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## TRIAL LAW NOTEBOOK

& GUIDE TO KENTUCKY SENTENCING LAW



Commonwealth of Kentucky  
Department of Public Advocacy  
Edward C. Monahan, Public Advocate

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**INTRODUCING THE DPA TRIAL LAW NOTEBOOK, 5TH EDITION****Introduction to the DPA Trial Law Notebook, 5th Edition**

We have added around 90 new cases to this fifth edition of the Trial Law Notebook and have rechecked the status on all of the cases throughout the manual. It contains opinions of the Kentucky Supreme Court and Kentucky Court of Appeals through March, 2016. Some of the new material we have added to this edition includes:

- updated case law from the time of the last edition in 2014, including changes in the Rules of Criminal Procedure and expanded sections on Batson challenges, prosecution witnesses, truth-in-sentencing, and probation revocations,
- new discussions of issues not yet resolved at the time of last publication,
- a new chart on graduated sanctions from 501 KAR 6:250,
- an expanded new table of contents to make the Notebook easier to use,
- special thanks to Zachary Chesser at Brandeis School of Law for interning with DPA and re-Shepardizing all the caselaw, and to Melanie Foote Hollingsworth for extensively editing and re-designing the layout.

The notebook begins with a section on general trial law which is organized alphabetically by topic. After that, though, the materials are organized in the sequence in which they would most likely be used during a trial. So, beginning with the section on juries, the notebook is designed so that an attorney can more or less follow the course of a trial by simply turning the pages of the notebook as the trial goes on.

One feature which sets this notebook apart from others is the Practice Tips. They are not meant to suggest what must be done in any situation to be either effective or ethical, but each one has been “learned the hard way” by some attorney who failed to preserve an important issue or otherwise got “burned” by a different practice. Special thanks to the people in appeals for most of them.

Although this is a notebook for defense attorneys - and many citations have been included simply because defense attorneys need to know about them - I have nevertheless tried as much as possible simply to state the law as it stands. To that end, I have tried to avoid simply collecting dicta which represent the law as I might prefer it to be, rather than as it is. Still, if there is any reference which is unclear or misleading, please do not hesitate to call it to my attention. Any suggestions for improvement will be appreciated.



Glenn S. McClister  
May 2016

A Note on Unpublished Opinions – I have tried to cite unpublished opinions as examples rather than authorities. In some cases, however, unpublished opinions cited in this notebook represent the only decision available on the specific issue. Should they be needed as authorities, an attorney should know that, effective January 1, 2007, CR 76.28(4) was amended to say: “...unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.” Of course, cases which are not yet final should not be cited as authority at all until they become so.

# Contents

## I. IN GENERAL 6

IN ABSENTIA	6
Enhanceable Offenses	6
Legal Standard	6
ADJOURNMENT	6
ADMONITIONS	6
ADVERSARIAL BOND HEARINGS	6
BIFURCATION	7
Legal Standard	7
PFO	7
Referring to Prior Convictions	8
Subsequent Offenses	7
IN CAMERA REVIEW	8
CHANGE OF LAW	8
SCOTUS decisions	9
COMMONWEALTH, GENERALLY	9
CONDITIONAL PLEAS	9
CONTINUANCES	10
Legal Standard	10
Unavailable Witness	10
Waiver	10
CONTINUING OBJECTIONS	11
DAUBERT AND EXPERTS	11
Challenging Expert Testimony	13
Experts and Discovery	12
Legal Standard	11
RCr 8.07	13
Right to Cross-examine Experts in Person	12
DEFENDANT IN SHACKLES	14
DEFENSE THEORIES, TYPES OF	14
DEFENSES WITH REFERENCES TO KENTUCKY LAW	15
DISCOVERY	16
Brady	18
Dismissal with Prejudice	17
Informants	17
Missing Evidence	18
Open File	16
Oral Incriminating Statements of Defendant	16
Scope	16
Showing Prejudice	17
Witness Lists	17
Witness Statements	16
EX PARTE HEARINGS	19
EX POST FACTO	19
INDICTMENTS	20
Age-Specific Offenses	22
Amending Indictments	22
Apprendi	22
Charges Barred by Double Jeopardy	21
Date-Specific Offenses	22
Double Enhancement	21
Facial Defects	20
History	20
Indictment Only Charges Misdemeanors	21
Legal Standard	20
Misleading the Grand Jury	22
Presenting Evidence to the Grand Jury	23
Proof at Trial	23
Substantive Defects	21
LIMITING INSTRUCTIONS	23
Appropriateness	23

Effect on Prosecution	23
MOTIONS IN LIMINE	24
Legal Standard	24
NOTICE OF DEFENSES	25
PRE-TRIAL MOTIONS	26
Bench Trials	26
Bill of Particulars	26
Challenges to Constitutionality	27
Competency	26
Jurisdiction	27
Motion Deadlines	26
Motions Which Must Be Made Before Entering a Plea	26
Motions Which Must Be Made Before Trial	26
Reconsider	27
Recusal	27
Separate Trials	28
Suppression Hearing	29
Unpublished Opinions	30
Venue	30
COMMON MOTIONS AND AUTHORITY	30
RIGHT TO TRIAL	34
STIPULATIONS	34
Stipulating to issues the opponent is not prepared to prove	34
Stipulating to issues the opponent is prepared to prove	34
SUBPOENAS	34
PRESERVING A CLEAR RECORD ON APPEAL	35
<b>II. THE JURY 35</b>	
PROCEDURE FOR SELECTING A JURY POOL	35
Failure to Follow the Procedure	35
Fair Cross-Section, Objecting to the Procedure Itself	36
Improperly Excusing Jurors	36
CHECKLIST FOR INVESTIGATING A JURY PANEL	37
OTHER OBJECTIONS TO THE JURY PANEL	37
Juror Also a Witness in the Case	38
Juror a Victim of Similar Crime	38
Juror Convicted a Co-Defendant	39
Juror Had Participated in Voir Dire in Previous Trials Against Same Defendant	39
Jurors Served in a Previous Trial of the Same Defendant	39
Remarks Made During Voir Dire	38
CALLING JURORS FROM THE POOL	40
NUMBER OF JURORS	40
<b>III. VOIR DIRE 40</b>	
Referring to Defense Attorney as Public Defender	42
Right to Conduct Voir Dire	40
The Purpose of Voir Dire	41
Voir Dire on Defendant Not Testifying	41
Voir Dire on Disproportionate Incarceration	42
Voir Dire on No Duty to Retreat	42
Voir Dire on Reasonable Doubt	41
Voir Dire on Sentencing Ranges	41
TIMING OF STRIKES FOR CAUSE	42
STRIKES FOR CAUSE, GENERALLY	42
Legal Standard	42
Resolving Doubts About Bias	42
STRIKES FOR CAUSE, EXAMPLES	43
Juror Cannot Consider Mitigators	43
Juror Fails to Meet Statutory Qualifications	43
Juror Has A Close Relationship With a Party	43
Juror Has A Close Relationship With Attorney	44
Juror Has A Close Relationship With a Witness	44
Juror Has Formed Opinion Regarding Guilt	43
Juror Has Other Biases	45
Juror Has Trouble Accepting Legal Principles	43
REHABILITATING BIASED JURORS	45

PEREMPTORY STRIKES	46	Fifth Amendment	73
Legal Standard	46	Improper Cross	73
Number of	46	Intimidating Defense Witnesses	73
BATSON CHALLENGES	47	Truthfulness of Other Witnesses	72
CHECKLIST FOR STRIKING JURORS	49	DIRECTED VERDICTS, RENEWING	74
EXERCISING PEREMPTORIES	50	Guilty Verdict	75
SWEARING OF THE JURY	50	Instructions	75
<b>IV. THE COMMONWEALTH'S CASE</b>	<b>50</b>	Legal Standard	74
ORDER OF TRIAL	50	Must Be Specific	74
ANNOUNCING "READY"	51	No Prosecution Appeal	75
Ineffective Assistance	51	Timing	74
No Time Allowed to Prepare	51	<b>VI. TO THE JURY</b>	<b>76</b>
SEPARATION OF WITNESSES	52	INSTRUCTIONS	76
READING THE INDICTMENT	52	GENERAL REQUIREMENTS	76
PROSECUTION THEORY OF THE CASE	52	Affirmative Defenses	76
PROSECUTION OPENING STATEMENT	53	Elements of the Offense	77
Computer Generated Visual Evidence	53	Interpretation of Evidence	76
PROSECUTION WITNESSES	54	Lesser Included Offenses	76
Bolstering Witnesses	55	Missing Evidence Instruction	77
Charts	57	Presumption of Innocence	77
Co-defendants	54	Right to Remain Silent	77
Crawford	54	The Judge Must Instruct on the "Whole Law of the Case"	76
False Testimony	55	The Judge's Role is to Inform the Jury of the Law	76
Habit Evidence	56	PRESERVATION OF ERROR	77
Improper Testimony	55	Effect of Failure to Preserve	78
Investigative Hearsay	56	Requirement and Sufficiency of Objection	77
Photographs	57	Sufficiency of Tendered Instructions	78
Statements Made on Tape or Video	57	UNANIMOUS VERDICT	78
OBJECTIONS	58	Prohibited Instructions	78
Constitutional Grounds	59	DEFENSES	79
Judge's Job at Trial	59	Burden of Proof	79
Objections, Legal Standard	58	Defendant Not Required to Testify	79
Objections, Purpose of	58	Defense Theory of the Case	79
Objections, Request Relief	58	Includes Alternative Theories	79
Objections, Ruling Required	58	Specific Defenses: Justification	79
CONSTITUTIONAL CHECKLIST	60	Specific Defenses: Liability	81
EXCLUDING EVIDENCE GUIDE	63	Specific Defenses: Responsibility	80
ADMITTING EVIDENCE GUIDE	64	LESSER INCLUDED OFFENSES	82
CROSS-EXAMINATION	65	Definition	82
Legal Standard	65	Effect of Requesting or Failing to Request	83
Parole or Probation	65	Proper Procedure	83
Pending Charges	66	Specific Offenses	83
Scope	65	When Required	82
DIRECTED VERDICTS	66	COMPLICITY AND FACILITATION	83
Legal Standard	66	Complicit Conduct	83
Must Be Specific	67	Complicit Mental State	83
No Prosecution Appeal	67	Complicity to Act	84
<b>V. THE DEFENSE CASE</b>	<b>67</b>	Complicity to Result	84
RIGHT TO PRESENT A DEFENSE	67	Difference Between Facilitation and Complicity	84
Alternative Perpetrator	68	Intent Element Required	84
Constitutional Significance	68	When Complicity Applies	84
Defense Theories	69	SENTENCING	84
Legal Standard	67	Combined TIS/PFO Sentencing	85
Self-Representation	69	Consecutive/Concurrent Recommendation	85
AVOWALS	70	PFO	84
Failure to Allow	70	MISCELLANEOUS	85
Legal Standard	70	Differentiating Between "Result" Offenses and "Act" Offenses	87
Necessary to Preserve Error	70	Instructions for Specific Crimes	86
DEFENDANT TESTIFYING	70	Interrogatories	85
Commenting on Failure to Testify	70	Mental State Instructions	87
Commenting on Post-Arrest Refusal to Speak to Police	70	Other Instructions	87
Commenting on Pre-Arrest Failure to Make Denials	71	Reasonable Doubt	85
Right to Testify	70	PROSECUTION CLOSING ARGUMENT	88
DEFENSE WITNESSES	72	Legal Standard	88
		Object!	88
		Request Relief!	89

IMPROPER CLOSING ARGUMENTS, EXAMPLES	89	Generally	107
Arguing Legal Presumptions	89	Life Sentences	107
Credibility and Character of Witnesses	90	SENTENCES MUST RUN CONSECUTIVELY	108
Defining Reasonable Doubt	89	Ammunition	108
Demonstrations	92	Awaiting Trial	109
Effect of Verdict	92	Escape	109
Failure of Accused to Testify	91	Sex Crimes	108
Golden Rule	91	DEFERRED PROSECUTION	109
Inflammatory, Abusive Language	91	PRETRIAL DIVERSION	109
Irrelevant Matters	90	PROBATION ELIGIBILITY	110
Jury Responsibilities	92	INELIGIBLE FOR PROBATION	110
Local Prejudice	91	Armed and Wearing Body Armor	111
Matters Not in Evidence	90	New Offense while on Parole or Probation	111
Misstatements of Law, Evidence	90	PFO's	111
Personal Opinions, Beliefs, Knowledge	90	Projectile Weapon	111
Reading Law to the Jury	92	Sex Offenders	110
Send a Message	91	Violent Offenders	110
CONTACT WITH JURORS	92	PROBATION REVOCATION	111
DELIBERATIONS	93	Attorney at Original Sentencing	113
CONTINUANCE DURING TRIAL	94	Child Support, Fines, Restitution	116
DEADLOCK, THE "ALLEN CHARGE"	94	Credit for Time Held in Contempt	115
POLLING THE JURY	94	Due Process Requirements	113
UNANIMOUS VERDICT	94	Extending the Probation Period	116
INCONSISTENT VERDICTS	95	Findings of Fact	115
In Separate Trials	95	Graduated Sanctions	112
In the Same Trial	95	Judicial Discretion, Findings Required by Statute	112
TRUTH-IN-SENTENCING, KRS 532.055	95	Neutral Court	115
Bail Pending Appeal	98	Not as Extensive as a Criminal Trial	114
Challenging Prior Convictions	97	Notice of Conditions of Probation, Generally	111
Juvenile Convictions	97	Right to Be Heard, Present Evidence, Confront	114
Mitigation	98	Separate Sentencing and Updated PSI	116
Nature of Prior Convictions	95	Standard of Proof	111
Out-of-state Convictions	97	Timing of Revocation	115
Parole Eligibility	97	Written Notice of Grounds for Revocation	114
Preservation of Sentencing Error	98	PAROLE ELIGIBILITY	117
Proof of Prior Convictions	96	By Types of Crimes	118
Serious Physical Injury/Violent Offender	98	CREDIT FOR TIME SERVED	118
Victims	98	SERVING TIME	119
PERSISTENT FELONY OFFENDER, KRS 532.080	99	Calculation of	119
Burden of Proof	99	Challenging the Calculation of Credit for Time Served	120
Capital Offenses	100	Educational Good Time, KRS 197.045(1)(a)(2)&(3)	120
Challenging Prior Convictions	99	Kinds of Time	119
Drug Paraphernalia as an Underlying Offense	100	Meritorious Good Time, KRS 197.045(1)(b)(2)	120
Identity	99	Modification of Sentence	119
Merger of Prior Offenses	100	Placement	119
Merger of Prior Offenses and Double Jeopardy	100	Sex Offenders	120
Separate Indictments	100	Statutory Good Time, KRS 197.045(1)(b)(1)	119
Sequence of Prior Offenses	99	Work Credit, KRS 197.047	120
PFO CHECKLIST	101	POSTINCARCERATION SUPERVISION	120
PFO and Sentencing Caps	102	PAROLE REVOCATION	121
PRESENTENCE INVESTIGATION REPORTS (PSI)	102	SEX OFFENSES	121
Copy to Defendant	102	PAROLE ELIGIBILITY CHART	123
Importance Of	102	PROBATION AND PAROLE VIOLATION MATRIX	124
Waiving	103	DOC SEX OFFENDER SENTENCING GUIDE	126
<b>VII. INITIATING THE APPEAL</b>	<b>103</b>	LAYING EVIDENTIARY FOUNDATIONS	142
At Sentencing	104	OBJECTIONS CHEAT SHEET	147
Within 5 Days	103		
Within 30 Days	104		
TERMINATION OF REPRESENTATION	104		
<b>VII. GUIDE TO KY SENTENCING</b>	<b>106</b>		
GENERALLY	106		
AGGREGATING SENTENCES	106		
Judicial Discretion, Hammer Clauses	106		
CONSECUTIVE VS. CONCURRENT	107		
Exceptions	107		

**DPA TRIAL LAW NOTEBOOK****I. IN GENERAL****IN ABSENTIA****Legal Standard**

RCr 8.28(4) allows trials in absentia in certain misdemeanor cases. However, the burden is on the Commonwealth to show that the defendant's absence is intentional, knowing, and voluntary – and thus demonstrating that the defendant is waiving his right to be present at his trial. Whether the mere absence of the defendant on the day of trial is sufficient to justify such a conclusion may differ from case to case. On one hand, the inference may not be justified if the defendant has never failed to show up for court before. On the other hand, the inference may be justified if the defendant never appeared at any of his pre-trial conferences. See *Donta*, below. Afterward, the defendant has the right (and the burden) to show that he did not intend to waive his right to be present at his trial. *Donta v. Commonwealth*, 858 S.W.2d 719 (Ky. App.1993), *Burns v. Commonwealth*, 655 S.W.2d 497 (Ky. App. 1983), *Jackson v. Commonwealth*, 113 S.W.3d 128 (Ky. 2003).

**Enhanceable Offenses**

RCr 8.28(4) does not allow trials or guilty pleas on any offense listed in either KRS 189A or KRS 218A presumably because many of the offenses in those chapters are enhanceable. This would lead one to conclude that trials in absentia should not be held on any enhanceable offense whether listed in 189A or 218A or not. See *Tipton v. Commonwealth*, 770 S.W.2d 239 (Ky. App. 1989), *abrogated*, a DUI case in which the court ruled that it was an abuse of discretion to accept a plea of guilty to DUI in absentia because the offense is enhanceable. Since *Tipton* was decided, however, the rule was modified to allow guilty pleas in such circumstances if the court receives a written waiver from the defendant.

**ADJOURNMENT**

RCr 9.70 provides the admonition which must be given to the jury at each adjournment. Failure to give the admonition does not necessarily require reversal if the jury has already been admonished during the same trial and if no impropriety occurs. *Commonwealth v. Messex*, 736 S.W.2d 341 (Ky. 1987).

**ADMONITIONS**

If you want the court to declare a mistrial, you need to be able to explain why an admonition would not be a sufficient remedy. Here is the rule: “There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will not be able to follow the court’s admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis and was “inflammatory” or “highly prejudicial.” *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003), quoted in *Combs v. Commonwealth*, 198 S.W.3d 574, 581-82 (Ky. 2006).

**ADVERSARIAL BOND HEARINGS**

The court must grant a motion for an adversarial bond hearing the first time a defendant requests one. RCr 4.40(1). The burden is on the defendant (that means the defendant goes first) to show that the bail set is excessive and the defendant may call prosecuting witnesses to the stand to inquire concerning anything relevant to the proper amount of bail, including the strength of the Commonwealth’s case. See the criteria in RCr 4.10, 4.12, 4.16(1), KRS 431.520, 431.525(1), and also *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977), and *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed.3d 3 (1951). The case which holds that the defendant may call prosecuting witnesses in an adversarial bond hearing is *Kuhnle v. Kassulke*, 489 S.W.2d 833 (Ky. App. 1973). See also the Kentucky Pretrial Release Manual, available at <http://dpa.ky.gov>

**BIFURCATION**

## NOTES

**Legal Standard**

KRS 532.055(1) governs verdicts in felony cases and requires bifurcation of guilt and sentencing phases, with separate hearings and separate verdicts. The statute does not cover misdemeanor trials.

So the question then becomes: What is the correct procedure when felonies and misdemeanors are tried together? In such cases, the jury retires to make only a determination of guilt or innocence. There should be no sentencing instructions, even on the misdemeanors. If the jury returns a verdict of guilty on both felonies and misdemeanors and the prosecution intends to introduce the defendant's prior convictions during sentencing, then the penalty phase is itself bifurcated. The jury sentences on the misdemeanors without the introduction of the prior convictions and then returns to sentence the defendant on the felonies under KRS 532.055, at which time the prior convictions may be introduced. If the jury only returns verdicts of guilty on misdemeanors, it then retires once again to reach a verdict on the sentence without any testimony, and with only the arguments of counsel. *Commonwealth v. Philpott*, 75 S.W.3d 209 (Ky. 2002).

**Subsequent Offenses**

Bifurcation is also usually necessary when the Commonwealth must also prove a 2nd or subsequent offense, or some other sentence enhancement, even in misdemeanor trials. Evidence of prior convictions is usually inadmissible during the guilt phase of a trial. *Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky. 1996) and *Dedic v. Commonwealth*, 920 S.W.2d 878 (Ky. 1996) both require bifurcation of subsequent offense evidence in DUI cases. This requirement of enhancing subsequent offenses in a separate hearing could easily lead to trifurcated trials in the case of felonies which are also subsequent offenses. For instance, a DUI 4th trial might have a guilt phase, an enhancement phase, then a truth-in-sentencing phase. *Brewer v. Commonwealth*, 478 S.W.3d 363 (Ky. 2015), requires trifurcation in a prosecution for Assault 4th, third or subsequent offense within five years. The exception is Possession of a Firearm by a Convicted Felon, in which proof of status as a felon is clearly part of the elements of the offense itself. (See, e.g., *Jackson v. Commonwealth*, 650 S.W.2d 250 (Ky. 1983), discussing the problem of double enhancement when proof of a prior felony conviction is necessary to the case-in-chief.)

**PFO**

One would expect that trials involving PFO charges would also be trifurcated: there would be the guilt/innocence phase, then the sentencing phase, then the PFO phase. KRS 532.080(1) requires a separate PFO phase, yet KRS 532.055(3) requires PFO evidence to be introduced in a combined sentencing/PFO hearing. This requirement has created some confusion. See, e.g., *Lemon v. Commonwealth*, 760 S.W.2d 94 (Ky. App.1988), *Maxie v. Commonwealth* 82 S.W.3d 860 (Ky. 2002). The Kentucky Supreme Court has indicated that a PFO trial is somewhere between bifurcated and trifurcated.

*Renner v. Commonwealth*, 734 S.W.2d 794 (Ky. 1987) was the case in which the Kentucky Supreme Court first held forth on KRS 532.055, the Truth-in-Sentencing statute which had just been passed the year before. In that opinion, the court split the difference in terms of the question of bifurcation or trifurcation by describing a "combined bifurcated" sentencing/PFO hearing. It outlined the procedure in this way: "...the jury in the combined bifurcated hearing could be instructed to (1) fix a penalty on the basic charge in the indictment; (2) determine then whether the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a persistent felony offender." *Renner*, at 798.

Note that this guidance from the Supreme Court requires the jury to deliberate twice during the same sentencing/PFO phase. The trial court follows KRS 532.055 prior to fixing the penalty for the underlying offenses. The court said: "The bifurcated penalty phase will decide the punishment on the specific charge after additional evidence pertaining to sentencing is heard." *Id.* The trial court then turns to KRS 532.080 for the remainder of the hearing to "(2) determine then whether

## NOTES

the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a persistent felony offender.” Note that the procedure is outlined in exactly this same way in the last paragraph of the *Commentary* to KRS 532.080.

The PFO statute also seems to require this procedure. See *Commonwealth v. Hayes*, 734 S.W.2d 467 (Ky. 1987), and *Davis v. Manis*, 812 S.W.2d 505 (Ky. 1991), which interpret the PFO statute to require that the defendant first be sentenced on the underlying charge before he can be convicted as a Persistent Felony Offender. This is the “better practice.” *Sanders v. Commonwealth*, 301 S.W.3d 497 (Ky. 2010). However, a jury’s failure to first set a penalty for the underlying offense may be merely a procedural error when it is not objected to at trial. *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009), *Owens v. Commonwealth*, 329 S.W.3d 307 (Ky. 2011).

For the proper procedure in a trial on Assault, 4th Degree, Third or Subsequent Offense within five years, see *Brewer v. Commonwealth*, 478 S.W.3d 363 (Ky. 2015).

### Referring to Prior Convictions

Referring to prior convictions which will be used to enhance current charges should be reserved to the penalty phase of the trial. “No reference shall be made to the prior offense until the sentencing phase of the trial, and this specifically includes reading of the indictment prior to or during the guilt phase.” *Clay v. Commonwealth*, 818 S.W.2d 264, 265 (Ky. 1991). Failure to do so results in “unavoidable prejudice” to the defendant. *Commonwealth v. Ramsey*, 920 S.W.2d 526, 528 (Ky. 1996). (Indeed, in *Clay*, the Kentucky Supreme Court found it to be reversible error.)

**Practice Tip:** Bifurcated Trials. In a bifurcated trial, make a motion in limine for the judge to begin the guilt/innocence phase by reading only the underlying offenses to the jury. For example, move to inform the jury the defendant is charged with DUI, but not DUI 4th Offense.

### IN CAMERA REVIEW

**Practice Tip:** When the court is reviewing material in camera, make sure to move the court to put any material not provided to the defense into the record for review in the event of an appeal. See, e.g., RCr 7.24(6) and KRE 612. If the court is reviewing medical or counseling records, the material should be sealed. See, e.g., RCr 7.26 and KRE 508. In camera review of a witness’ psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence. The prosecutor and defense counsel do not have to be present at the review. *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003).

### CHANGE OF LAW

The substantive law which applies to any given case is the law as it was at the time of the offense. This rule is codified in the (rather tortuous) language of the first part of KRS 446.110: “No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect.”

The procedural law which applies to any given case, however, is governed by the rules of procedure which exist at the time of the trial, not at the time of the commission of the offense. *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky.1987). The latter part of KRS 446.110 says that, upon a change in law, “proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings.” See *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky.2009) for a full discussion; See also *Bolen v. Commonwealth*, 31 S.W.3d 907 (Ky. 2000).

