 other than synthetic marijuana, salvia, or marijuana. Trafficking 3rd defined as 20 dosage units for a Schedule 4 or 5. Similar changes are made in the trafficking 2nd and 3rd laws. See KRS 218A.1412 and KRS 218A.1414.

Possession 1st changed to 1-3 years with deferred prosecution or presumptive probation. Possession 1st cannot be enhanced with PFO. Possession of a controlled substance does not include a quantity threshold. Possession in the 1st degree remains defined as possession of a

Schedule I or II narcotic, a controlled substance analogue, meth, LSD, PCP, GHB, or Rohypnol. The major changes to KRS 218A.1415 are that the enhancer has been eliminated and the penalty reduced from 1-5 to 1-3 years. In addition, deferred prosecution is the "preferred alternative" for the first offense, while the defendant shall be placed on presumptive probation for either the first or second offense unless he is not "eligible." Amendments to KRS 218A.010(37) state that the presumption of probation can be overcome only by a finding by the trial court of "substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety." Whether this is being followed in spirit by courts remains to be seen.

Possession 2nd and 3rd can no longer be enhanced. KRS 218A.1416 and KRS 218A.1417 have been amended to eliminate the enhancement from a Class A misdemeanor to a Class D felony.

All thefts of a controlled substance irrespective of value are a Class D felony. Previous law contained a \$300 threshold. HB 463 eliminated this. Now all thefts of a controlled substance are Class D felonies which may not be enhanced. Thefts of controlled substances must be prosecuted under KRS 218A rather than KRS Chapter 514.

Possession of marijuana changed to 1-45 days. KACDL seeks to have possession of marijuana made a violation. However, HB 463 made substantial progress, reducing marijuana possession from a Class A misdemeanor to mini-Class B misdemeanor punishable by 1-45 days in jail. Trafficking in marijuana under 8 ounces remains an enhanceable Class A misdemeanor. Trafficking in 8 ounces or more remains a Class D felony that is enhanceable to a Class C for subsequent offenses. Trafficking in marijuana of 5 pounds or more remains an enhanceable Class C felony. And the presumption remains that if a person possesses 8 ounces or more of marijuana that it is for the purpose of selling it.

Synthetic marijuana changed to 1-30 days.

Double enhancers have been altered. HB 463 changed the ability of prosecutors to enhance possession 1st offenses with PFO. A person may not have his sentence enhanced by PFO for committing the same offense. However, this offense may serve to enhance a different felony offense committed at a later date.

Meth laws remain harsh. There was great promise when the Task Force first produced its report that the harshness of our meth laws would finally be addressed. Initial proposals were shot down by prosecutors and law enforcement, and our meth laws have remained harsh, our sentences unusually long.

HB 463 has started down the road to reform of our drug laws. Significantly more reform will be needed, however, if we are to repair the damage to our communities, restore inmates to their families, and begin to use our resources more productively.

New Officers from page 2

J. Guthrie True of Frankfort's Johnson, True & Guarnieri, (502)875-6000 <http://www.jtgattorneys.com/true.htm> , takes over as **KACDL First Vice-President**.

Mr. True is a named partner in the Frankfort, Kentucky law firm of Johnson, True & Guarnieri, LLP. Mr. True concentrates his practice in the areas of white collar criminal defense, nursing home liability, plaintiff's personal injury, products liability and medical negligence, as well as other complex litigation. He is admitted to practice before all state and federal courts in Kentucky, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court. He serves on the Board of Directors of the Kentucky Association of Criminal Defense Lawyers. He also serves as a member of the Board of Directors of the Kentucky Bar Foundation. Mr. True recently served as a member of the Task force on the Penal Code and Controlled Substances Act appointed by the Kentucky General Assembly. Mr. True is a Fellow of the American College

of Trial Lawyers. He is also a Fellow of the American Board of Criminal Lawyers. Mr. True is recognized in several areas of practice expertise by the publication *The Best Lawyers in America*, and is also recognized as one of Kentucky's *Super Lawyers*.

Mr. True has served on the Board of Trustees of Georgetown College since 2002. He has served two terms as Chair of the Board of Trustees and three terms as Vice Chair.

Mr. True obtained his Bachelor of Science at Georgetown College, graduating *summa cum laude*, in 1981. He obtained his Juris Doctor from the University of Kentucky College of Law in 1984, where he served as President of the Moot Court Board.



J. Guthrie True

KACDL Files Amicus Brief

By Larry Simon

Members of the KACDL should be alerted to a Certification of Law case currently pending before the Kentucky Supreme Court.

The issue arose in Jefferson County District Court after a private criminal defense lawyer contacted a District Court judge, *ex parte*, for the purpose of setting aside an arrest warrant. In this case the warrant was recalled and converted to a summons.

The County Attorney's Office objected to the court's order on the next court date; however, the recalling of the warrant was affirmed by another District Court judge, prompting the Jefferson County prosecutor to ask the Supreme Court to certify the question of whether "a criminal defendant is authorized to request a judge to vacate or set aside an arrest warrant with no notice or opportunity for the Commonwealth to be heard."

The answer to this Certification of Law question will depend on the interpretation of a number of rules and statutes (Rcr 4.40; KRS 431.064; SCR 4.300-Judicial Cannon 3B(7)(a).)

The KACDL has filed an Amicus Brief with the Court on this issue.

The Jefferson County Commonwealth's Attorney's Office has also filed an Amicus Brief.

**KACDL LAWYER'S ASSISTANCE
STRIKE FORCE
Ready to help members**

The Strike Force provides expert representation to criminal defense attorneys facing contempt charges and similar matters at no charge.

The Strike Force is now representing a lawyer who was sanctioned by the Adair Circuit Court for a calendaring conflict despite taking all available measures to resolve the conflict.

Any member in need of Strike Force assistance or any member who is interested in being on the Strike Force should contact

Russ Baldani
KACDL Past-President
at russ@brr-law.com, or
859-259-0727.

Kiddy DUI TIP From Wil Zevely

Lawyers representing under 21 defendants charged with kiddy DUI's need to be aware of KRS 186.018. Subsection (2) deals with the driving records of people convicted of under 21 DUI.

The statute says the Transportation Cabinet shall not release any of these convictions. Further, within 5 days of the person getting his license reinstated, the records must be destroyed.

This means the convictions should not be available for use by prosecutors to seek non mandatory penalty enhancements. It also means these convictions won't go across state lines for use by prosecutors in other states to seek mandatory enhancements. Ohio is an example. Ohio, by statute, can use out of state Kiddy DUI convictions to seek mandatory enhancements.

Have a question?

Email us at:

Kacd12000@yahoo.com

Coming in June:

**KACDL 2012 Regional Seminars:
Advancing Your Criminal Law Capacity
Criminal Defense Experts providing timely information
and real-world tools to represent your clients. 3 hours of
CLE including the 2012 Legislative Update by Ernie
Lewis; plus an hour of ethics and an hour of practical
criminal defense practice.**