KRS 446.110 also allows a defendant to opt-in to any new provision of law which reduces or mitigates any punishment: “If any penalty, forfeiture or punishment is mitigated by any provision

of the new law, such provisions may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.” In that case, the defendant needs to file notice of his “unqualified consent” to be sentenced under the new law. *Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000). See also *Smith v. Commonwealth*, 400 S.W.3d 742 (Ky. 2013), in which the defendant’s diversion was revoked but, since no final judgment had ever been entered, the defendant was entitled to be sentenced to the new misdemeanor drug paraphernalia provisions, even though the charge was a felony at the time of the diversion. Many death penalty defendants used this statute when life without the possibility of parole became a new sentencing option. *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004), is another example. (See also “Ex Post Facto.”)

Relying on the holding in *Rodgers*, supra, the court ruled that the change in penalty provisions entailed in changing the Class D felony stolen property threshold from \$300.00 to \$500.00 should be applied to the defendant under KRS 446.110. *Blake v. Commonwealth*, 2012 WL 410019, Ky. App., Feb. 2012, unpublished. In *Virgil v. Commonwealth*, 403 S.W.3d 577 (Ky. App.2013), the defendant was allowed to opt-in to new provisions of KRS 422.285 extending the right to DNA testing, even though the defendant’s cause of action arose before the effective date of the new provisions.

### SCOTUS decisions

With regard to new United States Supreme Court decisions applying constitutional rules to criminal cases, the rule is very clear: the new rule applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past. *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987).

**Practice Tip:** Change of Law. Make sure to research the state of the law on the exact date that the offense occurred. Be especially careful in the summer, as many laws tend to take effect in the middle of July and will not yet be in the law books.

## COMMONWEALTH, GENERALLY

“[The] interest of the Commonwealth in a criminal prosecution is not that it shall win a case but that justice shall be done. The decisions of this court provide abundant support of this principle. We have many times declared that there rests upon prosecuting attorneys the obligation to deal fairly with the accused and to recognize his legal rights as well as the rights of the Commonwealth, and that these public officials should see that the truth is disclosed and justice shall prevail.” *Arthur v. Commonwealth*, 307 S.W.2d 182, 185 (Ky. 1957).

## CONDITIONAL PLEAS

Unconditional pleas of guilty waive the right to appeal a finding of guilt on the sufficiency of the evidence. *Taylor v. Commonwealth*, 724 S.W.2d 223 (Ky. App. 1986). Other issues survive this waiver, such as competency to plead guilty, *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004), whether the plea complied with the requirements of *Boykin v. Alabama*, 395 U.S. 238, 244; 89 S.Ct. 1709; 23 L.Ed.2d 274 (1969), see *Johnson v. Commonwealth*, 103 S.W.3d 687, 691 (Ky. 2003), subject matter jurisdiction and the failure to charge a public offense, RCr 8.18, and sentencing issues, *Hughes v. Commonwealth*, 875 S.W.2d 99, 100 (Ky. 1994), *Ware v. Commonwealth*, 34 S.W.3d 383, 385 (Ky. App. 2000). See also *Windsor v. Commonwealth*, 250 S.W.3d 306 (Ky. 2008), and *Grigsby v. Commonwealth*, 302 S.W.3d 52 (Ky. 2010). Issues involving illegal sentences are jurisdictional and will be reviewed de novo. *Brady v. Commonwealth*, 396 S.W.3d 315 (Ky. App. 2013).

As announced in *Dickerson v. Commonwealth*, 278 S.W.3d 145 (Ky. 2009), the court will consider issues on appeal from conditional guilty pleas only if the issues (1) involve a claim that the indictment did not charge an offense or the sentence imposed by the trial court was manifestly infirm, or (2) the issues upon which appellate review are sought were expressly set

## NOTES

forth in the conditional plea documents or in a colloquy with the trial court, or (3) if the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy. In *Helphenstine v. Commonwealth*, 423 S.W.3d 708 (Ky. 2014), the defendant preserved the trial court's denial of his motion to suppress but did not preserve the trial court's failure to hold a suppression hearing, because the defendant had never raised that issue with the trial court.

**Practice Tip:** RCr 8.09 allows conditional pleas of guilty when approved by the court. The plea must be in writing. Make sure to note on the guilty plea form: (1) that the client is NOT waiving his right to appeal, and (2) note the specific issue which the client is appealing. Put the information on the record as well. Move to have the condition placed in the final judgment. Do not enter a conditional plea of guilty and yet simultaneously have your client sign a form saying he is waiving his right to appeal.

## CONTINUANCES

### Legal Standard

In considering whether to grant a continuance a court must consider the length of delay, whether there have been any previous continuances, the inconvenience which may be caused by the continuance, whether the delay is the fault of the accused, the complexity of the case, and whether denying the continuance would prejudice the defendant. *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1995) overruled on other grounds, *Edmonds v. Commonwealth*, 189 S.W.3d 558 (Ky. 2006).

Continuances may be granted because the rules of discovery have not been followed, RCr. 7.24(9). See also *Mills v. Commonwealth*, 95 S.W.3d 838 (Ky. 2003), in which the Commonwealth failed to disclose a witness to a robbery; and *Wilson v. Commonwealth*, 388 S.W.3d 127 (Ky. App. 2012), in which the trial court's denial of a continuance was reversed because the appellate court found there was a reasonable probability that the outcome of the trial would have been different in the absence of prosecutorial delays in producing requested discovery. In some cases continuances must be granted if requested. See, e.g., *Anderson v. Commonwealth*, 63 S.W.3d 135 (Ky. 2001), in which the Commonwealth did not provide medical reports until just before trial and disclosed complaining witness statements only at the end of the first day of trial. Continuances may also be granted if the indictment does not include the names of the witnesses who appeared before the grand jury, RCr 6.08, or when the court allows the Commonwealth to amend an indictment, RCr 6.16.

For continuances that should be granted when the attorney has not been allowed sufficient time to prepare, see "Announcing 'Ready'".

### Unavailable Witness

When a continuance is sought because a witness is unavailable, RCr 9.04 requires that an affidavit be offered into the record stating what the testimony of the witness would have been and the due diligence the attorney has used in order to attempt to secure the witness. The Commonwealth can then agree or disagree to allow the affidavit into evidence. If the Commonwealth disagrees, the court may grant a continuance. Failure to grant a continuance is reviewed for abuse of discretion. See, e.g., *McIntosh v. Commonwealth*, 582 S.W.2d 54 (Ky. App. 1979), *abrogated on other grounds*; *Slone v. Commonwealth*, 382 S.W.3d 851 (Ky. 2012).

**Practice Tip:** If the motion for continuance is overruled, make sure to enter the affidavit into the record.

### Waiver

Failure to request a continuance waives the issue. *Lefevers v. Commonwealth*, 558 S.W.2d 585 (Ky. 1977). Failure to follow the requirements of the rule waives the issue. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006), corrected. Failure to accept a court's offer to continue waives the

issue. *Neal v. Commonwealth*, 95 S.W.3d 843 (Ky. 2003). This is probably true even if the defendant is in custody and a continuance will only lengthen his time in jail. *U.S. v. Quinn*, 230 F.3d 862 (6th Cir. 2000).

### CONTINUING OBJECTIONS

Continuing objections are generally not the best practice, especially in light of the fact that, as of May 1, 2007, KRE 103(a)(1) now requires that objections be made “stating the specific ground of objection.” Virtually the only time when a continuing objection is safe and appropriate is when counsel objects that the witness is incompetent to testify to anything at all; for example, the testimony might violate the marital privilege, or the same irrelevant evidence is being repeated by different witnesses, or the witness is literally incompetent to testify. In any other situation, counsel should be prepared to follow RCr 9.22 and KRE 103 and state specifically the testimony objected to and specifically what objection is being made. *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky. 2005), *Davis v. Commonwealth*, 147 S.W.3d 709 (Ky. 2004).

### DAUBERT AND EXPERTS

#### Legal Standard

A proper analysis of admitting expert testimony begins with KRE 702. It says: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” This rule includes three important requirements: (1) that the witness is indeed a qualified expert, (2) that the testimony to be offered is valid, and (3) that the testimony will “assist the trier of fact.”

*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), concerns itself with the second requirement: what is valid scientific evidence? The criteria to be considered include: (1) Can it be or has it been tested? (2) Has it been subject to peer review and publication? (3) Is the potential error rate known? (4) Do standards and controls exist? (5) Is it generally accepted within the scientific community? The factors were not meant to be exhaustive and do not all necessarily apply to every type of testimony.

*Daubert* was expanded to include technical and other specialized knowledge as well in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), 119 S.Ct. 1167, 143 L.Ed.2d 238. Although *Daubert* and *Kumho* only applied to federal courts and some states did not adopt either decision, Kentucky adopted *Daubert* in *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995) and *Kumho Tire* in *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). *Kumho Tire* held that “... choosing which factors to apply and the weight to give each factor are matters of trial court discretion.” at 139.

If the requirements of KRE 702 are satisfied, then the evidence is also then weighed under KRE 401 and 403, especially on the issue of whether the testimony will confuse or mislead the jury, or be just a waste of time. The court included the elements of all these rules in its analysis in *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (1997), which also allowed expert opinion on ultimate issues: “We now once again depart from the ‘ultimate issue’ rule and rejoin the majority view on this issue. Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact.”

An “ultimate issue” is, for example, whether the defendant’s speeding was the cause of the accident, or whether the drugs in the defendant’s possession were being held for sale. See *Commonwealth v. Alexander*, 5 S.W.3d 104, 106 (Ky. 1999), overruled by *Stringer*, in which the expert was allowed to testify that the defendant’s speed was the cause of the accident but the testimony did not invade the province of the jury when the jury could still have decided the

## NOTES

defendant was not guilty because he was responding to an emergency and did not hear that the emergency call had been cancelled.

The court should qualify the expert outside of the hearing of the jury and there should be no declaration that the witness is an expert. *Luttrell v. Commonwealth*, 952 S.W.2d 216 (Ky. 1997), *Applegate v. Commonwealth*, 299 S.W.3d 266 (Ky. 2009). The manner in which the expert can give his testimony is governed by KRE 705.

**Right to Cross-examine Experts in Person**

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009), the Supreme Court ruled that 1) the reports of the lab analysts were testimonial statements covered by the Confrontation Clause of the Sixth Amendment, 2) the analysts were not removed from coverage of the Confrontation Clause on the theory that they were neutral, scientific, non-accusatory witnesses, 3) the defendant's ability to subpoena the lab analysts did not relieve the state of its obligation to produce the analysts for cross-examination. See also *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). The lab technician's report was testimonial and admission of it violated the defendant's right to confront, requiring reversal in *Peters v. Commonwealth*, 345 S.W.3d 838 (Ky. 2011). The admission of a report from the state crime laboratory without live testimony from the report's author violated the defendant's right to confront, requiring reversal in *Whittle v. Commonwealth*, 352 S.W.3d 898 (Ky. 2011).

**Experts and Discovery**

RCr 7.24 requires the defense to disclose a defense expert's name, opinion, and the basis for that opinion when the defense expects the witness to testify and when it has first requested and received that information from the Commonwealth. Court opinions prior to this date which say otherwise are probably abrogated. This is true whether the expert generates a report or not. Rules regarding expert evaluations and opinions in cases involving mental health defenses are in RCr 8.07.

In *Barnett v. Commonwealth*, 763 S.W.2d 119 (Ky. 1988), the court reversed a conviction for a violation of RCr 7.24(1)(b) which requires the Commonwealth, on written request, to turn over to the defense any reports generated by its experts as the result of experiments or examinations conducted by the expert. In *Barnett*, the serologist speculated that the defendant had washed blood off his hands and, since this testimony exceeded anything which had been provided the defendant in the reports, the case was reversed. The principle here is that the defendant is unduly surprised when the Commonwealth's expert testifies based on a premise not formerly disclosed to the defendant.

Parties may be required to disclose the names of their experts but may not be required to have the expert generate a report. *Commonwealth v. Nichols*, 280 S.W.3d 39 (Ky. 2009). However, reversal was required in *George v. Commonwealth*, 2003 WL 22227195, Ky., Sept. 2003, *unpublished*, when the Commonwealth's failure to disclose the substance of its pathologist testimony as to the cause, nature, and extent of the victim's injuries denied the defendant "even the possibility of adversarial testing" of the expert's opinions.

Reliable science contradicting popular misconceptions should be admissible, and expert testimony on general scientific principles does not trigger the requirement to divulge the expert, *Terry v. Commonwealth*, 332 S.W.3d 56 (Ky. 2010). Expert testimony on improper interviewing techniques is admissible. *Jenkins v. Commonwealth*, 308 S.W.3d 704 (Ky. 2010). Expert testimony on the reliability of eyewitness identification is admissible. *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002).

The court's refusal to allow the defendant to present expert testimony as to the defendant's level of intoxication was reversible error in *Weaver v. Commonwealth*, 298 S.W.3d 851 (Ky. 2009).

It is improper to allow a drug recognition expert to testify when the testimony is not based on personal observations. *Burton v. Commonwealth*, 300 S.W.3d 126 (Ky. 2009). (This is also the

opinion holding that the probative value of urinalysis results was substantially outweighed by the danger of undue prejudice such that admission of the evidence was an abuse of discretion, requiring reversal.) It is reversible error to allow testimony regarding shaken baby syndrome after refusing to hold a *Daubert* hearing. *Hamilton v. Commonwealth*, 293 S.W.3d 413 (Ky. App. 2009).

Recently attempts have been made to prohibit many defense experts from testifying because they are not licensed in Kentucky or in some other way. In *Lukjan v. Commonwealth*, 358 S.W.3d 33 (Ky. App. 2012), for instance, the Commonwealth attempted to block the testimony of an arson defense expert from Eastern Kentucky University on the grounds that he was not licensed as a private investigator. (Among the services offered by licensed private investigators is the “obtaining or furnishing information with reference to . . . [t]he cause or responsibility for fires. . . [.] KRS 329A.010(4)(d).”) In that case, the court ruled that KRE 702, governing the admissibility of expert testimony, has no licensing requirements and that the exclusion of the expert witness’ testimony was not harmless, requiring reversal.

### **RCr 8.07**

RCr 7.24 used to include the procedures and notice requirements regarding mental health defenses. Effective January 1, 2013 that material was taken out of RCr 7.24, expanded, and put into a new rule, RCr 8.07. The features of the new rule include: (1) a new notice requirement regarding the purpose for the evidence. The defendant must disclose if the evidence will go to guilt or punishment or both. (2) The notice requirement for both insanity defenses and other mental health evidence was lengthened from 20 days to 90 days. The rule retains from RCr 7.24 the ability of the court to order the defendant to be examined, to order the defendant’s submission to an examination, and to order the exclusion of the defense evidence if the defendant does not cooperate.

### **Challenging Expert Testimony**

Under *Daubert*, the burden of proving the scientific validity of the proposed evidence is on the proponent of the evidence. Nevertheless, the Kentucky Supreme Court took judicial notice of the scientific validity of a number of types of scientific inquiry in *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999) (DNA, except for mitochondrial), and *Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky. 1999) (microscopic hair comparison, breath testing to determine blood alcohol level, HLA blood typing in paternity tests, fiber analysis, ballistics analysis, fingerprint analysis). In the case of these types of testimony, the court need no longer hold a *Daubert* hearing, and the burden is on the challenger.

Nevertheless, counsel should continue to make *Daubert* challenges when necessary. Ten years after *Johnson* was decided the National Academy of Sciences issued a scathing review of the scientific reliability of every one of the most common forms of forensic science. Only DNA typing was excepted. See *Strengthening Forensic Science in the United States: A Path Forward*, National Academy of Sciences, 2009. As it stands, the *Johnson* opinion continues to permit the admission of evidence which has come under very harsh criticism. See Andrea Kendall, “The Reliability and Admissibility of Forensic Science Evidence in Kentucky,” *The Advocate*, December, 2013 available at <http://dpa.ky.gov>. In *Meskimen v. Commonwealth*, 435 S.W.3d 526 (Ky. 2013), the court warned that although case law may be in acceptance of certain methods of forensic analysis, it is still the job of the court to “stay abreast of currently accepted scientific methods.”

Notable cases involving forensic science testimony since *Johnson* include, e.g., *Ragland v. Commonwealth*, 191 S.W.3d 569 (Ky. 2006), in which the case was remanded for retrial, in part, because the *Daubert* analysis conducted by the trial court did not include a consideration of the scientific reliability of the expert’s conclusions regarding comparative bullet analysis. In *McIntire v. Commonwealth*, 192 S.W.3d 690 (Ky. 2006), the defendant’s conviction was reversed because the expert testified outside her range of expertise. The court ruled that she was not qualified to give an “expert” opinion to the effect that a non-abusing parent would have had to

## NOTES

have been aware of the fact that the child was being abused.

For more detailed discussion of *Daubert* cases in Kentucky, see the Department of Public Advocacy Evidence Manual, 7th Edition, June, 2013, available at <http://dpa.ky.gov>.

### DEFENDANT IN SHACKLES

This is covered by RCr 8.28(5). This should be allowed only in extraordinary circumstances and requires findings that the defendant will be violent or a flight risk. Mere signs of displeasure or disrespect from the defendant are not sufficient. The error may be less harmful, however, in proceedings in which the defendant has already been found guilty. *Lovett v. Commonwealth*, 2005 WL 2045483, Ky., Aug. 2005, *unpublished*, *Barbour v. Commonwealth*, 204 S.W.3d 606 (Ky. 2006). However, see *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), in which the Supreme Court ruled that it was a violation of due process to shackle defendants routinely during the penalty phase of a capital proceeding. Whether the restraints are visible to the jury is a factor in considering prejudice. *Grady v. Commonwealth*, 325 S.W.3d 333 (Ky. 2010).

Make sure to object if the jury might have seen the defendant while being moved from the jail. It is the same kind of prejudice.

The rule against shackles does not extend beyond the defendant to defense witnesses. In a trial involving a riot at Northpoint prison, the defendant was not denied a fair trial when four defense witnesses, all inmates, testified while wearing shackles and prison garb. *Stacy v. Commonwealth*, 396 S.W.3d 787 (Ky. 2013).

On the related issues of armed guards in the courtroom see, e.g., *Soto v. Commonwealth*, 139 S.W.3d 827 (Ky. 2004) and *Miller v. Commonwealth*, 394 S.W.3d 402 (Ky. 2011).

### DEFENSE THEORIES, TYPES OF

“Practically every defense theory will fall within one of the following defense genres:

1. It never happened – (mistake, setup)
2. It happened, but I didn’t do it – (mistaken identification, alibi, setup. etc.)
3. It happened, I did it, but it wasn’t a crime (self-defense, accident, claim of right)
4. It happened, I did it, it was a crime, but it wasn’t this crime (lesser-included offenses)
5. It happened, I did it, it was a crime, but I’m not responsible (insanity)
6. It happened, I did it, it was a crime, I’m responsible, so what? (jury nullification – known in some jurisdictions as the “he needed killin” defense)

Cathy R. Kelly, “Trial By Design,” *The Champion*, vol. 26, no. 9, November, 2002, pp. 18-22.

**DEFENSES WITH REFERENCES TO KENTUCKY LAW****1. A crime didn't happen.**

- Accident
- Natural causes
- Self-inflicted
- Victim or witness lying
- False confession

**2. It happened, but I didn't do it.**

- Causation (KRS 501.060)
- Mistaken identification case
- Circumstantial evidence, no direct link to defendant
- Junk science linking defendant
- Alternative perpetrator, alternative suspect *Beaty v. Com.* 125 S.W.3d 196 (Ky. 2003)
- False confession
- Victim or witness lying.

**3. It happened, I did it, but it wasn't a crime.**

- Mistake (e.g., of age) (KRS 501.070)
- Mistake of Law (KRS 501.070)
- Entrapment (KRS 505.010)
- Justifiable Use of Force (KRS 503.050, et seq.)
- Choice of Evils (KRS 503.030)
- Duress (KRS 501.090)
- Execution of Public Duty (KRS 503.040)
- Victim consent
- Date of Offenses, substantive law at time of offense, ex post facto

**4. It happened, I did it, but it wasn't this crime**

- Guilty of a lesser-included offense, for any reason

**5. It happened, I did it, but I'm not responsible.**

- Insanity (KRS 504)
- Mental Illness (KRS 504)
- Intellectual Disability (KRS 504)
- Involuntary Intoxication (KRS 501.080)
- EED (KRS 507.020, et seq., KRS 508.040)
- Voluntary Intoxication, in limited circumstances (KRS 501.010, 501.080)

**6. It happened, I did it, I'm responsible, but I shouldn't or can't be prosecuted.**

- Jury nullification : When a defendant has pleaded not guilty, a court can never direct a verdict of guilty no matter how overwhelming the evidence. *Taylor v. Commonwealth*, 125 S.W.3d 216 (Ky. 2004))
- Jurisdiction (KRS 500.060)
- Venue (KRS 452.510)
- Competency (RCr 8.06, KRS 504.100)
- Double Jeopardy (KRS 505)
- Statute of Limitations (KRS 505.050)

**For the Burden of Proof on Defenses, see KRS 500.070.**

## NOTES

**DISCOVERY**

“A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced.” *James v. Commonwealth*, 482 S.W.2d 92, 94 (Ky. 1972). “In a case where the murder is shrouded in mystery and the question of guilt hung in the balance, it will not do to permit the possibility that victory was obtained by ambush and surprise, even if we accept that the mistake was not ‘malicious.’” *Barnett v. Commonwealth*, 763 S.W.2d 119, 123 (Ky. 1989).

Generally, evidence never turned over to the defense before trial is a more serious violation than evidence turned over too late to meet a statutory deadline. The former may require reversal, see, e.g., *James v. Commonwealth*, 482 S.W.2d 92 (Ky. 1972), while the latter may be more likely to be reviewed on appeal by the prejudice/harmless error standard, see, e.g., *Neal v. Commonwealth*, 95 S.W.3d 843, 848 (Ky. 2003). “A discovery violation justifies setting aside a conviction ‘only where there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different.’” *Weaver v. Commonwealth*, 955 S.W.2d 722, 725 (Ky. 1997), quoting *Wood v. Bartholomew*, 516 U.S. 1, 5, 116 S.Ct. 7, 10, 133 L.Ed.2d 1 (1995).

**Scope**

Officers and investigators are agents of the Commonwealth and any statements taken by them are in the possession of the Commonwealth, regardless of whether the Commonwealth’s Attorney is personally aware of them. *Anderson v. Commonwealth*, 864 S.W.2d 909, 912 (Ky. 1993). The prosecutor’s duty of disclosure extends to evidence in the possession of the prosecutor, his investigators, and other state agencies as well. *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1995), *overruled on other grounds*. The prosecution’s failure to prepare is no defense for failure to disclose exculpatory statements. *Lynn v. Commonwealth*, 2008 WL 4530901, Ky. App., Oct. 2008, *unpublished*.

**Open File**

If the Commonwealth claims to have adopted “open file” discovery, it will be held to full disclosure on appeal. *Hicks v. Commonwealth*, 805 S.W.2d 144 (Ky. App. 1990), *Barnett v. Commonwealth*, 763 S.W.2d 119, 123 (Ky. 1989).

**Oral Incriminating Statements of Defendant**

RCr 7.24(1), requiring the Commonwealth to disclose to the defense any oral incriminating statements made by the defendant, is not limited to statements that were written or recorded, *Chesnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008), *overruling Berry v. Commonwealth*, 782 S.W.2d 625 (Ky. 1990), *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996), and *Matthews v. Commonwealth*, 997 S.W.2d 449 (Ky. 1999). Reversal was required in *Trigg v. Commonwealth*, 460 S.W.3d 322 (Ky. 2015), when the Commonwealth did not disclose to the defense that the defendant had told the police that the room in which the contraband was found was his room.

The purpose of RCr 7.24(1) is not to inform the defendant that he made a statement but to inform the defendant, in order to plan defense strategy, whether the prosecution has knowledge of a defendant’s statements which the prosecution may introduce into evidence or use to impeach. *Grant v. Commonwealth*, 244 S.W.3d 39 (Ky. 2008).

There is no rebuttal exception to this requirement. *Chesnut, supra*. Presentation of undisclosed evidence in violation of RCr 7.24(1) under the guise of rebuttal evidence pursuant to RCr 9.42 constitutes reversible error. (But see *Clutter v. Commonwealth*, 322 S.W.3d 59 (Ky. 2010) in which the defendant’s statements were disclosed just prior to trial and were allowed in rebuttal.)

**Witness Statements**

RCr 7.26, which requires the Commonwealth to provide witness statements at least 48 hours prior to trial, is not reciprocal. Commonwealth’s failure to disclose under RCr 7.26 an officer’s assault report was reversible error which “prejudiced the [defendant’s] ability to prepare a defense. *Akers v. Commonwealth*, 172 S.W.3d 414 (Ky. 2005). There is no defense obligation to turn over witness statements. *Commonwealth v. Stambaugh*, 327 S.W.3d 435 (Ky. 2010). The RCr 7.24(2)

provision prohibiting the disclosure of the notes and work product of investigating officers does not apply under RCr 7.26 once the witness has testified. *LeGrande v. Commonwealth*, 494 S.W.2d 726 (Ky. 1973). Audiotaped statements of witnesses are discoverable. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006).

### Witness Lists

Neither party in a criminal action is required to disclose a witness list in pre-trial discovery. *King v. Venters*, 596 S.W.2d 721 (Ky. 1980), *Lowe v. Commonwealth*, 712 S.W.2d 944 (Ky. 1996). “It is our opinion that there is no authority for requiring a defendant to furnish such a list to the Commonwealth, and we are not entirely convinced that it would be free of constitutional difficulty.” *King*, at 721. See also *Commonwealth v. Nichols*, 280 S.W.3d 39 (Ky. 2009), for a full discussion. Nevertheless, a court may require a defendant to provide a witness list at trial, at the outset of voir dire, for the purpose of inquiring of the jurors if any of them were “close personal friends” or “related by blood or marriage” to any of the named witnesses. *Hardy v. Commonwealth*, 719 S.W.2d 727 (Ky. 1986). Failure to name a witness in voir dire may result in the exclusion of that “surprise” witness. *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008).

### Informants

The government has an informant identity privilege under KRE 508, but where an informant will be a testifying witness, or his identity and communications are relevant and helpful to the accused or essential to a fair trial, the privilege is overcome by Constitutional requirements. *Roviaro v. United States*, 353 U.S. 53 (1957). This includes any deals made between the prosecution and the informant. *Giglio v. United States*, 405 U.S. 150 (1972). This also includes past consideration paid to the informant in other cases and based on the expectation of help from the informant in the future. *McBeath v. Commonwealth*, 244 S.W.3d 22 (Ky. 2007). Disclosure must be made “promptly” under RCr 7.24(8). RCr 7.26, requiring disclosure only 48 hours before trial, does not apply.

### Showing Prejudice

It was an abuse of discretion for the court to allow the admission of evidence never turned over to the defense at all and which essentially gutted the defense. *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). It was an abuse of discretion to allow the admission of withheld evidence when the withheld evidence prevented the defense from making an informed decision as to appropriate trial strategy; specifically, whether the defendant should testify. *Grant v. Commonwealth*, 244 S.W.3d 39 (Ky. 2008). See also *Akers v. Commonwealth*, 172 S.W.3d 414 (Ky. 2005), in which discovery violations impaired the defense ability to prepare a defense.

### Dismissal with Prejudice

Subject to rare exceptions, a trial court has no authority to dismiss an indictment over the objection of the Commonwealth. Exceptions include violations of the right to a speedy trial, mistrials after jeopardy has attached, and misleading a grand jury. *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky. App. 2000). Another exception is when the Commonwealth’s refusal to comply with discovery obligations results in severe prejudice to the defendant. RCr 7.24(9); *Commonwealth v. Grider*, 390 S.W.3d 803 (Ky. App. 2013).

Discovery may be **waived** in plea bargaining. Plea offers may be conditioned on not viewing discovery without violation of a defendant’s due process rights. In *Porter v. Commonwealth*, 394 S.W.3d 382 (Ky. 2011), the defendant gave up the right to view the videotape of the drug transaction between himself and the confidential informant. See also *U.S. v. Ruiz*, 536 U.S. 622 (2002).

The defense was entitled to **social services records** in a sodomy case. *Dennis v. Commonwealth*, 306 S.W.3d 466 (Ky. 2010).

The court can order disclosure of **KASPER** records in a criminal case, despite the statutory bar to disclosure. *Commonwealth v. Bartlett*, 311 S.W.3d 224 (Ky. 2010). The opposite is true in civil cases. *Commonwealth v. Chauvin*, 316 S.W.3d 279 (Ky. 2010). The defendant’s

## NOTES

right to compulsory process prevails over the witness' privilege when the **medical records** are those of a crucial prosecution witness and have bearing on the witness' competency to testify. *Commonwealth v. Grider*, 309 S.W.3d 803 (Ky. App. 2012). The same is true when the records are **psychotherapy records**. *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003). (But see *White v. Willett*, 456 S.W.3d 810 (Ky. 2015), granting a writ of prohibition on an overly-broad discovery order for mental health records.)

RCr 5.16(3) provides that, "any person indicted by the **grand jury** shall have a right to procure a transcript of any stenographic report or a duplicate of any mechanical recording relating to his or her indictment..." This includes transcripts of testimony concerning co-defendants. See, e.g., *Gosser v. Commonwealth*, 31 S.W.3d 897 (Ky. 2000).

### Missing Evidence

In the case of evidence which was simply never collected in the first place, in order for there to be a due process violation requiring that relief be granted to the defendant, the defendant must show that the government acted in bad faith. In the case of evidence which was in the possession of the Commonwealth which was then later lost or destroyed, the defendant must also show that the exculpatory value of the evidence was obvious prior to destruction, and that the defendant can obtain the evidence by no other reasonable means. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), see also *Kirk v. Commonwealth*, 6 S.W.3d 823 (Ky. 1999), and *Metcalf v. Commonwealth*, 158 S.W.3d 740 (Ky. 2005). When the Commonwealth loses exculpatory evidence, the proper remedy may be a missing evidence instruction or some prohibitions or limitations on the Commonwealth's evidence. *Tinsley v. Jackson*, 771 S.W.2d 331 (Ky. 1989). For example, when a defendant is charged with a drug offense, the destruction of the total drug sample renders the test results inadmissible unless the defendant is provided with enough notes and information regarding the testing to enable him to obtain his own expert evaluation. *Green v. Commonwealth*, 684 S.W.2d 13 (Ky. App. 1984). If one method of testing will result in destruction of the evidence but another will not, the most benign method of testing should be used first. If both the Commonwealth's and the defense's methods will result in destruction of the evidence, the defense should be allowed to test first. If neither method will destroy the evidence, the decision concerning who tests first is within the discretion of the trial court. *McGregor v. Hines*, 995 S.W.2d 384 (Ky. 1999).

### Brady

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963), see also *Sweatt v. Commonwealth*, 550 S.W.2d 520 (Ky. 1977). *Brady* material also includes impeachment evidence concerning prosecution witnesses. *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), see also *Mounce v. Commonwealth*, 795 S.W.2d 375 (Ky. 1990). Where a specific request is made for information prior to trial, as in *Brady*, so long as there is a "substantial basis" for claiming that materiality exists, "the failure to make any response is seldom, if ever, excusable." *U.S. v. Agurs*, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976).

The defendant's right to exculpatory evidence applies whether or not there has been a request by the accused and encompasses impeachment as well as other exculpatory evidence. *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007). This opinion has a good review of the scope of exculpatory evidence under *Brady*.

Failure to disclose that the state's witness was also a paid informant was a *Brady* violation in *Robinson v. Mills*, 592 F.3d 730 (C.A.6th Cir. 2010).

A witness' criminal and juvenile records and probation status are *Brady* material. *Davis v. Alaska*, 415 U.S. 308 (1974).

Mental health records are *Brady* material. *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003), allows in camera review of psychotherapy records when there is evidence to establish a reasonable belief that they contain exculpatory evidence. See also *Commonwealth, Cabinet for Health and Family Services v. Bartlett*, 311 S.W.3d 224, 227 (Ky. 2010), citing *Barroso*.

Cases involving *Brady* violations typically involve discovery, after trial, of exculpatory evidence known to the prosecution but unknown to, and therefore not specifically requested by, the defense. These cases fall into two categories: “perjury” cases and “discovery” cases. In a “perjury” case the discovered evidence shows that a prosecution witness committed perjury on the stand during the trial. Since this is so very prejudicial to a defendant, the standard for setting aside the conviction is only that the false testimony could in any reasonable likelihood have affected the judgment of the jury. See *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1975). Since a “discovery” case involves exculpatory material not available to the defendant at trial but does not also involve perjured testimony, the standard in such cases is higher. In order to warrant reversal, the defendant must show that the undisclosed evidence would have created a reasonable doubt as to guilt which would not otherwise have existed without the evidence. *U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). See also *Williams v. Commonwealth*, 569 S.W.2d 139 (Ky.1978).

Nevertheless, “it is fundamental, however, that the materiality of a failure to disclose favorable evidence ‘must be evaluated in the context of the entire record.’ *U.S. v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). And the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome does not establish materiality in the constitutional sense. *Id.*, at 427 U.S. at 112 n. 20, 96 S.Ct. at 2401-02, 49 L.Ed.2d at 354 n. 20.” *St. Clair v. Commonwealth*, 140 S.W.3d 510, 541 (Ky. 2004).

**Practice Tip:** RCr 7.24 is really two rules. RCr 7.24(1)&(2) describe the initial obligations of the Commonwealth. Under the rule, these obligations are triggered by a written request or motion from the defendant. RCr 7.24(3)(a)&(b) detail the reciprocal discovery obligations of the defendant. Under the rule, these obligations begin only after the Commonwealth has fully complied with its own obligations. In spite of this, though, it is quite common for courts to enter blanket discovery orders which automatically confer reciprocal discovery obligations on both parties. A form order, “infringes on the election given the defendant under RCr 7.24(2)” *Penman v. Commonwealth*, 194 S.W.3d 237, 249 (Ky. 2006), *overruled on other grounds*. If for some reason you do not want to be automatically bound by reciprocal discovery obligations, ask the court to follow the rule as it is written. This may be important in cases where the Commonwealth is routinely slack in meeting its discovery obligations. For instance, if a prosecutor routinely claims to have “open file” discovery but never puts anything in the file, tell the court you do not want to be obligated to disclose anything until the Commonwealth meets its obligation. File notice of a discovery inventory with the court to inform of the court of what you have (not) received.

### EX PARTE HEARINGS

A motion to set aside an arrest warrant cannot be made *ex parte* without notice or opportunity for the Commonwealth to be heard. *Commonwealth v. Wilson*, 384 S.W.3d 113 (Ky. 2012), *Commonwealth v. Carman, et al*, 455 S.W.3d 916 (Ky. 2015).

**Practice Tip:** Don’t cut corners! When conducting an *ex parte* hearing, make a written motion (filed with the clerk), tender a prepared order to the judge, and put the hearing on the record. Without a record, there is no way to preserve the issue if the court refuses your request.

### EX POST FACTO

An *ex post facto* violation occurs when a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect of which is to deprive him of due process of law in the sense of being given fair warning that his contemplated conduct constitutes a crime. *Tharp v. Commonwealth*, 40 S.W.3d 356 (Ky. 2000). See also *Purvis v. Commonwealth*, 14

## NOTES

S.W.3d 21 (Ky. 2000). Nevertheless, if the court can construe the law as not *adding additional punishment*, this protection does not exist. For example, requiring registration and notification under the Sexual Offender Registration Act, for an offender who at the time of his offense was not required to register, does not disadvantage the offender to such a degree that retroactive application of the Act constitutes an improper ex post facto application of law; the designation of a sexual predator is not a sentence or punishment but simply a status resulting from a conviction of a sex crime, the purpose of the Act is remedial rather than punitive, and registration and notification under the Act impose only the slightest inconvenience to the offender but further the overwhelming public policy objective of protecting the public. *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002). See also *Buck v. Commonwealth*, 308 S.W.3d 661 (Ky. 2010). On the other hand, application of the new consecutive sentencing statute to the defendant's case violated the ex post facto clause in *Cecil v. Commonwealth*, 297 S.W.3d 12 (Ky. 2009).

## INDICTMENTS

### History

Under the old Code of Practice in Criminal Cases, an indictment was a “fact pleading”; there were no provisions for a Bill of Particulars, but the indictment was required to be “direct and certain” with regards to the party, the offense, the county, and the circumstances. The specificity of the indictment was itself supposed to make it possible for the defense to prepare adequately. When the Rules of Criminal Procedure went into effect on January 1, 1963, however, the purpose of indictments changed. Under the Rules, indictments are now “notice pleadings.” Their purpose is simply to provide adequate notice to a defendant of the charges against him. *Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky. 1996), *Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009).

### Legal Standard

“Under the Due Process Clause, the sufficiency of an indictment is measured by two criteria: first, that an indictment sufficiently apprise a defendant of the criminal conduct for which he is called to answer; and, second, that the indictment and instructions together provide adequate specificity that he may plead acquittal or conviction as a defense against any future indictment for the same conduct and that he not be punished multiple times in this action for the same offense.” *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 325 (Ky. 2006), quoting *Russell v. U.S.*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962), and *Valentine v. Vonteh*, 395 F.3d 626, 634-35 (6th Cir. 2000).

For an indictment to be sufficient, “the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.” *Schrimsher*, 325, quoting *Hamling v. U.S.*, 418 U.S. 87, 117-18, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590 (1974). In *Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009), the court held that naming the offense for which the defendant is indicted is usually sufficient, but remember that RCr 6.10(2) requires that the indictment contain a statement of the “essential facts constituting the offense.”

### Facial Defects

RCr 6.10 contains the requirements for the contents of an indictment. Sometimes indictments omit or incorrectly state some part of this information. Although these defects should certainly be pointed out, they virtually never rise to the level of requiring a dismissal. Indeed, RCr 6.12 says: “An indictment...shall not be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected by reason of a defect or imperfection that does not tend to prejudice the substantial rights of the defendant on the merits.”

An indictment can therefore omit the signature of the foreman of the grand jury, RCr 6.06, omit the names of the witnesses who appeared in front of the grand jury, RCr 6.08, get the caption wrong, RCr 6.10(1), get parts of the description of the offense wrong, RCr 6.10(2), contain the

wrong KRS citation for the offense charged, RCr 6.10(3), or omit the date the indictment was returned in open court RCr 6.10(4). Generally speaking, pursuant to RCr 6.12 none of these defects require the dismissal of the indictment. See, e.g., Abramson, Kentucky Practice, Vol. 8, 4th Ed., Sections 12:11 and ff. (West: 2003) pp. 312-318.

### Substantive Defects

Nevertheless, it is still possible for indictments to be defective in ways which might require a remedy from the court. For example, if the indictment does not name the time, place, or alleged victim, or if it is scanty with regards to the facts alleged by the Commonwealth, then the court should grant a Bill of Particulars under RCr 6.22. *Thomas v. Commonwealth*, 931 S.W.2d 446, 450 (Ky. 1996). Since indictments are no longer fact pleadings but merely abbreviated notice pleadings, when a defendant requests a Bill of Particulars, he should be supplied freely with the details of the charges so he can prepare his defense. *Finch v. Commonwealth*, 419 S.W.2d 146 (Ky. 1967).

Indictments might also contain charges which must either be dismissed or amended, or which might require the prosecutor to elect which charge to prosecute. A few examples are given below, without attempting to be exhaustive.

### Indictment Only Charges Misdemeanors

A District Court has exclusive jurisdiction over misdemeanor charges and a Circuit Court does not have jurisdiction unless the misdemeanor charges are combined with felony charges in the indictment. If the indictment charges only misdemeanors, the charges have to be remanded to District Court. KRS 24A.110, *Keller v. Commonwealth*, 594 S.W.2d 589 (Ky. 1980), see also RCr 5.20, which requires indictments returning only misdemeanors to be docketed in district court.

### Charges Barred by Double Jeopardy

For example, a person cannot be charged with both Forgery and Possession of a Forged Instrument, for the same instrument. KRS 516.080. Or, one charge might be a lesser included charge of another, both for the same act. See KRS 505.020 and *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996). Or the defendant may have already pled to an amended misdemeanor in district court. *Commonwealth v. Karnes*, 657 S.W.2d 583 (Ky. 1983).

### Double Enhancement

Double enhancement is a sub-specie of double jeopardy violations. A common example is the case of a defendant charged with both Possession of a Handgun by a Convicted Felon and also with PFO 2nd. Each offense requires proof of at least one prior felony conviction. The principle of double enhancement says that, in order to sustain convictions on both charges, the prosecution would have to prove that the defendant had two separate prior convictions. To prove both the handgun charge and the PFO charge with a single prior conviction, and in the same proceeding, would be “double-enhancement.” *Jackson v. Commonwealth*, 650 S.W.2d 250 (Ky. 1983), *Eary v. Commonwealth*, 659 S.W.2d 198 (Ky. 1983), *France v. Commonwealth*, 320 S.W.3d 60 (Ky. 2010) (involving using a prior felony sex offense to prove both persistent felony offender status and the requirement to register as a sex offender). If the indictment indicates that the Commonwealth does not have the sufficient number of prior felonies to prosecute both charges, the PFO will have to be dismissed. Remember too that, under the PFO statute, some prior felonies can merge into a single prior conviction, thus reducing the number of prior convictions available to the Commonwealth even more. KRS 532.080(4).

The big exception to this seems to be situations where there are also other charges against the defendant. In *Dale v. Commonwealth*, 715 S.W.2d 227 (Ky. 1986), one prior felony was used to prove the defendant’s status as a felon for purposes of a possession of a handgun charge, and a second prior felony was used to PFO-enhance a related robbery charge. In *O’Neil v. Commonwealth*, 114 S.W.3d 860 (Ky. App. 2003) a single prior felony was used both to prove Possession of a Handgun by a Convicted Felon and to PFO-enhance a charge of Burglary 2nd Degree. In *Oro-Jimenez v. Commonwealth*, 412 S.W.3d 174 (Ky. 2013) the Supreme Court

## NOTES

agreed with the reasoning of the Court of Appeals in *O'Neil*.

### **Date-Specific Offenses**

A few statutes are very specific about the dates of offenses, and the dates of offenses included in the indictment will have to be scrutinized carefully. For example, the PFO statute requires that the prior felonies which can be used to prove PFO status have to have been served out within five years prior to the current offense. KRS 532.080(2)(c), (3)(c). Also, remember that every charge is date-specific in the sense that it is governed by the substantive law in effect at the time of the offense.

### **Age-Specific Offenses**

Almost all of the sex offenses in KRS 510 are age-specific with regard to both the victim and the perpetrator. The indictment might, for example, charge a defendant with Rape 1st when the description of the offense would only support a charge of Rape 2nd.

### **Misleading the Grand Jury**

An indictment will not be dismissed simply because the Grand Jury was not presented with enough evidence or because the Grand Jury did not hear “both sides of the story.” RCr 5.08, 5.10. If a prosecutor knowingly presents false, misleading, or perjured testimony, however, the court may dismiss the indictment. *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky. App. 2000).

### **Amending Indictments**

RCr 6.16 allows indictments to be amended “any time before verdict or finding” but the amendment cannot charge an additional or different offense nor can it prejudice the substantial rights of the defendant. Kentucky courts have read this statute broadly, however, and a prosecutor can generally amend an indictment to conform to the proof without affecting the substantial rights of a defendant, so long as the defendant is not surprised, misled, or prejudiced. See, e.g., *Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993); and *Moran v. Commonwealth*, 399 S.W.3d 35 (Ky. App. 2013).

On the other hand, in *Stirone v. U.S.*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Supreme Court held that, after an indictment has been returned, a charge cannot be broadened through amendment to include wholly additional factual allegations except by the grand jury itself. The court reasoned that the substantial right violated by allowing the amendment was “the defendant’s substantial right to be tried only on charges presented in an indictment returned by a grand jury.” *Id.*, at 217. So one objection to allowing amendment of the indictment is that it allows the Commonwealth to proceed on a theory or set of facts never reviewed by a Grand Jury. That is why §12 of the Kentucky Constitution and RCr 6.02(1) require felonies to be prosecuted by indictment only, unless the defendant waives the requirement.

In *Wolbrecht v. Commonwealth*, 955 S.W.2d 533 (Ky. 1997), the Commonwealth, in both the indictment and in its Bill of Particulars, had alleged that the defendants had actually killed the victim, then amended the indictment to allege that the defendants had been accomplices of some unknown shooter. The Kentucky Supreme court reversed the conviction, citing *Stirone*. See also *Commonwealth v. Ellis*, 118 S.W. 973 (Ky. 1909), quoted in *Wolbrecht*, for the proposition that a defendant has the right to rely on the fact that he will only have to rebut evidence of which he was given notice. Failure to provide discovery and the Commonwealth’s last-minute change in its theory of criminal liability warranted dismissal of the indictment with prejudice in *Commonwealth v. Grider*, 390 S.W.3d 803 (Ky. App. 2012).

### **Appendi**

In *Appendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *U.S. v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the United States Supreme Court ruled that, except for prior convictions, any fact necessary to support an enhanced sentence must be either proven beyond a reasonable doubt or admitted by the defendant. A defendant is entitled to a jury determination of any fact which would increase the maximum punishment for an offense.

**Presenting Evidence to the Grand Jury**

This can be very effective. RCr 5.08 provides that, a defendant may contact the Commonwealth Attorney in writing, giving notice of his request to present evidence to the grand jury. The Commonwealth Attorney then informs the grand jury of the request. However, a defendant has no constitutional right to present evidence to a grand jury. RCr 5.08 is “simply an indulgence of the court.” *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001).

Neither a defendant nor his attorney should contact any member of the grand jury directly, and it is expressly not a good idea to have the defendant testify. The defendant will be put under oath (RCr 5.04) and examined by the Commonwealth Attorney (RCr 5.14) without his own attorney present, (RCr 5.18). See, e.g., *Ault v. Commonwealth*, 2005 WL 735588, Ky. App., April 2005, *unpublished*, in which the defendant, on advice from his attorney, went into the grand jury unprepared and made an awful showing, resulting in his indictment for murder. (The court held that the defendant probably would have been indicted anyway, but he faced trial having been under oath unable to keep his story straight. He pled guilty and got 13 years on an amended charge.)

**Proof at Trial**

In cases of indictments charging multiple offenses over a relatively long period of time, such as sexual abuse over a period of years, remember that when multiple offenses are charged in a single indictment, the Commonwealth must introduce evidence sufficient to prove each offense and also to differentiate each count from the others. *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002). See also *Valentine v. Vonteh*, 395 F.3d 626, 634-35 (6th Cir. 2000), in which the court described each charge as a “carbon copy” of the other, and thus held that the indictment had not given the defendant adequate notice. But see also *Applegate v. Commonwealth*, 299 S.W.3d 266 (Ky. 2009), holding that the child in that case was not required to remember specific dates and that the indictment specifying a range of time for the alleged events was sufficient.

Note: KRS 501 was amended effective April 9, 2016 to create criminal liability for a “continuing course of conduct” which would not require discreet proof of individual acts.

**LIMITING INSTRUCTIONS****Appropriateness**

Counsel should consider requesting limiting instructions when evidence is only admissible for a particular purpose and no others. KRE 105(a) is mandatory. It says: “...the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly.” So for example, a limiting instruction is appropriate when prior bad acts under KRE 404(b) are admitted for the limited purpose of establishing opportunity, plan, identity, etc., but not in order “to prove the character of a person in order to show action in conformity therewith.” See, e.g., *Bell v. Commonwealth*, 875 S.W.2d 882, 890 (Ky. 1994). Likewise, an instruction is appropriate when evidence of a prior conviction under KRE 609 is offered “for the purpose of reflecting upon the credibility of a witness.” In *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), the court ruled that a limiting instruction was required when the jury was going to listen to a tape-recorded interrogation in which the interrogating officer commented on the truthfulness of the defendant’s statements.

A court is not required to give a limiting instruction sua sponte. It must only do so “upon request.” KRE 105(a).

**Effect on Prosecution**

The important thing to remember about limiting instructions is that they also restrict the kind of argument the prosecutor can make in closing. The prosecutor will have to confine his remarks on that evidence to the purpose for which it was introduced. “[L]awyers are obligated to use such evidence only for its proper purpose during the course of a trial. For example, evidence admitted only for credibility but not a substantive purpose must be used in closing argument only in relationship to the credibility of witnesses.” Robert Lawson, *The Kentucky Evidence Law*

## NOTES

Handbook, 4th ed., Lexis-Nexis: 2003, § 1.05[5], p. 28. See, e.g., *Zogg v. O'Bryan*, 237 S.W.2d 511 (Ky. 1951). Without an instruction, however, the evidence is admitted “without limitation.” KRE 105(a).

The misuse of evidence of limited admissibility can constitute reversible error. See *Osborne v. Commonwealth*, 867 S.W.2d 484 (Ky. App. 1993). In *Osborne*, the defendant was charged with vehicular manslaughter and DUI. The prosecutor introduced the defendant’s prior DUI conviction in order to prove that the DUI the defendant was charged with was actually a DUI, 2nd Offense. No limiting instruction was asked for or given. The prosecutor then urged the jury to consider the prior DUI conviction while deliberating on the manslaughter charge. The Court of Appeals ruled that it was reversible error to admit the prior DUI conviction because the defendant was not charged with DUI 2nd and because the judge admitted the evidence without a limiting instruction. The Court of Appeals also said that “...the prosecutor specifically urged the jury to consider the improper information in deliberating on Osborne’s guilt on the manslaughter charge. The prosecutor’s comments were inappropriate, inaccurate, highly inflammatory, and unquestionably tantamount to palpable error affecting Osborne’s substantial rights.” *Id.*, at 489.

### MISTRIAL

Before a mistrial is appropriate the record must reflect a “manifest necessity” for such an extraordinary remedy. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985). For a mistrial to be proper, the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and that the prejudicial effect could be removed in no other way. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734 (Ky.1996), *Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006).

As a general rule, a mistrial granted on the defendant’s motion removes any double jeopardy bar to a retrial. *Commonwealth v. Deloney*, 20 S.W.3d 471 (Ky. 2000) (citing *Stamps v. Commonwealth*, 648 S.W.2d 868 (Ky. 1983)). In *United States v. Dinitz*, 424 U.S. 600 (1976), an exception to this rule was recognized “where ‘bad-faith conduct by judge or prosecutor,’ threatens the ‘[h]arrassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict’ the defendant.” *Id.* “Even if a criminal defendant successfully moves for a mistrial ..., he may still invoke the bar of double jeopardy in a second effort to try him if the conduct giving rise to the successful motion for a mistrial was intended to provoke him into moving for a mistrial.” *Commonwealth v. Grider*, 390 S.W.3d 803, 823 (Ky. App. 2013), See also *Couch v. Maricle*, 998 S.W.2d 469, 470-71 (Ky. 1999).

### MOTIONS IN LIMINE

#### Legal Standard

KRE 103(d) authorizes a request for a pretrial ruling on the admissibility of evidence. The rule says that the court may defer a ruling, but if the issue is resolved by an “order of record,” no further objection is necessary. According to the rule, making the motion and getting a ruling will preserve the issue for appellate review.

So, if that is true, do you have to then object all over again when the evidence comes up during the trial? Maybe you do. The rule notwithstanding, a motion in limine will only preserve an objection for appellate review if it meets the following criteria:

1. The motion pinpoints a specific issue, i.e., it states specifically what the evidence will be and what the objection to it is,
2. The motion includes a specific request,
3. You get a ruling on the record, and
4. Your objection at trial is the same objection as the motion in limine. If the objection at trial would be different from the one you made in limine, then the trial objection is not preserved unless you make it during trial.

*Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky.2005). See, e.g., *Tucker v. Commonwealth*, 916

S.W.2d 181 (Ky.1996), *overruled* by *Lanham*, in which it was held that making a motion in limine to exclude KRE 404(b) evidence did not suffice to preserve all the issues arising from that evidence. The motion in limine did not specifically object to some of the details of the uncharged crime which were presented at the trial, and when there was no contemporaneous objection to those details, the Court held the issue unpreserved.

To clarify, *Tucker* held that the contemporaneous objection rule required counsel to re-object. *Lanham* relaxed that requirement by specifying when a motion in limine is sufficient to preserve an issue. The best practice is simply to re-object if there is any doubt. If the objection is the same as the motion in limine, just refer the court back to that motion and the grounds for it.

**Practice Tip:** When the Court Defers a Decision. If the court defers a ruling on the admissibility of evidence, make sure to move the court to order that the evidence not be mentioned in opening statements. Do not forget to get a ruling later.

### NOTICE OF DEFENSES

In *Williams v. Florida*, 399 U.S. 78 (1970), the United States Supreme Court approved a Florida statute requiring the defense to give notice of the intent to introduce alibi evidence. The defendant had to disclose where and when the defendant would claim to have been and the names and contact information for any witnesses the defendant intended to call. In *Wardius v. Oregon*, 412 U.S. 470 (1973), the court ruled that it was a violation of due process to preclude defense alibi evidence for failure to give notice, when the statute did not impose a reciprocal obligation on the state to disclose its rebuttal alibi evidence. The situation in Kentucky seems clearer.

KRS 500.070(2) says simply, “No court can require notice of a defense prior to trial time.” This should be understood as a statutory extension of the substantive Constitutional right of a defendant to be free from the compelled disclosure of defenses. Section 11 of the Kentucky Constitution Bill of Rights arguably prohibits a court from requiring any response to a criminal charge from a defendant other than the entry of a plea. In *L&N Rail Co. v. Commonwealth*, 66 S.W. 505 (1902), a case decided 11 years after the adoption of the current Constitution, the court, relying on the “evidence against” language in the second sentence of Section 11, held that, “[w] hether therefore, the prosecution is by penal action or indictment, a plea of not guilty, under the constitution, is the only answer that the defendant may be required to file, and puts in issue all the allegations of the petition.”

Important exceptions to this rule include reciprocal discovery obligations under RCr 7.24, rape shield under KRE 412, mental health defenses under KRS 504.070 and RCr 8.07, and other motions specified in RCr 8.18.

RCr 7.26, which requires the Commonwealth to provide witness statements at least 48 hours prior to trial, is not reciprocal. There is no defense obligation to hand over witness statements. *Commonwealth v. Stambaugh*, 327 S.W.3d 435 (Ky. 2010).

Neither party in a criminal action is required to disclose a witness list in pre-trial discovery. *King v. Venters*, 596 S.W.2d 721 (Ky. 1980), *Lowe v. Commonwealth*, 712 S.W.2d 944 (Ky. 1996). “It is our opinion that there is no authority for requiring a defendant to furnish such a list to the Commonwealth, and we are not entirely convinced that it would be free of constitutional difficulty.” *King*, at 721. See also *Commonwealth v. Nichols*, 280 S.W.3d 39 (Ky. 2009), for a full discussion. Nevertheless, a court may require a defendant to provide a witness list at trial, at the outset of voir dire, for the purpose of inquiring of the jurors if any of them were “close personal friends” or “related by blood or marriage” to any of the named witnesses. *Hardy v. Commonwealth*, 719 S.W.2d 727 (Ky. 1986). It was not an abuse of discretion for the court to deny the defendant the opportunity to present a “surprise” witness when the defendant did not announce the witness until after voir dire but before opening statements, *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008).

It is a misuse of the grand jury for a prosecutor to facilitate his trial preparation by summoning defense witnesses to the grand jury. *Bishop v. Caudill*, 87 S.W.3d 1 (Ky. 2002).

**PRE-TRIAL MOTIONS****Motions Which Must Be Made Before Entering a Plea**

RCr 6.06 requires a certain type of objection to be raised before entering a plea. It says, “All indictments shall be signed by the foreperson of the grand jury. All informations shall be signed by an attorney for the Commonwealth. No objection to an indictment or information on the ground that it was not signed as herein required may be made after a plea to the merits has been filed or entered.” (Based on the old Cr.C. 119.) In *Stephenson v Commonwealth*, 982 S.W.2d 200 (Ky. 1998), the court imputed a waiver of the defendant’s objection to the fact that the indictment was unsigned, from the defendant’s failure to object to that fact prior to entering a plea.

**Motions Which Must Be Made Before Trial**

RCr 8.18 was originally written to encompass what were formerly motions to set aside or quash the indictment. Under the old Criminal Code, these motions also had to be made prior to entering a plea. (See above.) Effective January 1, 2015, the rule was expanded to cover motions to provide discovery, to suppress, to sever, and notice of mental health defenses. See also RCr 9.34, which requires that, “A motion raising an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors.” This rule also applies to the formation of a grand jury. *Commonwealth v. Nelson*, 841 S.W.2d 628 (Ky. 1992).

**Motion Deadlines**

RCr 8.20 allows the court to set deadlines for motions. RCr 8.18 provides for waiver of certain issues which are not raised by the time of the deadlines, but also provides for relief from a waiver upon a showing of good cause.

**Bench Trials**

The Commonwealth must agree to waiver of a jury trial under RCr 9.26(1). A defendant’s waiver must be in writing, and the written waiver is presumed to establish the voluntariness of the waiver for *Boykin* purposes, so that the trial court does not have to inquire further. *Marshall v. Commonwealth*, 60 S.W.3d 513 (Ky. 2001).

RCr 9.26(1) does not apply to petty offenses (generally those which carry less than 6 months in jail) unless the defendant has been granted a request for a jury trial. If so, he can then only waive the jury with the consent of the Commonwealth. *Commonwealth v. Green*, 194 S.W.3d 277 (Ky. 2006).

According to *R.S. v. Commonwealth*, 423 S.W.3d 178 (Ky. 2014), the proper motion for a directed verdict in a bench trial is a motion to dismiss under CR 41.02(2). The rule does not require that all evidence be evaluated in the light most favorable to the prosecution. Dismissal of charges after a bench trial serves as an acquittal for purposes of double jeopardy. *Commonwealth v. Angus*, 450 S.W.3d 719 (Ky. App. 2014).

**Bill of Particulars**

If the indictment does not name, e.g., the time, place, or alleged victim, or if it is scanty with regards to the facts alleged by the Commonwealth, then the court should grant a Bill of Particulars under RCr 6.22. *Thomas v. Commonwealth*, 931 S.W.2d 446, 450 (Ky. 1996), *Fitzgerald v. Commonwealth*, 403 S.W.2d 21 (Ky. 1966), *Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009). Since indictments are no longer fact pleadings but merely abbreviated notice pleadings, when a defendant requests a Bill of Particulars, he should be supplied freely with the details of the charges so he can prepare his defense. *Finch v. Commonwealth*, 419 S.W.2d 146 (Ky. 1967). A request for a bill of particulars can be waived once the motion has been made, if the case goes forward and the defense does not object to the failure of the Commonwealth to respond to the request. *Hampton v. Commonwealth*, 666 S.W.2d 737 (Ky. 1984), *Dunn v. Commonwealth*, 360 S.W.3d 751 (Ky. 2012).

**Competency**

Competency hearings are mandatory once the defendant has raised the issue. It is a denial of the

constitutional right to a fair trial for the trial court to refuse to hold a hearing. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Competency hearings are mandatory once specific facts are known sufficient to place the issue of competency in question. *Dorris v. Commonwealth*, 305 S.W.3d 438 (Ky. 2010). A court is not required to raise the issue of competency sua sponte. On the other hand, if there is substantial evidence of incompetency, the court must hold a hearing even if the defendant waives it. *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010) *overruling Gibbs v. Commonwealth*, 208 S.W.3d 848 (Ky. 2006).

### Legal Standard

The burden is on the defendant in a competency hearing to prove incompetency by a preponderance of the evidence. *Jackson v. Commonwealth*, 319 S.W.3d 347 (Ky. 2010).

In *Bishop v. Caudill*, 118 S.W.3d 159 (Ky. 2003), the Commonwealth requested an order requiring the defendant to submit to a competency evaluation by its own expert. The Kentucky Supreme Court ruled that the defendant was entitled to a writ of prohibition because the Commonwealth is not entitled to its own expert on the issue of competency.

Under KRS 31.185, a defendant is entitled to funds for an independent expert upon a showing of necessity and the impracticality of using state services. The reports of defense experts need not comply with KRS 504.100(2). It was not an abuse of discretion for the trial court to find the defendant incompetent even though both experts said she was competent. *Commonwealth v. Wooten*, 269 S.W.3d 857 (Ky. 2008).

For more discussion see the Department of Public Advocacy Mental Health Manual, June, 2014, available at <http://dpa.ky.gov>.

### Challenges to Constitutionality

CR 24.03 states, "When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney-General." See also KRS 418.075. Failure to follow this requirement may preclude not only appellate review of the constitutionality of the statute itself, but also review of whether the statute was unconstitutionally applied to a defendant. *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008).

### Jurisdiction

Pursuant to RCr 8.18(1)(b), the two motions which can be made anytime while a case is pending are motions to dismiss based on lack of jurisdiction and on failure of the indictment to charge an offense.

### Reconsider

In *Moore v. Commonwealth*, 357 S.W.3d 470 (Ky. 2011), the Kentucky Supreme Court dealt with the issue of filing motions to reconsider when the law and facts of the case had not changed in any relevant way. It said: "Such repetitious motions are improper. While it is true that under CR 54.02 the trial court retains broad discretion to revisit its interlocutory rulings at any time prior to the entry of a final judgment, that discretion is properly invoked only when there is a bona fide reason for it, i.e., a reason the court has not already considered. See *Tax Ease Lien Investments I, LLC v. Brown*, 340 S.W.3d 99 (Ky. App. 2011); *Bank of Danville v. Farmers National Bank of Danville*, 602 S.W.2d 160 (Ky. 1980). Otherwise a motion to reconsider amounts to no more than badgering the court, a practice that could well be deemed a violation of Civil Rule 11. The bench and bar are admonished to take notice that this practice of filing multiple vexatious motions to reconsider is not supportable under the Civil Rules and should be discontinued."

### Recusal

*Judge*. "KRS 26A.015(2) requires recusal when a judge has 'personal bias or prejudice concerning a party' or 'has knowledge of any other circumstances in which his impartiality might reasonably be questioned.' KRS 26A.015(2)(a) and (e), see SCR 4.300, Canon 3C(1). The burden of proof required for recusal is an onerous one. There must be a showing of facts 'of a character calculated

## NOTES

seriously to impair the judge's impartiality and sway his judgment.' *Foster v. Commonwealth*, 348 S.W.2d 759, 760 (Ky. 1961), cert. denied, 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962), see also *Johnson v. Ducobu*, 258 S.W.2d 509 (Ky.1953). The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal. *Webb v. Commonwealth*, 904 S.W.2d 226 (Ky. 1995)." *Stopher v. Commonwealth*, 57 S.W.3d 787, 794-95 (Ky. 2001).

A judge should disqualify himself in any proceeding where he has participated in previous proceedings concerning the same defendant to the extent that his impartiality may reasonably be questioned. *Small v. Commonwealth*, 617 S.W.2d 61 (Ky. App. 1981).

When a trial judge overruled a motion challenging guilty pleas from 1973 and 1977, he erred in failing to disqualify himself because he had been the county attorney at the time of the pleas. *Carter v. Commonwealth*, 641 S.W.2d 758 (Ky. App. 1982).

When the judge maintained, contrary to the record, that he reviewed the defendant's constitutional rights with the defendant at his guilty plea to a prior marijuana offense while serving as district judge, this is "personal knowledge" of the type abjured by KRS 26A.015(2)(a) and failure to either suppress the prior conviction or recuse was an abuse of discretion. *Woods v. Commonwealth*, 793 S.W.2d 809 (Ky. 1990).

*Prosecutor*. See KRS 15.733. Prosecuting attorneys are subject to public reprimand when they enter into contingency fee agreements to pursue civil actions against individuals they are simultaneously prosecuting on criminal charges. *K.B.A. v. Marcum*, 830 S.W.2d 389 (Ky. 1992). Disqualification on retrial following remand was proper when the defendant's attorney subsequently joined the Commonwealth Attorney's office. *Brown v. Commonwealth*, 892 S.W.2d 289 (Ky. 1995).

### Separate Trials

RCr 9.16 says that if a defendant or the Commonwealth will be prejudiced by the joinder of offenses or co-defendants in a single trial, the court "shall" order separate trials. However, this rule needs to be read together with RCr 6.18 and 6.20 – the rules on joining offenses and co-defendants. Since merely standing trial is itself a kind of prejudice, mere prejudice alone will not require separate trials. The joinder must be so prejudicial as to be unfair, or unnecessarily or unreasonably hurtful. An important factor for a court to consider in ruling upon a motion to sever is whether evidence in one offense could properly be admitted in the trial of the other. *Commonwealth v. English*, 993 S.W.2d 941, 944 (Ky. 1999), *Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky.2006). See also *Newcomb v. Commonwealth*, 410 S.W.3d 63 (Ky. 2013), in which the two alleged rapes were so similar that one could be admitted into the trial of the other for purposes of establishing a modus operandi under KRE 404(b). On the other hand, in *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky. 2005) it was error to consolidate into one indictment the separate charges of violating the Sex Offender Registration Act and Possession of a Handgun by a Convicted Felon, when the two charges were unrelated. In *Hammond v. Commonwealth*, 366 S.W.3d 425 (Ky. 2012), it was reversible error to join a murder charge with unrelated charges stemming from a burglary.

"In order to justify the granting of a severance, it must appear that the defendants have antagonistic defenses, or that the evidence as to one defendant tends directly to incriminate the other." *Tinsley v. Commonwealth*, 495 S.W.2d 776, 780 (Ky. 1973). See also *Rachel v. Commonwealth*, 523 S.W.2d 395 (Ky. 1975). "The movant must show that the antagonism between the co-defendants will mislead or confuse the jury." *U.S. v. Horton*, 847 F.2d 313, 317 (6th Cir. 1988). The movant satisfies this burden if he or she shows that the jury was unable "to separate and treat distinctively evidence that is relevant to each particular defendant at trial." *U.S. v. Gallo*, 763 F.2d 1504, 1525 (6th Cir. 1985), cert. denied, 475 U.S. 1017, 106 S.Ct. 1200, 89 L.Ed.2d 314 (1986).

Perhaps the most common problems requiring severance are those which have to do with issues surrounding the U.S. Supreme Court holdings in *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Under both opinions, statements may be admissible against one co-defendant but

not against another. If the Commonwealth intends to use a statement which is not redacted as required by *Bruton*, a severance might be necessary. See *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006), in which it was reversible error to refuse a motion to sever when the court ruled to admit evidence to impeach the defendant, in violation of *Crawford v. Washington*.

**Practice Tip:** Separate Trials. If your motion for separate trial is denied, remember to keep pointing out to the court, for the record, why the charges or co-defendants should have been severed, even into the penalty phase if necessary. See *Cosby v. Commonwealth*, 776 S.W.2d 367 (Ky. 1989), *overruled on other grounds*, and especially *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1991), in which it was reversible error to refuse to sever the penalty phase of the trial.

**Speedy Trials** - The right to a speedy trial is guaranteed by the Sixth Amendment and by §14 of the Kentucky Constitution. Each case must be reviewed on an individual basis, and the factors a court must consider are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. Only if the length of delay is presumptively prejudicial must the court then go on to consider the remaining factors. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). See also *Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004), for a full discussion.

There are also two important statutory rights to a speedy trial. KRS 500.110 governs situations in which a defendant in jail in one county is also being held on a detainer from another county. KRS 440.450 is the Interstate Agreement on Detainers, governing similar situations between different states. In both cases, the defendant must be brought to trial within 180 days of giving the proper notice of his request to the proper prosecuting authority.

**Practice Tip:** Speedy Trials. Once a speedy trial issue is raised, make sure to (1) make all the relevant dates clear for the record, (2) do not consent to a continuance unless it is in your client's best interest (agreeing to a continuance stops the clock), and (3) move to dismiss the charges.

### Suppression Hearing

RCr 8.27 includes motions to suppress alleged confessions, fruits of illegal searches, and eyewitness identifications. Motions to suppress should be made before trial and the hearing should be held outside the hearing of the jury. The rule also includes requirements regarding notice of witness statements prior to the hearings. Briefs may be filed on the issues presented by the testimony either before or after the hearing. KRE 104(c), see also *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). The preferred practice is for the court to make a ruling at the suppression hearing rather than postponing the ruling for trial. See *Hayes v. Commonwealth*, 175 S.W.3d 574, 595-96 (Ky. 2005), in which it was prejudicial error to refuse to rule on the defendant's suppression motion.

While testifying in a suppression hearing, the defendant cannot be cross-examined concerning any other issues in the case. KRE 104(d), *Shull v. Commonwealth*, 475 S.W.2d 469 (Ky. 1971).

A defendant's testimony to establish standing at a suppression hearing cannot be used against the defendant at trial unless the defendant testifies. A defendant is not required to make a "Hobson's choice" between establishing standing under the 4th Amendment and then being impeached with it, or maintaining his 5th Amendment right to remain silent and therefore waiving the suppression issue. *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), *Hayes, supra*, at 595-96. (If anyone may wonder, a "Hobson's choice" is the choice between what is offered or nothing at all. It is named after Thomas Hobson (1544-1631), the keeper of a livery stable in Cambridge, England, who gave his customers one choice: buy the horse nearest to the stable door, or nothing.)

If the defendant's prior testimony at a suppression hearing is used against him as evidence of guilt in the prosecution's case-in-chief, the defendant must object to its use in order to maintain his Fifth Amendment right to remain silent. *Commonwealth v. Taylor*, 477 S.W.3d 592 (Ky. 2015).

## NOTES

**Practice Tip:** RCr 8.27 requires an evidentiary hearing. Make sure the facts surrounding the search go into the record, even if the defendant and the Commonwealth both stipulate to the same facts. Hearings which do not reflect the factual basis of the suppression issue, as it was presented to the trial court, leave appellate courts with nothing to rule on. You must object to not holding an evidentiary hearing. *Commonwealth v. Jones*, 217 S.W.3d 190 (Ky. 2006), *Lewis v. Commonwealth*, 42 S.W.3d 605 (Ky. 2001).

**Unpublished Opinions**

CR 76.28(4) says: "...unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action."

**Venue**

Venue is generally vested in the county or city in which the offense was committed. KRS 452.510. Improper venue can be waived by the defendant, so make sure that a timely motion or objection is made. RCr 8.26, KRS 452.650, *Chancellor v. Commonwealth*, 438 S.W.2d 783 (Ky. 1969), *Derry v. Commonwealth*, 274 S.W.3d 439 (Ky. 2008). A motion for change of venue must comply with KRS 452.210 and KRS 452.220. Make sure that the petition is verified and accompanied by at least two affidavits. Also, make sure that the request for a change of venue is made in a timely manner, with notice to the Commonwealth. See *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), *Whitler v. Commonwealth*, 810 S.W.2d 505 (Ky. 1991) and *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky. 1991), *overruled on other grounds*. According to *Thompson v. Commonwealth*, 862 S.W.2d 871 (Ky. 1993), a motion filed two days before trial is not timely. The motion must be renewed after voir dire. *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 2000). Although venue is not an element of any offense and the termination of a trial for lack of proper venue does not serve as an acquittal, the state has the burden to prove venue in all cases, but failure to do so must be raised by the defendant with a motion to transfer to proper venue. *Turner v. Commonwealth*, 345 S.W.3d 844 (Ky. 2011).

**COMMON MOTIONS AND AUTHORITY****Arraignment**

- Motion to Dismiss Charges, Double Jeopardy, US 5th Amend., Ky. § 13, KRS 505
- Motion Dismiss Charges, Lack of Probable Cause on Citation, RCr 3.02(2)
- Motion to Dismiss Charges, No Review for Probable Cause within 48 Hours
- Motion to Dismiss Charges, Statute of Limitations, KRS 500.050
- Motion for an Interpreter, KRS 30A.410
- Motion for ROR Bond, RCr 4.10
- Motion for Bond to be set at "least onerous conditions", RCr 4.12
- Motion for Competency Evaluation, RCr 8.06
- Motion to Advise Defendant of Rights under the Vienna Convention
- Motion to Advise Co-defendants of Potential Conflicts, RCr 8.30(1)

**Representation**

- Notice of Appearance and Assertion of Rights

**Preliminary Hearing**

- Motion to Discharge Defendant, Proceed by Indictment Only, 10 Day Rule, RCr 3.10

**Grand Jury**

- Motion to Discharge Defendant, No True Bill, RCr 5.22
- Motion to Discharge Defendant, Adjournment of Grand Jury, RCr 5.22
- Motion to Discharge Defendant, Fail to Indict within 60 Days, RCr 5.22
- Request to Submit Evidence, RCr 5.08

**Indictments**

- Motion to Quash the Indictment, RCr 8.20, RCr 6.06
- Motion to Dismiss for Failure To State an Offense, RCr 6.10, RCr 8.18
- Motion to Dismiss for Lack of Jurisdiction, RCr 8.18
- Motion to Dismiss, Improper Venue, KRS 452.510
  
- Motion to Dismiss, Indictment Only Charges Misdemeanors, KRS 24A.110, RCr 5.20
- Motion to Dismiss, Statute of Limitations Has Lapsed, KRS 500.050
- Motion to Dismiss Charges Used Twice to Enhance Other Charges
- Motion to Dismiss, Double Jeopardy
  
- Motion to Dismiss, Improper Transfer to Circuit Court, KRS 635.020
- Motion to Dismiss, Improper Automatic Transfer to Circuit Court, *Apprendi v. N.J.*
- Motion to Dismiss, Statute Unconstitutional, CR 24.03, KRS 418.075
- Motion to Dismiss, Improper Formation of Jury Pool, Grand Jury, KRS 29A.040

**Bill of Particulars**

- Motion for Bill of Particulars, RCr 6.22

**Multiple/Joined Counts**

- Motion for Severance (of multiple counts), RCr 9.16, RCr 6.18, RCr 6.20

**Co-Defendants**

- Motion for Severance (of the joined trial), RCr 9.16, RCr 6.18, RCr 6.20
- Motion to Redact Statement of Co-defendant
- Motion to Exclude Statement of Non-Testifying Co-Defendant, *Crawford v. Washington*

**Change of Venue**

- Motion for a Change of Venue, KRS 452.210, KRS 452.230

**Recusal**

- Motion to Recuse, Judge, KRS 26A.015(2)
- Motion to Recuse, Prosecutor, KRS 15.733

**Speedy Trial**

- Notice of Assertion of Right to a Speedy Trial, 6th Amend., Ky Const. § 14
- Motion to Dismiss for Lack of Speedy Trial, see also KRS 500.110 and KRS 440.450

**Jury trial**

- Motion for a Jury Trial in Petty Offenses, KRS 29A. 270(1), RCr 9.26(1)

**Bench Trial**

- Motion for a Bench Trial / Waiver of Jury Trial, RCr 9.26(1)
- Motion to Dismiss (directed verdict), CR 41.02(2)

**Adversarial Bond Hearing**

- Motion for Adversarial Bond Hearing, RCr 4.40(1)

**Suppression of Evidence**

- Motion for Suppression Hearing, RCr 8.27, 8.18, KRE 104(c)

**Evidence**

- Motion to Preserve
- Motion to Inspect Evidence Held by the Commonwealth
- Motion for Defense Testing of Evidence

**Continuance**

- Motion for Continuance w/ Affidavit, showing of Due Diligence, RCr 9.04
- Motion for Continuance, Discovery Violation, RCr 7.24(9)
- Recognizance of Witnesses, RCr 3.20

## NOTES

**Discovery**

- Discovery Inventory
- Motion to Opt Out of Automatic Reciprocal Discovery As Normally Ordered by the Court
- Motion to Compel Discovery, RCr 7.24
- Motion to Dismiss for Discovery Violations, RCr 7.24(9)

**Depositions**

- Motion to Depose Witness, RCr 7.06, et seq.

**Witnesses**

- Motion to Close Proceedings
- Motion to Separate Witnesses under The Rule, KRE 615
- Motion for Competency Hearing, KRE 601, 602

**Experts**

- Ex Parte Motion for Funds, KRS 31.185
- Motion for a Daubert Hearing

**Competency**

- Motion for a Competency Evaluation, RCr 8.06
- Motion for Defense Expert
- Ex Parte Motions for Funds, KRS 31.185

**Counseling Records**

- Motion for in camera Review of Counseling Records

**Motions in Limine**

- Motion to Exclude on Grounds that Evidence Will not Help the Jury Find the Truth, Will be Needless Repetitive, Mislead or Confuse the Jury, Unduly Prejudicial, KRE 102, KRE 611(a)(i), KRE 403
- Motion to Exclude Hearsay, Improper Bolstering
- Motion to Exclude Social Worker Hearsay
- Motion to Exclude Investigative Hearsay
- Motion to Exclude Hearsay in the Form of Prosecution Charts or Exhibits
- Motion to Exclude Co-Defendant Hearsay, Crawford v. Washington
- Motion to Redact Hearsay on Audio or Video
- Motion to Exclude Prosecution Transcripts of Audio or Video
- Motion to Exclude Improper Rebuttal Evidence, RCr 9.42
- Motion to Require Commonwealth to Elect Charges (double enhancement)
- Motion to Exclude Improper Closing Argument

**Avowals**

- Motion to Make an Avowal, KRE 103(a)(2)

**Jurors**

- Motion to Dismiss Improperly Formed Jury Pool, KRS 29A.040
- Motion to Strike, RCr 9.36(1), KRS 29A.290(2)(a)
- Motion for Additional Defense Peremptory Strikes, RCr 9.40, KRS 29A.280(1)
- Batson Challenge to Prosecution Use of Peremptory Strikes
- Notice of Jurors Defense Would Have Struck with Peremptories if Other Jurors Had Been Properly Struck for Cause
- Motion to Sequester, RCr 9.66
- Motion to Transfer Jurors to Crime Scene
- Motion to Voir Dire Juror on Improper Contact with Witnesses, KRS 29A.310(2)
- Motion to Poll the Jury, RCr 9.88

**Directed Verdict**

- Motion for Directed Verdict, End of Prosecution Case, permitted, CR 50.01
- Motion for Directed Verdict, End of All Evidence, mandatory, CR 50.01
- Objection to Giving Instructions on Greater Charge when Proper Charge is a Lesser Included Offense and Defense Tenders Instructions on Lesser Included Offense
- Motion for Judgment Notwithstanding the Verdict, RCr 10.24 (a renewed motion for directed verdict, within 5 days of verdict)

**Instructions**

- Presumption of Innocence (mandatory), RCr 9.56(1)
- Motion to Instruct on Defendant Not Testifying, RCr 9.54(3)

**Sentencing**

- Motion for Directed Verdict, PFO
- Motion to Waive PSI, Defendant in Custody, RCr 11.02(1)
- Motion to Amend PSI
- Motion to Inspect Victim Impact Statements
- Motion to Specify the Defendant is Not a Violent Offender
- Motion to Specify the Offense Did Not include Serious Physical Injury
- Motion to Specify Defendant's Parole Eligibility

**Judgments**

- Motion to Amend Judgment, CR 60.01

**New Trial**

- Motion for New Trial, RCr 10.06, CR 59.01, CR 60.02

**Appeals**

- From District Court Ruling on Bail, RCr 4.43(2), KRS 419
- From District to Circuit, CR 72
- From Circuit Court Ruling on Bail, RCr 4.43, CR 76.06, CR 76.12
- Motion to Stay Execution of Sentence, RCr 12.76
- Motion for Bail, RCr 7.28
- Motion / Order to Proceed in forma pauperis, KRS 453.190, KRS 31.110(2)(b)
- Notice of Appeal, RCr 12.04
- Motion for Extension of Time, CR 73.08
- Designation of Record
- Motion to Photograph Large Exhibits for Appellate Record, CR 75.07(3)

**Juvenile**

- Motion to Proceed under the Rules of Criminal Procedure, KRS 610.015(1)
- Motion to Exclude Persons from Proceedings, KRS 610.070(3)
- Motion for a Jury Trial
- Motion for Review of DJJ Custody
- Motion to Waive Disposition
- Motion for Competency Evaluation, RCr 8.06
- Ex Parte Motion for Funds, KRS 31.185
- Appeal of District Court Disposition, KRS 610.130

**Habeas Corpus**

- Petition for Writ of Habeas Corpus Seeking Release of Individual Detained without Due Process, KRS 419 Writs of Prohibition, Mandamus

**Writs of Prohibition, Mandamus**

- To Circuit Court Against District Court, CR 81
- To Court of Appeals Against Circuit Court, CR 76.36
- Against Custodians of Prisoners or Hospitals, KRS 419, KRS 202A.151
- Against an Administrative Body, CR 81

## NOTES

**RIGHT TO TRIAL**

There is no constitutional right to a jury trial in the case of “petty” offenses (generally, those which carry 6 months or less in jail). Nevertheless, KRS 29A.270(1) gives a defendant the statutory right to a jury trial in “all criminal prosecutions, including prosecutions for violations of traffic laws, in Circuit and District Courts.” The statute should then be interpreted as placing the burden on the accused to request a jury trial in the case of petty offenses. *Commonwealth v. Green*, 194 S.W.3d 277 (Ky. 2006).

**STIPULATIONS**

Stipulations should be in writing, but it is not necessarily fatal if they are not. *Clark v. Commonwealth*, 418 S.W.2d 241, 242 (Ky. 1967). The judge sometimes publishes the stipulation to the jury.

**Stipulating to issues the opponent is not prepared to prove**

Be aware that stipulating to part of the Commonwealth’s case will have the effect of waiving that issue on appeal. See, e.g., *Harris v. Commonwealth*, 2007 WL 3226193, Ky., Nov. 2007, *unpublished*, in which the defendant who stipulated to chain of custody could not later raise the issue on appeal.

**Stipulating to issues the opponent is prepared to prove**

Sometimes attorneys attempt to stipulate to an issue in order to keep an opponent’s evidence out. The theory is that once a party stipulates to an issue, the production of further evidence on the issue is just cumulative, and therefore more prejudicial than probative under KRE 403. See *Old Chief v. U.S.*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), in which the U.S. Supreme Court held that it was reversible error for the trial court to refuse the defendant’s stipulation to the prior conviction element of the charged offense and to then allow the prosecution to show not only the fact of the prior offense, but the specific nature of it as well. Kentucky adopted *Old Chief* in *Anderson v. Commonwealth*, 281 S.W.3d 761 (Ky. 2009), in which the court ruled that the defendant should have been allowed to stipulate to his prior convictions in a trial for possession of firearm by a convicted felon, the evidence of the nature of the prior convictions being less probative than prejudicial under KRE 403.

Remember, however, that the Commonwealth does not have to accept a stipulation: “the prosecution is permitted to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the case that he does not want the jury to see.” *Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003), quoting *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). Moreover, if the Commonwealth does not accept the offer to stipulate, the mere fact that the defendant *offered* to stipulate will not preserve an error under KRE 403. *Johnson*, at 439.

**SUBPOENAS**

A witness in a criminal trial can only comply with a subpoena by appearing in court, and cannot be excused by an attorney. Once a witness is subpoenaed for trial, by either side, he has “a continuing obligation...to be available as a witness until the case was concluded or until he was dismissed by the court.” *Anderson v. Commonwealth*, 63 S.W.3d 135, 142 (Ky. 2002), quoting *Otis v. Meade*, 483 S.W.2d 161, 162 (Ky. 1972). In *Anderson*, the Commonwealth Attorney knew that the defendant was relying on the testimony of a subpoenaed prosecution witness and excused the witness without informing either the defendant or the court.

Refusal to comply with a subpoena is punishable as contempt of court, KRS 421.110, a warrant of arrest may be issued, KRS 421.130, and a special bailiff may even be authorized to arrest persons who are in another county, KRS 421.135. See also RCr 7.06.

It is an abuse of subpoena power to compel a witness in a criminal case to attend pretrial interviews in the attorney’s office. Subpoenas can only be used to require a witness’s attendance at a formal

judicial proceeding. “The government may not use trial subpoenas to compel prospective trial witnesses to attend pretrial interviews with government attorneys.” *Hillard v. Commonwealth*, 158 S.W.3d 758, 764 (Ky. 2005), quoting *U.S. v. LaFuente*, 991 F.2d 1406, 1411 (8th Cir. 1993). See also Ethics Opinion E-423 (OPINION) adopted by the KBA Board of Governors in January 2004 and published in the March 2004 issue of the Kentucky Bench and Bar, amended by *Stengel, below*.

It is an abuse of subpoena duces tecum power to compel the production of documentary or other tangible objects to the office of an attorney when other parties receive no notice and the issuance of the subpoena was not in connection with a deposition or court proceeding, requiring sanctioning with a public reprimand. *Megibow v. K.B.A.*, 173 S.W.3d 618 (Ky. 2005). CR 45.01 states: “Subpoenas may not be used for any purpose except to command the attendance of the witness and production of documentary or other tangible evidence at a deposition, hearing or trial.” See also Ethics Opinion E-140, March, 1976 in which the use of subpoenas for *ex parte* investigation is prohibited. (KRS 500.120, authorizing the use of subpoenas in the investigation of Internet exploitation of children, is an example of an exception to this rule. See OAG 15-021, 2015 WL 9647504, on the use of “criminal investigative subpoena duces tecum” prior to the initiation of prosecutions.)

KRS 422.305 is the medical exception in cases of subpoenaed documents and requires that both sides get a copy.

RCr 5.06, concerns the use of subpoenas in grand jury proceedings, and was amended by order in *Stengel v. K.B.A.*, 162 S.W.3d 914 (Ky. 2005). See that opinion for the state of the law in that area. The amendment to RCr 5.06 arguably gives defense counsel the power to subpoena witnesses to the grand jury.

### **PRESERVING A CLEAR RECORD ON APPEAL**

You will have a lot to think about in any trial, but try to remember the following: (1) If it cannot be seen or heard on the record, or reconstructed by the written record, it did not happen. All gaps in the record will be presumed to support the trial court. (2) Watch for dead spots in audio recording and blind spots in video recording. Know where your microphones are and where the cameras are aimed. Do not create a dead spot at counsel table by blocking microphones with books and shuffling papers. (3) Bench conferences: speak up! In courtrooms with modern sound systems, the white noise you hear when the amplifiers go off will stop the jury from overhearing what you have to say. If the judge is too far away from the microphone or is whispering, restate the judge’s ruling into the microphone.

## **II. THE JURY**

### **PROCEDURE FOR SELECTING A JURY POOL**

The master list of prospective jurors includes all persons in the county who are over 18 and have a license, all those persons on the county’s voter registration lists, and all those persons whose tax returns show them to be residents of the county. AOC must create a master list “at least annually.” Administrative Procedure of the Court of Justice, APCJ II, Sec. 2, KRS 29A.040(2). The AOC then uses a computer to generate a randomized list of potential jurors from the master list, and the chief circuit judge then takes as many names as needed off the list in sequence. APCJ II, Sec. 3 and 5. The people are then summonsed and become the jury pool for that county.

APCJ II, sec. 6, and KRS 29A.060(4) govern the procedure for contacting jurors for jury service and requiring that they make themselves available for “thirty (30) judicial days thereafter.”

#### **Failure to Follow the Procedure**

This can require dismissal of the indictment when it involves a grand jury, *Gill v. Commonwealth*, 374 S.W.2d 848 (Ky.1964), *Fugate v. Commonwealth*, 233 S.W.2d 1019 (Ky.1950), or the granting

## NOTES

of a new trial when it involves a petit jury, *Williams v. Commonwealth*, 71 S.W.2d 626 (Ky.1934).

RCr 9.34 requires that, “A motion raising an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors.” See *Stroud v. Commonwealth*, 922 S.W.2d 382 (Ky. 1996), and *McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011), *overruling Bowling v. Commonwealth*. This rule applies to grand juries as well as petit juries. *Commonwealth v. Nelson*, 841 S.W.2d 628 (Ky. 1992), *Johnson v. Commonwealth*, 292 S.W.3d 889 (Ky. 2009). (This case also discusses the proof which must be offered to sustain a claim of systematic exclusion of racial minorities from jury pools.) The exception is when the defendant could not have discovered the irregularities by due diligence prior to the time of trial. *Allen v. Commonwealth*, 901 S.W.2d 881 (Ky. App. 1995), *Bartley v. Loyall*, 648 S.W.2d 873 (Ky. App. 1982), *McQueen, supra*.

Note: In both *Commonwealth v. Nelson*, 841 S.W.2d 628 (Ky. 1992) and *Allen v. Commonwealth*, 901 S.W.2d 881 (Ky. App. 1995), the courts ruled that a judge cannot delegate the responsibility of reviewing juror qualification forms and disqualifying those jurors who fall under the criteria of KRS 29A.080(2). At the time of those decisions, both APCJ II, Sec. 8 and KRS 29A.080 required the determination to be made by a judge. However, KRS 29A.080(1) was amended in 2002 and now allows those determinations to be delegated to court administrators and clerks. (APCJ II, Sec. 8 still requires judges to do the job.)

### **Fair Cross-Section, Objecting to the Procedure Itself**

A defendant has a Sixth Amendment right to a jury which represents a fair cross-section of his community. *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). An objection to the composition of a jury pool based on the due process right to a fair cross-section must show that: (1) the group allegedly excluded is a distinctive group in the community, (2) the representation of that group in the venires from which the jury is selected is not fair and reasonable in relation to the numbers of other persons in the community, and (3) the underrepresentation is due to the systematic exclusion of the group in the jury selection process. *Ford v. Commonwealth*, 665 S.W.2d 304 (Ky. 1984), *cert denied*, 469 U.S. 984, 105 S.Ct. 392, 83 L.Ed.2d 325; *Smith v. Commonwealth*, 734 S.W.2d 437 (Ky. 1987), *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009), *Mash v. Commonwealth*, 376 S.W.3d 548 (Ky. 2012).

A defendant also has an equal protection right to a jury in which there is no substantial underrepresentation of a racial or other identifiable group. This applies to petit juries as well as grand juries. *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

Nevertheless, a master list is not unconstitutional just because it may fail to include some potentially eligible voters. A fair cross-section complaint cannot be established by merely comparing the composition of the jury to that of the community, because the composition of the community also includes ineligible voters. *Ford, supra*, at 308.

### **Improperly Excusing Jurors**

Note, however, that even if the master list is unobjectionable, the court may be so liberal in granting excuses or otherwise so lax in following up on jurors who simply do not respond to being summonsed, that a drastic reduction in the available jury pool results nevertheless. For a thorough review of these issues, see Tim Arnold and Gail Robinson, “Jury Pool Issues,” *The Advocate*, vol. 26, no. 3, May 2004, pp. 10-15. In the course of representing a murder defendant, the authors discovered that out of 500 people summonsed for service in the defendant’s circuit, only 91 of them were left to serve as potential jurors on circuit, district and grand juries after one accounted for all those who never responded to the summons (178), were disqualified (48) or simply excused (183). See, e.g., *Sanborn v. Commonwealth*, 754 S.W.2d 534, 548 (Ky. 1988), “The trial court erred in the jury selection procedures, in that the judge excused a number of prospective jurors without recording a reason for the excuses on the jury qualification form,” and *Ward v. Commonwealth*, 695 S.W.2d 404, 406-7 (Ky. 1985), “It is undisputed that the trial judge had not complied with the statute [KRS 29A.100] prior to the motion to be furnished with

the list.”

From the Arnold and Robinson article, p 13, including the checklist below:

“KRS 29A.080(1) and 29A.100(2), as amended in 2002, permit the chief judge to delegate decisions concerning disqualification, excuse from service for 10 days or less and postponement of service for less than a year to another judge, court administrator, or clerk. However, decisions involving excuses for “undue hardship, extreme inconvenience or public necessity” for more than 10 days must still be made by the judge. KRS 29A.100(3). If the local authorities are not following the law concerning jury selection a motion to quash the indictment and/or a motion to dismiss the petit jury panel should be made. Such a motion must be made prior to examination of the jurors. See RCr 9.34

“It is important to realize that merely making an oral objection prior to voir dire is not sufficient to preserve the error. In *Grundy v. Commonwealth, Ky.*, 25 S.W.3d 76 (2000), the court considered a situation...where a surprisingly low number of jurors appeared for trial. Trial counsel asked to postpone the proceedings until the no-show jurors appeared, and the court denied the motion. On appeal, Grundy alleged that the court violated Nelson by improperly excusing an excessive number of jurors. The Supreme Court held that the claim was unpreserved, because trial counsel had not made a sufficient record to permit the appellate court to rule on whether the excuses were or were not proper.

“The accused has a right to make a record sufficient to permit appellate review of alleged errors. See *Powell v. Commonwealth, Ky.*, 554 S.W.2d 386, 390 (1977). Consequently... counsel should object to any juror being absent who was not excused pursuant to the procedures set forth in KRS Chapter 29A and APCJ, Part II. Counsel should then ask the court to allow him or her to review the excuses for any “no show” jurors. If the court permits that, counsel should put those excuses in the record for appellate review. If, on the other hand, the judge wishes to proceed to trial without allowing counsel to review the excuses, counsel should make an oral motion on the record asking the court to put the excuses in the record as an avowal.”

### CHECKLIST FOR INVESTIGATING A JURY PANEL

1. When did the chief circuit judge last ask AOC to select jurors for the current term
2. Did he ask for a sufficient number of names from AOC?
3. Is the list being used to summons jurors for this term fresh or stale?
4. Is the chief judge asking the clerk to summons a sufficient number of jurors?
5. If the letters including the jury summons and qualification forms don't reach the jurors, is the chief circuit judge having the sheriff attempt personal service?
6. Is the chief judge or someone he's properly designated reviewing forms and deciding if jurors are disqualified
7. Is the reason for disqualification being entered on the form?
8. Is the judge following the strict standard on permanent medical exemptions?
9. As far as excuses, is the chief circuit judge acting or designating someone listed in the statute to act only as permitted (excused up to 10 days, postponement up to 12 months)?
10. Is the judge following the strict standard for excuses (undue hardship, extreme inconvenience, public necessity)?
11. When does the judge grant excuses and does counsel have any input?
12. If jurors have appeared for orientation but don't appear for trial, does the judge require them to explain themselves?
13. Have you attended the orientation and listened to what the judge tells the jurors?

### OTHER OBJECTIONS TO THE JURY PANEL

Other problems might arise once the jurors have been called to sit on the jury and voir dire has begun. A few cases have addressed some of these situations. Generally speaking, it is rare that

NOTES

## NOTES

any occurrence during voir dire will require dismissal of the entire jury panel.

### Remarks Made During Voir Dire

In *Tabor v. Commonwealth*, 948 S.W.2d 569 (Ky. App. 1997), a prospective juror said during voir dire that she believed she recognized the defendant and then asked out loud if he had been in the “West Kentucky Correctional Center.” The trial court then excused the juror after a conference with her outside the hearing of the rest of the jurors, leaving the unmistakable impression that the juror had been right about the defendant. The Court of Appeals ruled that this response tainted the entire venire. What was crucial in this case was the fact that, although the defendant did have a prior felony conviction, he could not have been impeached with it during trial because the conviction was still on appeal. Thus, the juror gave the other jurors access to information concerning the defendant which would not have come into evidence during trial.

The Kentucky Supreme Court declined to grant relief in a similar situation in *Hall v. Commonwealth*, 2003 WL 21254856, Ky., May 2003, *unpublished, overruled on other grounds*. In that case, a prospective juror said during voir dire that he knew the defendant and then added, “I used to be deputy jailer in Whitesburg.” The trial court struck the juror for cause but did not grant the defendant’s motion for a mistrial. The Supreme Court ruled that a mistrial was not necessary because there were any number of reasons why a deputy jailer might have known the defendant other than because he had been in jail. For instance, said the court, the other prospective jurors could have assumed he had worked there, or had delivered supplies there, or had been in law enforcement.

The Court of Appeals also declined to follow *Tabor* in a case very similar to *Hall*. In *Bryant v. Commonwealth*, 2003 WL 22110576, Ky. App., Sept. 2003, *unpublished*, a prospective juror also said during voir dire that he knew the defendant from jail. In that case, unlike in *Tabor*, the defendant took the stand and was impeached with his prior felonies. The court ruled that the error was therefore harmless and a mistrial was not necessary.

### Juror a Victim of Similar Crime

In *Jett v. Commonwealth*, 862 S.W.2d 908, 910-11 (Ky. App. 1993), *overruled on other grounds*, the defendant on trial for trafficking moved to set aside the jury panel when one prospective juror stated, in the presence of the entire panel, that a drug trafficker had killed his daughter. Instead, the trial court struck the prospective juror. The Court held it was not error to refuse to strike the entire panel because the defendant had proven no prejudice. A prejudicial remark by a juror does not necessarily require striking the entire panel.

Where the defendant was on trial for robbery, the fact that two prospective jurors had been robbery victims was not sufficient to render prospective jurors unqualified. *Stark v. Commonwealth*, 828 S.W.2d 603, 608 (Ky. 1991), *overruled on other grounds*. Also, where the defendant was on trial for assault and burglary and knew the victim, it was not error for the trial court to fail to strike for cause a juror who had been raped at her home three months before by a perpetrator who she did not know and who had not yet been caught. *Butts v. Commonwealth*, 953 S.W.2d 943, 945 (Ky. 1997), *overruled on other grounds*. See also *Allen v. Commonwealth*, 278 S.W.3d 649 (Ky. App. 2009).

### Juror Also a Witness in the Case

In *Hellard v. Commonwealth*, 829 S.W.2d 427 (Ky. App. 1992), *overruled on other grounds*, the defendant was charged with theft by deception and forgery based on a forged rental agreement with a video store. The owner of the video store was a member of the jury pool. The defendant moved for a continuance of her trial until a new jury pool was called. The Kentucky Court of Appeals held that, even though the issue had not been preserved, it was palpable error for the trial court to deny the motion for continuance because the “possibility of a jury according the testimony of a witness greater weight than it otherwise would have received is just too great when the witness is a member of the same jury pool.” Furthermore, the court did “not feel that *Hellard* was required to show bias or prejudice under these circumstances.” *Id.* at 429. Compare, *Colwell v. Commonwealth*, 37 S.W.3d 721 (Ky. 2001), in which the complaining witness was also a

member of the jury pool but no reversible error occurred because the witness was excused before the day of trial and therefore did not mingle with other jurors prior to trial.

In *Jones v. Commonwealth*, 737 S.W.2d 466 (Ky. App. 1987), a member of the juror pool was also a witness in the defendant's trial. The juror was removed from the jury pool before trial began and the defendant was allowed to voir dire on the issue of the weight other jurors might place on the witness's testimony. It was not error to deny a continuance when all the remaining jurors answered they would not be unduly influenced by the testimony of the former juror.

#### **Juror Convicted a Co-Defendant**

In *Pelfrey v. Commonwealth*, 842 S.W.2d 524 (Ky. 1993), the defendant moved for a continuance until a new jury pool could be empanelled because the jury that had convicted the defendant's companion one month earlier had been selected from this same jury pool. The trial court denied the continuance motion.

On appeal, the Court held the trial court had not abused its discretion in denying the continuance motion because "there were adequate safeguards in place to assure an unbiased jury" (i.e., for-cause and peremptory challenges). *Id.*, 525 Furthermore, the defendant had conducted a thorough voir dire examination and had not challenged any prospective jurors for cause, and the trial court had admonished the jurors to consider only what they heard from the witness stand.

The Kentucky Supreme Court further held that because the defendant had not challenged any of the prospective jurors for cause "we can only assume that he was satisfied with the jury." And that, "a continuance motion for a new panel is not the equivalent of individually challenging jurors for cause. Once trial counsel's [continuance] motion was denied, his method for reviewing the bias issue was to specifically challenge jurors. Without doing so, counsel clearly waived his jury challenge." *Id.*

See also *Hicks v. Commonwealth*, 805 S.W.2d 144 (Ky. App.1990), in which the defendant failed to show that he could not receive a fair trial from a jury drawn from the same pool of jurors who had previously convicted an alleged accomplice. And see also *U.S. v. Dempsey*, 733 F.2d 392 (6th Cir.1984), in which members of the panel called to try the defendant's case had been members of the same panel from which jurors were selected for the prior trial of the co-defendant, and three had actually served on the jury which had tried and convicted the co-defendant. The U.S. Court of Appeals ruled there was no error when the trial court did not remove the entire panel but did remove those jurors who had served on the co-defendant's panel.

#### **Juror Had Participated in Voir Dire in Previous Trials Against Same Defendant**

In *Merriweather v. Commonwealth*, 99 S.W.3d 448 (Ky. 2003), the court ruled that it was not reversible error to refuse to strike for cause six jurors who had participated in the voir dire of a previous unrelated assault case against the same defendant when the trial court determined that the jurors had only vague recollections of the nature of the former charges and that the defendant was able to use his peremptories so as to excuse all the jurors in question.

On the other hand, see *Miracle v. Commonwealth*, 646 S.W.2d 720 (Ky. 1983), in which it was held to be reversible error for the trial court to try the defendant before jurors who had previously been present when the defendant entered a guilty plea which had subsequently been withdrawn. See also *Dickerson v. Commonwealth*, 174 S.W.3d 451,462 (Ky. 2005), in which the court ruled that "the jurors who participated in the voir dire at Appellant's sodomy trial, and thereby learned he used a handgun to forcibly sodomize a child under twelve years of age, were impliedly biased and should have been excused from serving on the subsequent handgun trial," when the two charges were related, the defendant exhausted all his peremptories, and three of the biased jurors actually served on the handgun trial.

#### **Jurors Served in a Previous Trial of the Same Defendant**

Members of the jury panel who served as jurors in previous trials of the defendant must be disqualified and excused. *Gossett v. Commonwealth*, 426 S.W.2d 485 (Ky. 1968). Members of the jury panel who had been empanelled to try the defendant on another charge the previous day,

## NOTES

and others who had been in the courtroom during that trial, should have been struck for cause. *Brumfield v. Commonwealth*, 374 S.W.2d 499 (Ky. 1964).

### CALLING JURORS FROM THE POOL

RCr 9.30 describes the process used for the selection of the jury at trial. The specific procedure for calling names in a random way can be found at APCJ II, Sec. 10. Pursuant to RCr 9.30(2), “The jury selection process shall be conducted in accordance with Part Two (2) of the Administrative Procedures of the Court of Justice.” The procedure used to be in KRS 29A.060(2), but the statute was amended in 2002. Failure to substantially follow the proper procedure requires automatic reversal, and no prejudice need be shown. *Robertson v. Commonwealth*, 597 S.W.2d 864 (Ky. 1980). See also *Bartley v. Loyall*, 648 S.W.2d 873, 874-75 (Ky. App. 1982), which held it was reversible error for the clerk to try to equalize the workload by calling the numbers of jurors who had participated in fewer cases before calling the numbers of jurors who had participated in more cases. Remember, too, that RCr 9.34 requires an objection to be made before voir dire. Calling a juror whose name had been left out of the jury selection box did not deprive the defendants of the right to a randomly selected jury when the juror had been present in the courtroom all day. *Campbell v. Commonwealth*, 260 S.W.3d 792 (Ky. 2008). Likewise, it was not a substantial deviation from the proper procedures when the court drew jurors from the jury pool of another court in another division of the same circuit as the trial court in *Hayes v. Commonwealth*, 320 S.W.3d 93 (Ky. 2010). Minor deviations from proper procedure do require a showing of prejudice. There was no palpable error when the defendant failed to object to a voir dire of the entire jury panel in *Oro-Jimenez v. Commonwealth*, 412 S.W.3d 174 (Ky. 2013). See also *Barker v. Commonwealth*, 477 S.W.3d 583 (Ky. 2015).

### NUMBER OF JURORS

KRS 29A.280(2) provides for 6 jurors in District Court and 12 jurors in Circuit Court. However, a defendant may agree to have fewer than 12 jurors in Circuit Court, down to as few as 6. The right to a 12-person jury is sufficiently fundamental under the state constitution to require that a trial court must establish on the record that a defendant has been advised of the right to a 12-person jury and has personally waived it. A record reflecting the acquiescence of defense counsel is not sufficient. *Commonwealth v. Simmons*, 394 S.W.3d 903 (Ky. 2013).

There was no constitutional error in the court’s failing to dismiss an alternate juror prior to the beginning of jury selection, resulting in deliberation by a 13-person jury, in *Sevier v. Commonwealth*, 434 S.W.3d 443 (Ky. 2014).

The clerk will initially call a number of jurors equal to the number of jurors who will sit on the jury plus the total number of combined strikes to be exercised by both sides. RCr 9.36(2). For example, for a trial in which there will be a single defendant and a jury with 2 alternates, the clerk would begin by calling 32 prospective jurors: 14 jurors plus 18 total peremptories for both sides. (See “Peremptory Strikes,” below.) As jurors are struck for cause during voir dire, the clerk calls new prospective jurors to replace them, RCr 9.30(1)(a), and the process continues until there are no more motions to strike for cause or until the judge ends the voir dire.

## III. VOIR DIRE

### Right to Conduct Voir Dire

RCr 9.38 allows for a couple of different scenarios: (1) the court allows the attorneys to conduct the voir dire, (2) the court conducts the voir dire but must then allow the attorneys to supplement the voir dire with either direct questions or questions submitted to the court in writing. If the death penalty is sought, there must be individual voir dire on capital punishment, race, or pretrial publicity and, upon request, the court must allow the attorneys to conduct it.

Although there is no statutory right to conduct voir dire in Kentucky, “part of the guarantee of a defendant’s Sixth Amendment right to an impartial jury is an adequate voir dire to identify unqualified jurors. A voir dire examination must be conducted in a manner that allows the parties

to effectively and intelligently exercise their right to peremptory challenges and challenges for cause.” *Hayes v. Commonwealth*, 175 S.W.3d 574, 584 (Ky. 2005), quoting *Morgan v. Illinois*, 504 U.S. 719, 729-30, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992).

### **The Purpose of Voir Dire**

The purpose of voir dire is not to get jurors either to indicate or to commit to which verdict they might render in the case once the case is submitted to the jury. The purpose of voir dire, rather, is simply to obtain a fair and impartial jury free of any interest, bias or prejudice which might prevent their finding a just and true verdict. Questions put to jurors should be as varied and elaborated as circumstances require, but questions which are clearly designed to have jurors indicate or commit to how they will vote are simply not proper. *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985), *Woodall v. Commonwealth*, 63 S.W.3d 104 (Ky. 2001). See, e.g., *Bowen v. Commonwealth*, 2005 WL 2318967, Ky., Sept. 2005, *unpublished*, in which the defendant attempted to play to the jurors his taped statement to police during voir dire, in an attempt to determine if they would vote to convict based upon the statement.

### **Voir Dire on Sentencing Ranges**

It is reversible error to refuse to allow voir dire on sentencing ranges. *Varble v. Commonwealth*, 125 S.W.3d 246 (Ky. 2004). However, voir dire on sentencing ranges need not include informing the jury of the sentencing ranges for either enhanced or lesser included offenses, *Commonwealth v. Philpott*, 75 S.W.3d 209 (Ky. 2002), nor should it include the sentencing ranges for PFO enhancements, *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

On the other hand, the admission of evidence with regard to sentencing ranges is improper during the guilt/innocence phase of a felony trial. See, e.g., *Day v. Commonwealth*, 361 S.W.3d 299 (Ky. 2012).

### **Voir Dire on Defendant Not Testifying**

Refusal to allow defense counsel to voir dire prospective jurors regarding whether they would hold against defendants the fact that they exercised their Fifth Amendment right not to testify was an abuse of discretion. *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005).

### **Voir Dire on Reasonable Doubt**

Reasonable doubt can no more be defined in voir dire than in opening statements or closing arguments. *Marsch v. Commonwealth*, 743 S.W.2d 830 (Ky. 1988), *Commonwealth v. Callahan*, 675 S.W.2d 391 (Ky. 1984), *Cuzick v. Commonwealth*, 276 S.W.3d 260 (Ky. 2009). Nevertheless, for the Commonwealth to point out that “beyond a reasonable doubt” is different from “beyond a shadow of a doubt” is not an attempt to define reasonable doubt. It is, rather, simply to point out the obvious. *Howell v. Commonwealth*, 163 S.W.3d 442 (Ky. 2005), *Johnson v. Commonwealth*, 184 S.W.3d 544 Ky. Feb. 2005, *Brooks v. Commonwealth*, 217 S.W.3d 219 (Ky. 2007). On the other hand, “It is proper for a defendant to inform jurors in voir dire that the Commonwealth’s burden of proof is ‘beyond a reasonable doubt’ and to inquire whether they will hold the Commonwealth to that burden.” *Hayes v. Commonwealth*, 175 S.W.3d 574, 587 (Ky. 2005).

However, the use of an analogy is an attempt to define reasonable doubt, and it violates the 14th Amendment safeguard “against the dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” See, e.g., *Rice v. Commonwealth*, 2006 WL 436123, Ky., Feb. 2006, *unpublished*, in which the prosecutor used the example, during voir dire, of deciding to marry someone. See also *Marsch, supra*, in which the prosecutor, during voir dire, used the example of himself as a hypothetical witness to an auto accident. “In all those cases [where this court found an impermissible attempt to define ‘reasonable doubt’], some attempt was made to use other words to convey to the jury the meaning of ‘beyond a reasonable doubt’” *Howell, supra*, at 447, quoting *Simpson v. Commonwealth*, 759 S.W.2d 224, 226 (Ky. 1988). It is permissible to refuse to allow educational remarks during voir dire on the difference between the standards of proof in civil and criminal cases when the remarks are not designed to elicit disqualifying information from the jurors. *Rogers v. Commonwealth*, 315 S.W.3d 303 (Ky. 2010).

## NOTES

**Voir Dire on No Duty to Retreat**

The defendant has the right to voir dire on the subject of no duty to retreat in self-defense cases. *Hannah v. Commonwealth*, 306 S.W.3d 509 (Ky. 2010).

**Voir Dire on Disproportionate Incarceration**

The defendant cannot be prohibited from asking a Caucasian juror her opinion as to whether a disproportionate number of African-Americans are incarcerated. *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013).

**Referring to Defense Attorney as Public Defender**

It is entirely improper to make any reference to whether the defendant's attorney is being paid, or to how much or how little. *Goff v. Commonwealth*, 44 S.W.2d 306 (Ky. 1931).

**TIMING OF STRIKES FOR CAUSE**

Pursuant to RCr 9.36(1), "Challenges for cause shall be made first by the Commonwealth and then by the defense," and (3) "All challenges must be made before the jury is sworn. No prospective juror may be challenged after being accepted unless the court for good cause permits it."

**STRIKES FOR CAUSE, GENERALLY**

Strikes for cause are unlimited. KRS 29A.290(2)(a). Each defendant has the right to a fair and impartial jury under the 6th Amendment to the United States Constitution and § 11 of the Kentucky Constitution. Beyond this substantive right, each defendant also has a right to substantive due process in the picking of a jury under the 14th Amendment to the United States Constitution and § 2 of the Kentucky Constitution.

**Legal Standard**

RCr 9.36(1) provides the standard for when jurors should be struck for cause: "When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." The test on appeal for failure to strike a juror for cause is abuse of discretion. *Adkins v. Commonwealth*, 96 S.W.3d 779 (Ky. 2003).

The trial court must determine the existence of bias based on the particular facts of each case. *Taylor v. Commonwealth*, 335 S.W.2d 556 (Ky. 1960).

"A potential juror may be disqualified from service because of connection to the case, parties, or attorneys and that is a bias that will be *implied as a matter of law*." *Sholler v. Commonwealth*, 969 S.W.2d 706, 709 (Ky. 1998) (emphasis added).

"Irrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses." *Sholler v. Commonwealth*, 969 S.W.2d 706, 709 (Ky. 1998), *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1992). "Some relationships between a potential juror and an attorney, party, victim, or witness are so close that the implied bias from the relationship 'transgresses the concept of a fair and impartial jury.'" *Cochran v. Commonwealth*, 114 S.W.3d 837, 840 (Ky. 2003).

"Once that close relationship is established, without regard to protestations of lack of bias, the court should sustain a challenge for cause and excuse the juror." *Sholler v. Commonwealth*, 969 S.W.2d 706, 709 (Ky. 1998), *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985).

**Resolving Doubts About Bias**

"Even where jurors disclaim any bias and state they can give the defendant a fair trial, conditions may be such that their connection would probably subconsciously affect their decision in the case. It is always vital to the defendant in a criminal prosecution that doubt of unfairness be resolved in his favor." *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), *Sholler v. Commonwealth*, 969 S.W.2d 706 (Ky. 1998), *Randolph v. Commonwealth*, 716 S.W.2d 253 (Ky. 1986), *overruled on other grounds*.

**STRIKES FOR CAUSE, EXAMPLES**

## NOTES

**Juror Fails to Meet Statutory Qualifications**

The factors which disqualify a person for jury service are set forth in KRS 29A.080(2)(g) and 29A.130. Counsel may particularly wish to ask if any jurors have served on a grand jury within the last 24 months prior to their current term of service on the petit jury (the disqualification period used to be 12 months). See, e.g. *Musgrove v. Commonwealth*, 2006 WL 3333351, Ky. App., Nov. 2006, *unpublished*.

**Juror Has Formed Opinion Regarding Guilt**

*Neace v. Commonwealth*, 230 S.W.2d 915 (Ky. 1950), *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky.1992), *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky.1993), *Allen v. Commonwealth*, 276 S.W.3d 768 (Ky.2008), *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky.2009).

**Juror Has Trouble Accepting Legal Principles**

Juror demonstrated a serious problem accepting the concepts of a defendant's right to remain silent, the burden of proof, and the presumption of innocence. *Humble v. Commonwealth*, 887 S.W.2d 567 (Ky. App. 1994). See also *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005), for a full discussion.

**Juror Cannot Consider Mitigators**

*Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007), *Fugett v. Commonwealth*, 250 S.W.3d 604 (Ky. 2008). "Any juror to whom mitigating factors are...irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis and the evidence developed at trial." *Morgan v. Illinois*, 504 U.S. 719, 739; 112 S.Ct. 2222, 2235; 119 L.Ed.2d 492, 509 (1992).

The following is meant to be illustrative but not exhaustive.

**Juror Has A Close Relationship With a Party**

- One juror worked with the victim's wife and another juror had worked with the victim and liked him. *McDaniel v. Commonwealth*, 341 S.W.3d 89 (Ky. 2011).
- Juror discussed the case with a relative of the victim. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993).
- Married to a person who was a second or third cousin of the victim. *Marsch v. Commonwealth*, 743 S.W.2d 830 (Ky. 1987).
- First cousin to victim. *Pennington v. Commonwealth*, 316 S.W.2d 221 (Ky. 1958).
- Juror's mother was a first cousin to victim's mother. *Leadingham v. Commonwealth*, 201 S.W. 500 (Ky. 1918).
- Juror's wife was a second cousin of defendant. *Smith v. Commonwealth*, 734 S.W.2d 437 (Ky. 1987).
- Juror's sister was a Victim's Advocate working closely with the prosecution and assigned to aid, assist, and comfort members of the victim's family. *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013).
- Juror knew murder victim's brother. *Jackson v. Commonwealth*, 392 S.W.3d 907 (Ky. 2013)
- But see *George v. Commonwealth*, 885 S.W.2d 938 (Ky. 1994), where the Court held that no error occurred when the trial court allowed a juror to remain on the jury after she realized during testimony that she was the victim's third cousin.
- Disqualification was not required of juror who was Facebook "friend" of victim's wife. *McGaha v. Commonwealth*, 414 S.W.3d 1 (Ky. 2013).
- Defendant was entitled to a hearing to investigate potential juror misconduct when jurors denied using Facebook and the defendant then proved, after trial, that they were "friends" of the victim's mother. *Sluss v. Commonwealth*, 381 S.W.3d 215 (Ky. 2012).
- A juror whose mother worked with the stepfather of the victim, who frequently drove

## NOTES

past the memorial erected at the site of the accident, and who had been told the defendant took drugs and acted irresponsibly should have been struck for cause in *Sluss v. Commonwealth*, 450 S.W.3d 279 (Ky. 2014).

**Juror Has A Close Relationship With a Witness**

- Juror's being related to and living in the same rural area of the county with the complaining witness's boyfriend, and being married to boyfriend's cousin, may have justified a challenge for cause. *Anderson v. Commonwealth*, 864 S.W.2d 909, 911 (Ky. 1993).
- Where juror, an investigative social worker, was employed by CHR, the same organization with which a key Commonwealth witness was employed, and was assigned to the same unit as two key Commonwealth witnesses, it was an abuse of discretion to fail to excuse the juror for cause. *Alexander v. Commonwealth*, 862 S.W.2d 856, 864 (Ky. 1993), *overruled on other grounds*.
- Juror knew both the Commonwealth Attorney and the chief investigating officer in the crime. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993).
- Juror was a friend of the chief investigating officer. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993).
- Juror was the brother of a sheriff who was active in the prosecution of the case. *Hayes v. Commonwealth*, 458 S.W.2d 3 (Ky. 1970).
- First cousin to a key prosecution witness. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).
- Wife of the arresting police officer. *Calvert v. Commonwealth*, 708 S.W.2d 121 (Ky. 1986).
- Juror who played little league baseball and went to high school with a witness for the prosecution ten years before trial, but who denied any continuing social relationship with the witness, had to be excused for cause in prosecution for murder and burglary, where witness appeared ambivalent as to whether prior relationship would affect his determinations of credibility. *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999).

**Juror Has A Close Relationship With Attorney**

- Prospective and actual jurors who had previously been represented by the prosecutor and who stated they would seek out such representation in the future (although attorney/client relationship does not automatically disqualify a juror). *Futrell v. Commonwealth*, 471 S.W.3d 258 (Ky. 2015), *Fugate v. Commonwealth*, 993 S.W.2d 931, 938 (Ky. 1999), *Riddle v. Commonwealth*, 864 S.W.2d 308 (Ky. 1993).
- Juror knew both the Commonwealth Attorney and the chief investigating officer in the crime. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993), *overruled on other grounds*.
- Juror had business dealings with the prosecution. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993), *overruled on other grounds*.
- Juror's wife and the prosecutor were first cousins by marriage (however, relationship by blood and affinity are treated the same for purposes of juror disqualification). *Thomas v. Commonwealth*, 864 S.W.2d 252, 256-7 (Ky. 1993).
- Uncle of the Commonwealth Attorney. *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985).
- Secretary of the Commonwealth Attorney. Position gave rise to a loyalty to employer that would imply bias. *Randolph v. Commonwealth*, 716 S.W.2d 253 (Ky. 1986), *overruled on other grounds*.
- Manager of an ambulance service, which had a contract with the Ambulance Board for which the prosecutor was the attorney, and who had been asked as manager of the Ambulance Board to participate in the search for the defendants (who were charged with escape) and who had been held hostage in a previous escape. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (1992).
- County attorney at the time of the defendant's preliminary hearing. *Godsey v. Commonwealth*, 661 S.W.2d 2 (Ky. App. 1983).

- Juror was being represented by the prosecutor on a legal matter at the time of trial. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1992).
- Prosecutor was cousin's son-in-law. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1992).
- But see *Sholler v. Commonwealth*, 969 S.W.2d 706, 709 (Ky. 1998), wherein the trial court did not abuse its discretion in refusing to dismiss for cause a potential juror who knew the Commonwealth attorney through mutual friends and their mutual membership in a large card club.

### Juror Has Other Biases

- Where the defendant, on trial for sexual crimes against his seven year-old daughter, is black, his wife is white, and their child is biracial, a juror who expressed a distaste for "mixed marriages," and stated he would judge the wife's credibility a degree differently than he would judge the credibility of other witnesses, should have been excused for cause. *Alexander v. Commonwealth*, 862 S.W.2d 856, 864 (Ky. 1993), *overruled on other grounds*.
- Where juror stated (1) he was racially biased, (2) he left his neighborhood because young black men were hanging around in the area, (3) when he walked into the courtroom, he assumed Appellant was the accused because of the color of his skin, and (4) he was opposed to, in fact offended by, inter-racial relationships, he should have been excused for cause. *Gamble v. Commonwealth*, 68 S.W.3d 367, 373 (Ky. 2002).
- Jurors related to prison employees, who knew many prison employees, whose two best friends and two brothers worked at the prison, and had discussed the case with their brothers should have been struck for cause. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993), *overruled on other grounds*.
- Former police officer and present deputy sheriff. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1992). But see *Sholler v. Commonwealth*, 969 S.W.2d 706, 708 (Ky. 1998), where the court reaffirmed the principle espoused in *Sanders v. Commonwealth*, 884 S.W.2d 665 (Ky. 1990), *cert. denied*, 502 U.S. 831, 112 S.Ct. 107, 116 L.Ed.2d 76 (1991), which held that police officers are not disqualified per se to serve as jurors in criminal cases.
- Employee of the prison from which defendants escaped and who acknowledged he would give more credibility to a law enforcement officer's testimony and would feel "bad" about acquitting the defendants if proof was not sufficient to show guilt. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1992).
- Outside patrolman and guard for a prison who acknowledged he had spoken with persons in the prison regarding the escape. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1992).
- Juror states he will give police officers more credibility than other witnesses. *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007), *Fugett v. Commonwealth*, 250 S.W.3d 604 (Ky. 2008). But compare, *Sholler v. Commonwealth*, 969 S.W.2d 706 (Ky. 1998), *Stopher v. Commonwealth*, 57 S.W.3d 787 (Ky. 2001), and *Soto v. Commonwealth*, 139 S.W.3d 827 (Ky. 2004),

### REHABILITATING BIASED JURORS

There is simply no "magic question" such as, "Can you set aside what you have heard, your connection, your religious beliefs, etc., and make a decision based only on the evidence and instructions given by the Court?" *Montgomery v. Commonwealth*, 819 S.W.2d 713, 717-718 (Ky. 1992). In *Montgomery*, the Court declared "the concept of 'rehabilitation' is a misnomer in the context of choosing qualified jurors and direct[ed] trial judges to remove it from their thinking and strike it from their lexicon." *Id.* at 718. This basic principle has been repeatedly upheld by the Court. *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 2000), *Gill v. Commonwealth*, 7 S.W.3d 365 (Ky.1999), *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009).

## NOTES

Where potential jurors' attitudes and past experiences created a reasonable inference of bias or prejudice, their affirmative responses to the "magic question" did not eradicate the bias and prejudice. *Alexander v. Commonwealth*, 862 S.W.2d 856, 865 (Ky. 1993), *overruled on other grounds*. A juror may indicate that he can be impartial, but may demonstrate a state of mind to disprove that statement by subsequent comments or demeanor so substantially at odds that it is obvious he is biased. In contrast, an individual may flatly and blatantly demonstrate his inability to be impartial and fair and no magic question can rehabilitate his bias. *McDaniel v. Commonwealth*, 341 S.W.3d 89 (Ky. 2011).

Once a potential juror expresses disqualifying opinions, the potential juror may not be rehabilitated by leading questions regarding whether she can put aside those opinions and be fair and impartial. *Thomas v. Commonwealth*, 864 S.W.2d 252, 258 (Ky. 1993), *overruled on other grounds* (juror expressing strong opinion on death penalty). "Even where jurors disclaim any bias and state that they can give the defendant a fair trial, conditions may be such that their connection [to the case or the parties] would probably subconsciously affect their decision in the case." *Thomas* at 255. See also *Gamble v. Commonwealth*, 68 S.W.3d 367 (Ky. 2002) (juror expressing strong racial bias).

The Kentucky Supreme Court has also held that the answers of prospective jurors "to leading questions, that they would disregard all previous information, opinions and relationships should not be taken at face value." *Marsch v. Commonwealth*, 743 S.W.2d 830, 834 (Ky.1988) (emphasis added). "Mere agreement to a leading question that the jurors will be able to disregard what they have previously read or heard, without further inquiry, is not enough...to discharge the court's obligation to determine whether the jury [can] be impartial." *Miracle v. Commonwealth*, 646 S.W.2d 720, 722 (Ky.1983).

## PEREMPTORY STRIKES

### Legal Standard

In *Thomas v. Commonwealth*, 864 S.W.2d 252 (Ky. 1993), the court established a bright line rule which required automatic reversal whenever a defendant had to use his peremptory strikes in order to remove jurors who should have been struck for cause. The premise of the rule was that a defendant is entitled to the free use of all his peremptories without having to use them on jurors who should have already been removed. This rule was abandoned in *Morgan v. Commonwealth*, 189 S.W.3d 99 (Ky. 2006), *overruling Thomas*.

However, *Morgan* was itself overruled on December 20, 2007 in *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). So the *Thomas* rule is once again the law: being forced to use a peremptory challenge on a juror who should have been struck for cause is a denial of the full use of a defendant's peremptory strikes and, as such, is reversible error per se. See *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009) and *Hurt v. Commonwealth*, 409 S.W.3d 327 (Ky.2013), requiring the defendant to specify which jurors he would have struck if he had not had to use his peremptories to strike another juror who should have been struck for cause. See also *King v. Commonwealth*, 276 S.W.3d 270 (Ky.2009), noting an exception to *Shane*, holding that it is not reversible error when the juror one would have struck does not end up sitting on the jury. See also *McDaniel v. Commonwealth*, 341 S.W.3d 89 (Ky.2011), holding that the trial court's failure to strike two clearly biased prospective jurors constituted a violation of the defendant's substantial right and rendered the jury process unfair. (*Shane* was applied to civil cases in *Grubb v. Norton Hospitals, Inc.*, 401 S.W.3d 483 (Ky.2013).)

### Number of

In District Court each side gets 3 peremptory strikes, in Circuit Court each side gets 8. KRS 29A.280(1) and RCr 9.40(1).

Additional peremptories are required when alternate jurors are seated and also when co-defendants are tried together. RCr 9.40(1),(2), and (3). When alternates are seated, there is one more strike per side and also one more per defendant. In addition, when co-defendants are tried together the

defense gets one more defense strike for each co-defendant, to be exercised independently of any other defendant.

So, for example, in a trial with two co-defendants and two alternate jurors, the peremptories would be distributed as follows:

	“Per Side”		“Per Defendant”	
	Prosecution	Defense	Co-D #1	Co-D #2
Normally	8	8		
With Alternates	1	1	1	1
Co-Defendants			1	1

As one can see on the chart: Each side starts with 8 peremptories. Since there are alternates, there is one more strike per side and also one more strike per defendant (the strikes per defendant are to be used independently). Lastly, since there are 2 co-defendants, each co-defendant gets one more strike apiece, to be also used independently of each other. That would give the Commonwealth 9 total peremptories and the defendants 13, in that trial. *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999). “[T]he basic entitlement to peremptory challenges under RCr 9.40(1) is eight for the Commonwealth and eight for the defense. If more than one defendant is being tried, the defendants are entitled to a total of ten peremptory challenges: eight to be exercised jointly pursuant to RCr 9.40(1), and one each to be exercised independently pursuant to RCr 9.40(3). If one or two additional (alternate) jurors are seated, the defendants are entitled to a total of thirteen peremptory challenges: nine to be exercised jointly pursuant to RCr 9.40(1) and (2); one each to be exercised independently pursuant to RCr 9.40(3); and an additional one each to exercised independently pursuant to RCr 9.40(2)....” Id. at 444.

The exception is that in cases with just a single defendant and alternate jurors, the defendant only gets one extra peremptory, like the prosecution, for a total of 9. The reasoning is that, if there are not multiple co-defendants, there is no defense “side,” apart from just the single defendant. *Stopher v. Commonwealth*, 57 S.W.3d 787 (Ky. 2001), *Furnish v. Commonwealth*, 95 S.W.3d 34 (Ky. 2002).

**Practice Tip:** You must object to not getting your correct number of peremptories. Failure to give the correct number of peremptories is grounds for automatic reversal. The objection is waived, however, once the jury is sworn. *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999), *Commonwealth v. Young*, 212 S.W.3d 117 (Ky. 2006).

### BATSON CHALLENGES

The Equal Protection Clause of the 14th Amendment prohibits the discriminatory use of peremptory strikes in order to exclude members of a cognizable minority from participation in jury service. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Batson* applies to both prosecutors and defendants. *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky. App. 1998).

“[A] criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race.” *Powers v. Ohio*, 499 U.S. 400, 401, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). *Batson* challenges can also be made to peremptory strikes which are discriminatory on the basis of gender. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky. App. 1998). (*Hannan v. Commonwealth*, 774 S.W.2d 462 (Ky. App. 1989), which says that *Batson* does not apply to gender discrimination in the use of jury strikes, was decided before *J.E.B.*)

## NOTES

*Batson* challenges must be made before the swearing of the jury and the discharge of the remainder of the jury panel. RCr 8.18, *Dillard v. Commonwealth*, 995 S.W.2d 366 (Ky.1999), *Gamble v. Commonwealth*, 68 S.W.3d 367 (Ky. 2002).

The *Batson* process has three steps: first, the objector must make a prima facie showing of purposeful discrimination in the opponent's exercise of his or her peremptory strikes. The traditional *Batson* situation obtains when a defendant is a member of a minority and the jurors being struck are members of the same minority. In that situation, a prima facie case would involve a showing that a) the defendant is a member of a cognizable racial group, b) the prosecution used peremptory strikes to remove jurors of the defendant's race, and c) the facts and circumstances raise the inference that the prosecutor excluded the jurors on the basis of their race. Remember, though, that under *Powers, supra*, the defendant no longer has to be of the same race or gender as the excluded jurors.

Second, if the court rules that a prima facie case has been made, then the burden shifts to the prosecutor to offer an alternative non-discriminatory explanation of the use of his peremptories. The explanation offered need not rise to the level of justifying a strike for cause, and may not even be particularly plausible. But it must be race- or gender-neutral on its face. The information the prosecutor points to does not have to be proven true, but simply offered in good faith. It can come to the prosecutor through means outside of direct questioning of the juror, such as the impressions or perceptions of counsel, personal knowledge, or jury questionnaires. *Commonwealth v. Snodgrass*, 831 S.W.2d 176 (Ky. 1992). It all depends on the facts and circumstances of each particular situation. The Commonwealth was allowed to strike an African-American juror on the basis that the juror was biased toward the prosecution and inclusion of the juror in the jury panel would create a potentially fatal trial error in *Newcomb v. Commonwealth*, 410 S.W.3d 63 (Ky. 2013).

Nevertheless, self-serving explanations based merely on claims of intuition or mere disclaimers of any discriminatory motive are not sufficient to overcome a *Batson* challenge. *Washington v. Commonwealth*, 34 S.W.3d 376 (Ky. 2000).

Last, the court must then decide – as it would decide any disputed fact – whether the proffered reasons are, firstly, neutral and reasonable and then it must also decide, secondly, that the reasons are not a pretext for purposeful discrimination. Clear and reasonably specific reasons for legitimately excluding jurors must meet both requirements. *Gamble v. Commonwealth*, 68 S.W.3d 367 (Ky. 2002).

A prosecutor's vague concern over an African-American prospective juror's age, without more; a prosecutor's bare reference to knowing another African-American prospective juror's past and past associates, without more; and a prosecutor's "gut feeling" that another prospective African-American juror was "too much of a wild card," without more; are not race-neutral reasons for exercising peremptory strikes. *Johnson v. Commonwealth*, 450 S.W.3d 696 (Ky. 2014).

The defendant established a prima facie case for gender discrimination when the prosecutor candidly admitted he was striking women because the prosecution key witness was female and he thought that females tend to be harder on other females. *Ross v. Commonwealth*, 455 S.W.3d 899 (Ky. 2015).

For more discussion on *Batson* Challenges see the Department of Public Advocacy Justice for All Manual, May, 2008, available at <http://dpa.ky.gov>.

**Practice Tip:** To preserve the issue on appeal, remember to renew your objection to the Commonwealth's use of peremptories after the Commonwealth offers its reasons. If the prosecutor gives a reason not evident from the record, move for an evidentiary hearing. State again you do not believe the reasons given were non-discriminatory and object again to the seating of the jury before the jury is sworn.

### CHECKLIST FOR STRIKING JURORS

**Are We On the Record?** - The voir dire of the prospective jurors must be recorded and transcribed, or videotaped, and designated as part of the record on appeal.

**Do We Know Who We're Talking About?** – It is extremely common for appellate attorneys working on an appeal to experience great difficulty identifying which jurors were being discussed during any given motion to strike for cause. The identity of the juror cannot often be inferred from the video or audio record. A good practice is to simply preface your motion to strike with a short statement identifying the juror in question, such as “Your honor this motion is in reference to Mr. Smith, juror no. 22.” Then make your objection.

**Get to the Point** - Conduct as thorough a job of questioning as you are allowed to. General questions of fairness and impartiality are not sufficient. Counsel needs to ask specific questions related to the facts of the case and the theory of defense. Attempt to elicit facts known by the juror or opinions held by the juror that reasonably could be expected to influence her decision. “It often takes detailed questioning to uncover deep-seated biases of which the juror may not be aware. The cursory examination typically conducted by the trial court is often inadequate for this purpose.” Trial Practice Series, Jury Selection, The Law, Art, and Science of Selecting a Jury, 2nd ed., James J. Gobert, Walter E. Jordon (1992 Cumulative Supplement, p. 23), quoted in *Miracle v. Commonwealth*, 646 S.W.2d 720, 723 (Ky. 1983), (Leibson, J., concurring).

**Move to Strike** - Defense counsel must assert a clear and specific challenge for cause to the prospective juror and must clearly articulate the grounds for the challenge. State the name of the person you are challenging especially if your trial record will be on videotape. Challenge for cause all persons you believe the law requires to be stricken.

List every reason that would require removal of the juror. In some appellate opinions, the courts have assessed the bias of jurors by listing several areas of bias which, when combined, required removal for cause. See *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1992).

**Peremptories** - You must use all your peremptory challenges and the record must reflect that. Failure to use all of your peremptories waives the right on appeal to object to any jurors who remain on the jury. See, e.g., *Baze v. Commonwealth*, 965 S.W.2d 817 (Ky. 1997). However, the prosecution can agree to give up some of its strikes. *Fitzgerald v. Commonwealth*, 148 S.W.3d 817 (Ky. 2004).

If you choose to use your peremptory challenges to remove jurors who should have been struck for cause, put into the record that you are doing so, and state by name the jurors you would have used the peremptories on, if you had not had to use them on the jurors who should have been struck for cause. This is the procedure dictated by *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009). See also *Sluss v. Commonwealth*, 450 S.W.3d 279 (Ky. 2014) and *Futrell v. Commonwealth*, 471 S.W.3d 258 (Ky. 2015). Or write the names on a note and have it entered into the record. Ask for additional peremptory challenges in order to be able to use your peremptories in the way they were intended. This will preserve the issue for review.

**Strike Sheets** - Be sure the juror strike sheets are made part of the record on appeal. RCr 9.36(4), CR 75.07(4).

**After Trial** - When the defendant did not learn until after the trial that a juror was related to, and living in the same rural area of the county with, the complaining witness's boyfriend, and was married to the boyfriend's cousin, the proper procedure was to bring this information to the trial court's attention in a motion for a new trial. *Anderson v. Commonwealth*, 864 S.W.2d 909, 911 (Ky. 1993).

## NOTES

**EXERCISING PEREMPTORIES**

RCr 9.36 (2) provides: “After the parties have been given the opportunity of challenging jurors for cause, each side or party having the right to exercise peremptory challenges shall be handed a list of qualified jurors drawn from the box equal to the number of jurors to be seated plus the number of allowable peremptory challenges for all parties. Peremptory challenges shall be exercised simultaneously by striking names from the list and returning it to the trial judge.”

The Commonwealth can give up peremptory strikes if it looks like the remaining jury pool is getting too small. *Fitzgerald v. Commonwealth*, 148 S.W.3d 817 (Ky. 2004). The defendant, however, must use all his peremptories or he waives the issue of any biased jurors sitting on the jury. See, e.g., *Baze v. Commonwealth*, 965 S.W.2d 817 (Ky. 1997). Neither side can hold back peremptories to first see who the other side has struck. See *Baze v. Commonwealth*, 965 S.W.2d 817 (Ky. 1997).

**SWEARING OF THE JURY**

Some courts swear the jurors to answer truthfully the questions they will be asked, prior to the beginning of voir dire. According to RCr 9.36(3), however, administering the actual oath of a juror found in KRS 29A.300 comes after the strikes for cause and the peremptory strikes, when the final jury which will try the case is finally sat. KRS 29A.300 says: “The court shall swear the petit jurors using substantially the following oath ‘Do you swear or affirm that you will impartially try the case between the parties and give a true verdict according to the evidence and the law, unless dismissed by the court?’” The swearing of the jury is the moment when double jeopardy protections attach, and the moment after which no further challenges can be made to the composition of the jury.

Comments on How to Judge the Credibility of Witnesses or the Weight of Evidence – The practice in Kentucky, since statehood, has been to disapprove judicial comment on the evidence and how to judge the credibility of witnesses. Telling a jury to consider the witness’s interest in the outcome of the proceedings, demeanor, clarity of recollection, etc., was disapproved of in *Walker v. Commonwealth*, 349 S.W.3d 307 (Ky. 2011), but did not rise to the level of palpable error.

**IV. THE COMMONWEALTH’S CASE****ORDER OF TRIAL**

The order of the guilt/innocence phase of a trial is governed by RCr 9.42. For the order of trial in the sentencing phase of a felony cases, see KRS 532.055(2)(c). The PFO statute is KRS 532.080. The death penalty sentencing statute is KRS 532.025. See also “Bifurcation.”

RCr 9.42 allows rebuttal evidence from either party. The rule regarding rebuttal evidence is that the Commonwealth should present all of its substantive evidence concerning the elements of the offense in its case-in-chief instead of waiting to present it in rebuttal, especially if the defense has already rested. It is taking undue advantage of a defendant to withhold important evidence till rebuttal. See, e.g., *Archer v. Commonwealth*, 473 S.W.2d 141 (Ky. 1971), and *Gilbert v. Commonwealth*, 633 S.W.2d 69 (Ky. 1982).

There is no rebuttal exception to RCr 7.24(1), requiring the Commonwealth to disclose any incriminating statements made by the defendant. *Chesnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008).

In *Rowe v. Commonwealth*, 50 S.W.3d 216 (Ky. App. 2001), it was error for the trial court to allow the prosecution to introduce evidence of the defendant’s charges involving disorderly conduct and the use of obscene language in public as rebuttal to the defendant’s assertion that he had never used obscene language in public. Whether the defendant used obscene language was entirely collateral to the issue of whether the defendant assaulted the victim.

The defendant’s prior convictions can be used to impeach him on the issue of credibility, or they

can be used to impeach any character witness called by the defendant. But when character was not at issue, it was improper for the prosecution to offer those convictions in rebuttal in order to show the bad character of the defendant. The convictions were inadmissible for that purpose. *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005).

### ANNOUNCING “READY”

Announcing “ready” waives objections to the Commonwealth’s non-compliance with discovery obligations. *Sargent v. Commonwealth*, 813 S.W.2d 801 (Ky. 1991), *Barclay v. Commonwealth*, 499 S.W.2d 283 (Ky.1973).

#### No Time Allowed to Prepare

It is an abuse of discretion for a trial court to deny defense counsel in a criminal prosecution a reasonable time to prepare a defense. The defendant’s right to be represented by reasonably prepared counsel was impinged when he had no notice of the withdrawal of previous counsel and counsel appointed at trial was granted only one hour to confer with the defendant before trial. *Eden v. Commonwealth*, 451 S.W.2d 623 (Ky. 1970). See also *Stumph v. Commonwealth*, 408 S.W.2d 618 (Ky. 1966) (refusal to grant a continuance was an abuse of discretion where counsel was appointed two days before trial, had never tried a case before a jury, and the docket was not congested), *Woods v. Commonwealth*, 305 S.W.2d 935 (Ky. 1957) (refusal to grant a continuance was an abuse of discretion when trial was held the same day that appointed counsel withdrew and new counsel was appointed), *Woolsey v. Commonwealth*, 282 S.W.2d 625 (Ky. 1955) (refusal to grant a continuance was an abuse of discretion when appointed counsel was required to proceed to trial thirty minutes after appointment), and *Raisor v. Commonwealth*, 278 S.W.2d 635 (Ky. 1955) (court erred in refusing to grant continuance even after defendant held told the court he had retained private counsel and would be ready for trial on that date, when attorney appointed by the court on the day of trial had only four hours to prepare).

The defendant’s due process rights were violated in a revocation hearing in which the probation officer was not sworn, the defendant’s attorney was not given the opportunity to cross-examine, no testimony was taken, the officer simply stated the defendant’s alleged violations and the court asked the defendant to respond. The court improperly shifted the burden of proof to the defendant by asking him to show cause why he should not be revoked, and appointment of the public defender at the time of the hearing violated the defendant’s due process rights when counsel had just received the file that morning and admitted she had not investigated the allegations against the defendant and had not had time to prepare for the hearing. *Hunt v. Commonwealth*, 326 S.W.3d 437 (Ky. 2010). See also *Van Hooser and Young v. Commonwealth*, 2008 WL 7438772, Ky. App., Oct. 2008, *unpublished*, in which the trial court appointed the public defender and then revoked each defendant within four and three minutes, respectively.

#### Ineffective Assistance

When a claim of ineffective assistance of counsel arises, there exists a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668 (1984). However, in certain Sixth Amendment contexts, *Strickland* does not apply and prejudice must be presumed. *U.S. v. Cronin*, 466 U.S. 648 (1984). A presumption of prejudice arises, and the *Strickland* analysis is abandoned, under three circumstances: (1) where the accused is completely denied counsel, (2) where counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, and (3) where, although counsel is available to assist the accused, the likelihood that any lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate. *Cronin*, 466 U.S. at 659. If the trial court finds that counsel completely abdicated his responsibility to his client at a critical proceeding, the court is required to apply *Cronin*’s presumption of prejudice. When defense counsel did not prepare for a juvenile transfer hearing, did not interview witnesses, did not research relevant law, and did not challenge blatantly incorrect testimony, the trial court should have applied the presumption of prejudice established in *Cronin*. *Commonwealth v. Robertson*, 431 S.W.3d (Ky. App. 2013). See also *U.S. v. Morris*, 470 F.3d 596 (6th Cir. Ct. of App. 2006), finding *Cronin*-type ineffective assistance in advising a defendant of a plea offer in the context of a “rocket-docket.”

## NOTES

**SEPARATION OF WITNESSES**

Separation of witnesses under KRE 615 is mandatory once requested by counsel and only those who fall under a clear exception to the rule should be allowed to hear the testimony of other witnesses. *Mills v. Commonwealth*, 95 S.W.3d 838 (Ky. 2003).

Lead investigators are usually exempt from separation under exception (2) of the rule, which allows for “designated representatives,” and the Commonwealth does not have to demonstrate that they are “essential to the presentation of the case” under exception (3). *Humble v. Commonwealth*, 887 S.W.2d 567 (Ky. App. 1994).

Other witnesses however, including victims, must meet the “essential to the presentation of the case” exception under (3) and generally should not be allowed to remain in the courtroom during testimony. See *Justice v. Commonwealth*, 987 S.W.2d 306 (Ky. 1998), and especially *Mills v. Commonwealth*, 95 S.W.3d 838 (Ky. 2003), in which it was ruled prejudicial error to allow the victim to remain in the courtroom when the victim was the only witness to the robbery, his credibility was crucial, and listening to the other Commonwealth’s witnesses describe the perpetrators and the details of the robbery allowed the victim to take the stand with a completely refreshed memory. See also *Spears v. Commonwealth*, 448 S.W.3d 781 (Ky. 2014), in which the court ruled that KRE 615 also excludes experts who wish to sit in on the testimony of opposing experts.

The factors which the court will consider in determining whether it was abuse of discretion for a trial court to allow violation of this rule include: (1) the relative importance of the witness’ testimony, (2) effect on potential testimony by what the witness already heard, (3) the reasonableness of the litigant’s failure to anticipate the need for the witness to be separated, (4) the contribution of a party to rendering a violation of the rule. *Hatfield v. Commonwealth*, 250 S.W.3d 590 (Ky. 2008).

If a witness violates the rule, the court cannot automatically preclude the witness’ testimony, but must hold a hearing before ruling. *Henson v. Commonwealth*, 812 S.W.2d 718 (Ky. 1991). Counsel is free to talk to his or her own witnesses, but it is a violation of the rule to communicate to witnesses who are yet to testify what the testimony of other witnesses has been. *Smith v. Miller*, 127 S.W.3d 644 (Ky. 2004).

**READING THE INDICTMENT**

See the “Practice Tip” under “Bifurcation.” Many judges also read the first part of RCr 9.56 after reading the charges: “The law presumes the defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him or her.”

**PROSECUTION THEORY OF THE CASE**

Prosecutors sometimes prefer to try a case in the alternative. See, e.g., *Commonwealth v. Wirth*, 936 S.W.2d 78 (Ky. 1997), in which the prosecution did not have to elect which part of the DUI statute it was proceeding under. In a murder case, for instance, a prosecutor might want to argue that the shooting of the victim was either wanton or intentional. Of course the problem with this, from a defense perspective, is that it deprives the defendant of his right to a unanimous verdict. § 7 of the Kentucky Constitution and RCr 9.82(1). The general rule is that alternative theories for the same offense, and “combination” instructions providing for both alternatives, do not violate the right to a unanimous verdict if the evidence would support a conviction under either theory. *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978), *Commonwealth v. Combs*, 316 S.W.3d 877 (Ky. 2010). On the other hand, when the jury is presented with alternative theories of guilt in the instructions, and one of those theories is unsupported by the evidence, then the right to a unanimous verdict has been denied. For example, in *Boulder*, the evidence at trial proved only intentional assault but the jury instructions allowed the jury to choose between either intentional or wanton states of mind. *Boulder v. Commonwealth*, 610 S.W.2d 615 (Ky. 1980), *overruled on other grounds*.

In other circumstances, shifting theories of liability can deprive a defendant of the due process right to present a defense. See *Grider v. Commonwealth*, 390 S.W.3d 803, 821 (Ky. 2013), in which the Commonwealth repeatedly failed to provide the defense with a bill of particulars and then shifted theories of criminal liability in its opening statement. The court ruled that a defendant “should not be required to shoot at a moving target.” See also *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004), *overruled on other grounds*, in which it was ruled a due process violation for a prosecutor to use two conflicting theories concerning the identity of the shooter to convict both the defendant and his accomplice in two separate proceedings.

### PROSECUTION OPENING STATEMENT

The prosecutor may state the nature of the charge and the evidence upon which he or she will rely to support it. RCr 9.42(a).

“The office of an opening statement is to outline to the jury the nature of the charge against the accused and the law and facts counsel relies upon to support it, so the jury may follow and understand the testimony as it falls from the lips of witnesses. It is highly improper to attempt to sway the jury by making statements as to facts which counsel knows he cannot prove or will not be permitted to introduce. It is never proper in an opening statement for counsel to argue the case or to give his personal opinions or inferences from the facts he expects to prove.” *Turner v. Commonwealth*, 240 S.W.2d 80 (Ky. 1951).

The pre-recorded statements of witnesses cannot be played during opening statements. *Fields v. Commonwealth*, 12 S.W.3d 275, 281 (Ky. 2000).

It is not reversible error for a prosecutor to fail to mention every element of the offense during his opening statement. *Hourigan v. Commonwealth*, 883 S.W.2d 497 (Ky. App. 1994).

It is reversible error for a prosecutor to discuss evidence that the court has ruled inadmissible. *Linder v. Commonwealth*, 714 S.W.2d 154 (Ky.1986), see also KRE 103(c). Prosecutor’s comment in opening statement that the evidence would show the defendant was a two-time convicted persistent felon violated the rule prohibiting comment on inadmissible evidence. *Polk v. Greer*, 222 S.W.3d 263 (Ky. App. 2007).

If the prosecutor opens on evidence prejudicial to the defendant but fails to later introduce evidence to support it, the proper remedy is a motion for mistrial. *Williams v. Commonwealth*, 602 S.W.2d 148 (Ky. 1980), *Parker v. Commonwealth*, 241 S.W.3d 805, 809 (Ky. 2007).

**Practice Tip:** The Kentucky Court of Appeals agreed that PowerPoint presentations are essentially a “high-tech blackboard” in *Compton v. St. Elizabeth Medical Center, Inc.*, 2005 WL 327116, Ky. App., Feb. 2005, *unpublished*. “The use of blackboards or other visual aids rests in the sound discretion of the trial court.” *Meglemry v. Bruner*, 344 S.W.2d 808, 809 (Ky. 1961) *overruled in part*. If the prosecution intends to use a PowerPoint presentation: (1) Move to Review It in Advance. If it is an opening statement, the presentation must be an accurate reflection of the evidence. (2) Object to Prejudicial “Special Effects.” Computer-generated simulations, animations, and sound effects should not take the place of evidence. (3) Make Sure the Presentation Goes Into the Record on Appeal. In video jurisdictions, most court room cameras will not pick up presentations displayed on a wall or a screen. The cameras are pointed at the judge, attorney tables, and witness box, instead. Ask the court to have the prosecution put a copy of the presentation in the record.

### Computer Generated Visual Evidence

Demonstrative computer generated visual evidence (CGVE) usually consists of still images or animation which merely illustrates a witness’ testimony, while *substantive* CGVE usually consists of computer simulations or recreations which are prepared by experts and which are based on mathematical models in order to recreate or reconstruct an accident or event. The admissibility of CGVE is analyzed in the same way as hand-drawn diagrams or photographically created evidence; it has to be relevant, is subject to exclusion on grounds of prejudice, confusion,

## NOTES

or waste of time, is subject to the trial court's discretion over the mode and order of presentation of evidence, has to be authenticated by testimony of a witness that he or she has personal knowledge of the evidence's subject matter, and that the evidence is accurate. CGVE which is merely illustrative of a witness' testimony does not normally depend for admission on testimony as to how the data was gathered or put into the computer. *Gosser v. Commonwealth*, 31 S.W.3d 897 (Ky. 2000).

### PROSECUTION WITNESSES

The physical layout of the courtroom must allow the defendant to confront witnesses face-to-face. *Star v. Commonwealth*, 313 S.W.3d 30 (Ky. 2010). This includes the prosecutor standing between the defendant and, say, a child witness. *Sparkman v. Commonwealth*, 250 S.W.3d 667 (Ky. 2008). See also *Gentry v. Death*, 381 F. Supp. 2d 630 (W.D. Ky. 2004). The only small exception is child victims under KRS 421.350.

Once a witness is subpoenaed, the witness can only be excused by the court. Defense counsel was entitled to rely on the fact that the Commonwealth had subpoenaed a witness and it was improper for the prosecutor to contact the witness and tell him he need not appear at trial. *Anderson v. Commonwealth*, 63 S.W.3d 135, 141 (Ky. 2001). KRPC 3.4(a) says an attorney cannot obstruct access of an opposing party to a witness.

#### Crawford

In light of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), statements against penal interest are no longer admissible in a criminal trial unless the defendant had the opportunity to confront the witness at the time the statement was made. *Terry v. Commonwealth*, 153 S.W.3d 794 (Ky. 2005). See also *U.S. v. Cromer*, 389 F.3d 662 (6th Cir. 2004), in which it was a violation of the confrontation clause for the investigating officer to tell the jury what the confidential informant said about the name of the person he sold drugs to, as well as the physical description of that person and what happened during the transaction.

Other Kentucky cases adopting and applying *Crawford* include: *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006), *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky. 2007), *Turner v. Commonwealth*, 248 S.W.3d 543 (Ky. 2008), *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009), *Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009) and *Commonwealth v. Stone*, 291 S.W.3d 696 (Ky. 2009). *Crawford* does not apply to hearsay statements admitted in pretrial proceedings in which hearsay is admissible. *Oakes v. Commonwealth*, 320 S.W.3d 50 (Ky. 2010).

#### Co-defendants

The prosecutor cannot call a co-defendant to testify that he pled guilty to the charges, or introduce a co-defendant's conviction on the same charges. The convictions of co-defendants are not substantive evidence. "It has long been the rule in this Commonwealth that it is improper to show that a co-indictee has already been convicted under the indictment.' To make such a reference and to blatantly use the conviction as substantive evidence of guilt of the indictee now on trial is improper regardless of whether the guilt has been established by plea or verdict, whether the indictee does or does not testify, and whether or not his testimony implicates the defendant on trial." *Tipton v. Commonwealth*, 640 S.W.2d 818 (Ky. 1982), citing *Parido v. Commonwealth*, 547 S.W.2d 125 (Ky. 1977) and *Martin v. Commonwealth*, 477 S.W.2d 506 (Ky. 1972). But see *Mayse v. Commonwealth*, 422 S.W.3d 223 (Ky. 2013), in which defense counsel opened the door by cross-examining the co-indictee.

Reversible error occurred when the Commonwealth, over the defendant's objection, called the defendant's co-indictee to the stand knowing she would take the Fifth Amendment, and then asked her a question she then declined to answer on Fifth Amendment grounds. *Higgs v. Commonwealth*, 554 S.W.2d 74 (Ky. 1977), see also *Bush v. Commonwealth*, 839 S.W.2d 550 (Ky. 1992). It is improper to call a witness knowing he will refuse to testify. *Combs v. Commonwealth*, 74 S.W.3d 738, 742 (Ky. 2002), citing *Clayton v. Commonwealth*, 786 S.W.2d 866 (Ky. 1990).

**Improper Testimony**

Repeated unsolicited statements from the Commonwealth's witness on direct examination give rise to the inference that either the witness or the Commonwealth is out of control and, together with other prosecutorial misconduct, can rise to the level of reversible error. *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994), *overruled on other grounds*, citing *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), *overruled on other grounds*.

It is reversible error requiring mistrial which no admonition can cure for a prosecutor to question a witness in order to assert the content of a former conversation with the witness. Assertions of fact from counsel concerning the contents of a prior conversation with the witness have the effect of making the prosecutor the witness and allow the prosecutor to testify to matters no witness has testified to. The prosecutor should not have been allowed to lead her own prosecution witness. *Holt v. Commonwealth*, 219 S.W.3d 731 (Ky. 2007).

**False Testimony**

Due process was denied the defendant when the State's key witness testified falsely that he had received no promise of consideration in return for his testimony and the Assistant State's Attorney who had promised the consideration did nothing to correct the false testimony. A state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction. This principle is implicit in any concept of ordered liberty and does not cease to apply simply because the false testimony goes only to the credibility of a witness. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

In order to justify reversal when the defendant's conviction was based on false testimony and when the prosecutor did not know that the testimony was false, the defendant must show that there is a reasonable certainty that the testimony was false and that the conviction probably would not have resulted had the truth been known to the jury. *Commonwealth v. Spaulding*, 991 S.W.2d. 651 (Ky. 1999).

The jury was allowed to deliberate the defendant's sentence based on false testimony in *Fegley v. Commonwealth*, 337 S.W.3d 657 (Ky. App. 2011) when the probation officer testified that the defendant could receive a maximum of 120 years in prison when, in fact, he could not receive more than 70 years.

**Bolstering Witnesses**

It is improper to permit a witness to testify that another witness has made prior consistent statements absent an express or implied charge against the declarant of recent fabrication or improper influence. Otherwise, the witness is simply vouching for the truthfulness of the declarant. *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky. 2005).

It was reversible error to allow the police detective to testify about the prior consistent statements of the victim in a sexual assault case when the victim had already given detailed testimony and the victim's motive to fabricate, if it existed, remained the same from the start of the investigation to the time of trial. The detective's testimony concerning the prior consistent statements had no probative value and was also highly prejudicial, as it served only to bolster the victim's credibility. *Smith v. Commonwealth*, 920 S.W.2d 514 (Ky. 1995)

Testimony of a social worker was inadmissible hearsay as an attempt to bolster the victim's testimony where social worker testified before any attack had been made on victim's credibility. *Reed v. Commonwealth*, 738 S.W.2d 818 (Ky. 1987). It was reversible error to allow the social worker to unfairly bolster the credibility of the alleged victim. *Smith v. Commonwealth*, 920 S.W.2d 514 (Ky. 1995), *Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky. 2009).

A police officer was improperly allowed to bolster the credibility of an informant when he testified that the informant was reliable and that the informant's work had always ended in convictions. *Farrow v. Commonwealth*, 175 S.W.3d 601 (Ky. 2005).

Commonwealth's witness was improperly allowed to testify while holding a Bible. *Brown v.*

NOTES

## NOTES

*Commonwealth*, 983 S.W.2d 513 (Ky. 1999).

It was an inadmissible attempt to bolster the victim's identification of the defendant when the police officer testified that the victim's eyes "got larger" when she first spotted a photograph of the defendant. *McGuire v. Commonwealth*, 573 S.W.2d 360 (Ky. App. 1978).

Improper bolstering occurred in *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015) when the investigating officer, while careful not to repeat what he was told in an initial interview, was allowed to testify to the demeanor of the alleged victim of sexual abuse as the interview progressed. The only purpose for this testimony from the officer was to bolster the victim's credibility.

The cumulative effect of repeated bolstering by hearsay was palpable error requiring reversal when the child's statements and credibility were the only evidence against the defendant. *Alford v. Commonwealth*, 338 S.W.3d 240 (Ky. 2011).

A medical professional's testimony as to who the child identified as the perpetrator during a medical examination is improper hearsay and is not covered under the medical treatment exception to the rule of hearsay. *Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010), *Hoff v. Commonwealth*, 394 S.W.3d 368 (Ky. 2011).

Improper bolstering was found to be palpable error and manifest injustice in *King v. Commonwealth*, 472 S.W.3d 523 (Ky. 2015), when the investigating officer was allowed to tell the jury that a task force on child sexual abuse composed of local officials and prominent citizens had reviewed the case and recommended prosecution.

A witness, including a defendant, should not be required to characterize the testimony of another witness as lying. *Duncan v. Commonwealth*, 322 S.W.3d 81 (Ky. 2010).

### **Investigative Hearsay**

The police officer's actions must somehow be at issue before this kind of testimony is relevant under KRE 401. *Daniel v. Commonwealth*, 905 S.W.2d 76, 79 (Ky. 1995), *Stringer v. Commonwealth*, 956 S.W.2d 883, 887 (Ky. 1997). For example, an officer cannot testify to what he was told by the radio dispatcher that caused him to pull the defendant's car over unless the defendant has made that relevant by "opening the door" and claiming an improper motive in the stop. *White v. Commonwealth*, 5 S.W.3d 140, 142 (Ky. 1999). Likewise, it is error to allow a police officer to testify to why he was suspicious of a defendant in a drug-trafficking case. Such testimony is based on hearsay and is also irrelevant. *Gordon v. Commonwealth*, 916 S.W.2d 176 (Ky. 1995). It was reversible error to allow a police officer to testify that he received an anonymous tip that the defendant was trafficking in drugs when the evidence reflected directly on the defendant's guilt, in spite of the fact it was offered to show why the officer arrested the defendant. *Kerr v. Commonwealth*, 400 S.W.3d 250 (Ky. 2013).

Furthermore, since a defendant can only make such testimony relevant by "opening the door" and attacking the officer or the investigation, this testimony will almost never be relevant during the Commonwealth's direct examination.

The Supreme Court has repeatedly admonished prosecutors on this point. In *Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988), it said: "Prosecutors should, once and for all, abandon the term 'investigative hearsay' as a misnomer, an oxymoron." It recently repeated this admonition in *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015). See that case for another full analysis.

### **Habit Evidence**

Prosecution witnesses should not be allowed to testify to the habits or routines of a certain class of people in order to show that the defendant acted in the same way. What other people usually do is not evidence of what the defendant did. For example, it was reversible error for the prosecution's witness to testify that the defendant matched the profile of a pedophile.

“Profile” evidence is inadmissible in any criminal case to prove either guilt or innocence. *Dyer v. Commonwealth*, 816 S.W.2d 647, 652 (Ky. 1991), *overruled on other grounds*. See also *Tungate v. Commonwealth*, 901 S.W.2d 41, 43 (Ky. 1995) and *Pendleton v. Commonwealth*, 685 S.W.2d 549, 553 (Ky. 1985). Likewise, it was error to admit testimony that methamphetamine users are usually skinny and that 85% of them also use the product. *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005), and reversible error to allow testimony that 90% of all abused children delay the reporting of the abuse. *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002). It was error to solicit evidence that coal truck drivers run red lights and blow their horns, implying that the defendant, a coal truck driver, acted likewise. *Johnson v. Commonwealth*, 885 S.W.2d 951, 953 (Ky. 1994). Finally, reversible error occurred when the opinion testimony of a police detective included that the defendant, after shooting the victim’s, did not act like people who had lawfully defended themselves, but instead acted like someone who was fabricating a self-protection defense in *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2012). This sort of habit evidence is not the kind allowed by KRE 406, adopted July 1, 2006, which allows evidence as to the habits of particular individuals.

### Statements Made on Tape or Video

Most recorded interrogations include assertions from the officer that the defendant is not being truthful in some way. In *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), the court ruled that the detective’s comments could be heard by the jury in order to provide the context of the defendant’s replies, but that the statements were not to be introduced to prove the truth of the matter asserted, and that the trial court should give a limiting admonition to that effect. In *Fields v. Commonwealth*, 12 S.W.3d 275, 279-82 (Ky. 2000), the court ruled that in the case of a video recording of the investigation of a crime scene, the video portion was admissible but the audio voiceover, including the repetition of the defendant’s alleged confession, was hearsay. See also *Fulcher v. Commonwealth*, 149 S.W.3d 363 (Ky. 2004), in which the court also ruled that the audio portion of the video was hearsay, but the defendant failed to object. Compare *Brown v. Commonwealth*, 2005 WL 387437, Ky., Feb. 2005, *unpublished*, in which an expert commented on the contents of a video. When a tape, such as a recording of a drug deal, is partially inaudible, the court must decide whether the problems are serious enough to mislead the jury or make the entire piece of evidence untrustworthy. *Gordon v. Commonwealth*, 916 S.W.2d 176, 180 (Ky.1995), *Perdue v. Commonwealth*, 916 S.W.2d 148, 155 (Ky. 1995). An informant cannot act as an “interpreter” of the tape, clarifying inaudible sections as the tape is played. The witness must rather testify from memory, *Gordonsupra*, at 180. It is not within the discretion of a trial court to provide a jury with the prosecutor’s version of inaudible or indistinct portions of an audiotape. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), *overruled on other grounds*. The detective improperly interpreted the audio recording of the drug deal in *Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010).

When narrating video footage, witnesses are limited to a description of events to which they have personal knowledge and it is improper to allow a witness to interpret the footage or offer opinions. *Boyd v. Commonwealth*, 439 S.W.3d 126 (Ky. 2014). It was error to allow an officer to narrate a recording and testify to matters to which he had no personal knowledge and to express opinions regarding the role played by the defendant in the drug deal. *Commonwealth v. Wright*, 467 S.W.3d 238 (Ky. 2015).

### Photographs

Admission of an excessive number of gruesome crime scene and autopsy photographs required reversal in *Hall v. Commonwealth*, 468 S.W.3d 814 (Ky. 2015). The trial court admitted a ten-minute video of the crime scene as well as 43 crime scene and autopsy photographs, 28 of which were admitted over objection. The Supreme Court went over every one of the 28 photographs in its opinion.

### Charts

Admission of a chart drawn by an absent informant was hearsay and reversible error. Cross-examination of the witness concerning the hearsay did not waive the objection to the admission

## NOTES

of the evidence. *Salinas v. Commonwealth*, 84 S.W.3d 913 (Ky. 2002). It was error for the court to admit into evidence police-created crime scene reconstruction diagrams through the testimony of an officer who had not been present at the scene at the time of the shooting and thus did not have personal knowledge of the locations of persons and items represented in the diagram. His testimony was investigative hearsay. *Gosser v. Commonwealth*, 31 S.W.3d 897 (Ky. 2000).

In a case in which a social worker did an out-of-court experiment with a child and a stuffed animal to determine whether the child could have harmed his sibling, the court held that the foundation requirement for testimony involving out-of-court experiments is sufficient similarity between the test conditions and the actual event. *Rankin v. Commonwealth*, 327 S.W.3d 492 (Ky.2010)

## OBJECTIONS

### Objections, Legal Standard

Formerly, KRE 103(a)(1) only required an attorney to state the grounds of an objection “upon request of the court.” For years this was the rule in Kentucky and it was also consistent with RCr 9.22. Effective May 1, 2007, however, KRE 103(a)(1) was amended to read: “Objection. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.” So the best practice now is to state the grounds of the objection unless the context makes them obvious. Do not count on preserving error on appeal if you do not state the grounds of your objections.

If the trial court denies counsel an opportunity to approach the bench and explain the objection, do it “[a]t the first reasonable opportunity to preserve the record.” *Anderson v. Commonwealth*, 864 S.W.2d 909, 912 (Ky. 1993).

### Objections, Purpose of

Appellate courts view objections as giving the trial court the opportunity to do the right thing. For example: “It is the duty of counsel who wishes to claim error to keep current on the law, and to object with specificity so that the trial judge will be advised on how to instruct. The underlying purpose of such a rule is to obtain the best possible trial at the trial level and to call any error to the attention of the trial judge, thereby affording him the opportunity to give the correct instructions.” *Gibbs v. Commonwealth*, 208 S.W.3d 848, 854 (Ky. 2006), *overruled on other grounds*.

And for example: “If there has been no motion for a directed verdict at the close of all the evidence, it cannot be said that the trial judge has ever been given the opportunity to pass on the sufficiency of the evidence as it stood when finally submitted to the jury.” *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1997).

The entire philosophy of preservation is based on this principle. Appellate courts will not grant relief when the trial court was never given the opportunity to do so. “[T]he entire premise for the principle that issues not presented to the trial court are not preserved for appellate review is that the trial court should be afforded a reasonable opportunity to rule upon alleged errors that were not brought to his attention and otherwise could have been corrected at trial.” *Manns v. Commonwealth*, 80 S.W.3d 439, 442-43 (Ky. 2002).

### Objections, Ruling Required

If an objection is made, the party making it must insist on a ruling or the objection is waived. *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005), *Bell v. Commonwealth*, 473 S.W.2d 820, 821 (Ky. 1971), *Harris v. Commonwealth*, 342 S.W.2d 535, 539 (Ky. 1960).

### Objections, Request Relief

If an objection is overruled, the contemporaneous objection (see RCr 9.22) preserves the issue on appeal. On the other hand, if an objection is sustained, there is no further issue preserved for appeal unless the defendant also then requests a mistrial or admonition which is then denied. “An admonition is appropriate only if the objection is sustained.” *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002). “In the absence of a request for further relief, it must be assumed that appellant was satisfied with the relief granted, and he cannot now be heard to complain.”

*Baker v. Commonwealth*, 973 S.W.2d 54, 56 (Ky. 1998). “[M]erely voicing an objection, without a request for a mistrial or at least an admonition, is not sufficient to establish error once the objection is sustained.” *Hayes v. Commonwealth*, 698 S.W.2d 827, 829 (Ky. 1985). The exact same situation obtains when a trial court offers an admonition and the defendant declines to accept it – it is the same as never asking for one. So request further relief!

**Practice Tip:** Cascade your objections. Start with mistrial. Accept an admonition if it is offered, without waiving the motion for mistrial. Tell the court what admonition you want the jury to be given.

Also, if the court refuses to admit evidence the defendant believes should be admitted, offering a limiting instruction along with the evidence will affect the standard of review on appeal. Failure to offer such an instruction, however, leaves the standard of review at palpable error. KRE 105(b).

### Judge’s Job at Trial

As the editors of the Evidence Manual, 7th ed., say on p. 55, “A judge is more than an umpire for resolving evidentiary disputes.” Aside from ruling on the order, mode of presentation, and admissibility of evidence, the two main duties of a trial judge, according to the Kentucky Rules of Evidence, are to: (1) help the jury find the truth, KRE 102 and 611(a)(i), and (2) make sure the jury is not misled or confused, KRE 403. Either of these can always serve as the grounds for an objection.

### Constitutional Grounds

Failure to constitutionalize your grounds for objection could mean that your client may someday be barred from appealing to the Federal District Court or the U.S. Supreme Court. In order to appeal to either of those courts, the defendant will have to be able to show that the state court had an opportunity to consider and correct violations of federal constitutional rights. See *Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). For example, United States Supreme Court Rule 14 says that a petition for a writ of certiorari must contain a statement specifying “the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts...” See the enclosed chart.

Remember that the right to present a defense is itself a federal constitutional right to due process. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973.) “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment... or in the Compulsory Process or Confrontation clauses of the Sixth Amendment..., the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

**Practice Tip:** Joining a Co-Defendant’s Objections. Appellate courts will not automatically assume that a defendant has joined in his co-defendant’s objections or motions. Joining a motion must, therefore, be done explicitly on the record. Or file a notice that the defendant intends to join in all objections and remind the court again at the beginning of the trial.

**Practice Tip:** Being Explicit. In some decisions, remarks which would normally be understood as nothing more than ordinary politeness and civility have been interpreted on appellate review as waivers of some very important issues. In *Alley v. Commonwealth*, 160 S.W.3d 736 (Ky. 2005), defense counsel spent a good deal of time arguing that his client should not be forcibly medicated to gain competency to stand trial. The trial court refused to rule on the issue, saying there was no proper motion before the court on the matter. Defense counsel’s response was “That’s fine. We understand.” The appellate court ruled that defense counsel had, by saying that, waived the issue he had fought over so long and hard. In *Lattner v. Commonwealth*, 2006 WL 2924653, Ky. App., Oct. 2006, unpublished, the defendant had testified that he was against the use of drugs.

## NOTES

The prosecutor wanted to impeach the defendant with a former conviction for drug possession. Defense counsel objected. The trial judge responded by saying that he thought the defendant had opened the door to the impeachment by setting himself up as a “innocent lamb type guy.” Defense counsel’s response was, “That’s fine.” Even though the appellate court explicitly acknowledged that defense counsel had objected to the intended impeachment, it ruled that defense counsel had waived the issue on appeal by then saying “That’s fine.” So, be polite, but be explicit.

## CONSTITUTIONAL CHECKLIST

### BAIL

**Federal:** 8th Amendment

- *Stack v. Boyle*, 342 U.S. 1 (1951)

**Kentucky:** KY Constitution Sections 2, 16, 17

- *Fryrear v. Parker*, 920 S.W. 2d 519 (Ky. 1996)
- *Marcum v. Broughton*, 442 S.W. 2d 307 (Ky. 1969)

### COMPULSORY PROCESS

**Federal:** 6th Amendment

- *Pennsylvania v. Ritchie*, 480 U.S. 39, 55-56 (1987) (right to compulsory process is same as that afforded by due process)

**Kentucky:** KY Constitution Section 11

- *Justice v. Commonwealth*, 987 S.W. 2d 306 (Ky. 1998)

### CONFRONTATION & CROSS-EXAMINATION

**Federal:** 6th Amendment

- *Crawford v. Washington*, 541 U.S. 36 (2004)

**Kentucky:** KY Constitution Section 11

- *Dillard v. Commonwealth*, 995 S.W. 2d 366 (Ky. 1999)
- *Rogers v. Commonwealth*, 992 S.W. 2d 183 (Ky. 1999)

### CRUEL & UNUSUAL PUNISHMENT

**Federal:** 8th Amendment

- *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion)
- *cf. Harmelin v. Michigan*, 501 U.S. 957 (1991) (no majority for non-capital offense)

**Kentucky:** KY Constitution Sections 2, 17

- *Sizemore v. Commonwealth*, 485 S.W. 2d 498 (Ky. 1972)
- *Cornelison v. Commonwealth*, 84 Ky. 583, 2 S.W. 235 (1886)

### COUNSEL (Right to Counsel; Effective Counsel; Self-Representation/Hybrid Counsel)

**Federal:** 6th Amendment

- *Gideon v. Wainwright*, 372 U.S. 335 (1963)
- *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (at critical stage)
- *Geders v. U.S.*, 425 U.S. 80, 88 (1976) (access during long recess)
- *Strickland v. Washington*, 466 U.S. 668 (1984) (effective counsel)

**Kentucky:** KY Constitution Section 11

- *Ivey v. Commonwealth*, 655 S.W. 2d 506 (Ky. App. 1983) (Effective counsel)
- *Hill v. Commonwealth*, 125 S.W. 3d 221 (Ky. 2004) (Self/hybrid representation)
- *Baucom v. Commonwealth*, 134 S.W. 3d 591 (Ky. 2004) (hybrid representation)

### DOUBLE JEOPARDY

**Federal:** 5th Amendment

- *Lockhart v. Nelson*, 488 U.S. 33 (1988);
- *Blockburger v. United States*, 284 U.S. 299 (1932)

**Kentucky:** KY Constitution Section 13

- *Benton v. Crittenden*, 14 S.W. 3d 1 (Ky. 1999)

**DUE PROCESS (5th Amendment in Federal; 14th Amendment in State)****Federal:** 5th & 14th Amendment

- *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (opportunity to present defense)
- *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (opportunity to present defense)
- *Fuentes v. Shevin*, 407 U.S. 67 (1972) (right to notice)

**Kentucky:** KY Constitution Sections 2, 3, 10, 11, 14 (“Due course of law”)

- *Commonwealth v. Raines*, 847 S.W. 2d 724 (Ky. 1993)

**EQUAL PROTECTION****Federal:** 5th & 14th Amendment

- *McGinnis v. Royster*, 410 U.S. 263 (1973) (unequal treatment under statute)

**Kentucky:** KY Constitution Sections 1, 2, 3, 59

- *Yost v. Smith*, 862 S.W. 2d 852 (Ky. 1993)
- *Commonwealth v. Brown*, 911 S.W. 2d 279 (Ky. App. 1995)
- *Commonwealth v. Howard*, 969 S.W. 2d 700 (Ky. 1998)

**EX POST FACTO (Prohibition against)****Federal:** Art. 1, Sec. 9 cl. 3, and Sec. 10

- *Weaver v. Graham*, 450 U.S. 24, 30 (1980)

**Kentucky:** KY Constitution Section 19

- *Martin v. Chandler*, 122 S.W. 3d 540 (Ky. 2003) (the ex post facto clause applies only when a legislature retroactively renders behavior criminal. When a court does it, it violates due process, not ex post facto.)
- *Bouie v. City of Columbia*, 378 U.S. 347, 354–55 (1964).

**FREEDOM OF SPEECH****Federal:** 1st Amendment

- *Gooding v. Wilson*, 405 U.S. 518 (1972) (violation of 1st Am. to criminalize language short of “fighting words.”)

**Kentucky:** KY Constitution Section 8

- *Musselman v. Commonwealth*, 705 S.W. 2d 476 (Ky. 1986) (citing *Gooding v. Wilson*)

**GRAND JURY INDICTMENT****Federal:** None

- *Green v. United States*, 356 U.S. 165, 184 (1958) (no right to grand jury indictment);
- *cf.*, *Hamling v. U.S.*, 418 U.S. 87 (1974) (if indicted, sufficiency required)

**Kentucky:** KY Constitution Section 12

- *King v. City of Pineville*, 222 Ky. 73, 299 S.W. 1082 (1927)
- *Commonwealth v. Baker*, 11 S.W. 3d 585 (Ky. 2000)

**INFORMED OF NATURE OF ACCUSATION****Federal:** 6th Amendment

- *Hamling v. United States*, 418 U.S. 87 (1974) (sufficiency required)

**Kentucky:** KY Constitution Section 11

- *Carter v. Commonwealth*, 404 S.W. 2d 461 (Ky. 1966)

**JURY TRIAL****Federal:** 6th Amendment

- *Sullivan v. Louisiana*, 508 U.S. 275 (1993)
- *Johnson v. Louisiana*, 406 U.S. 356 (1972) (no federal right to jury of 12).

**Kentucky:** KY Constitution Sections 7 (right to a 12-person jury), 11

- *Commonwealth v. Simmons*, 394 S.W.3d 903 (Ky. 2013)
- *Jackson v. Commonwealth*, 113 S.W. 3d 128 (Ky. 2003)
- *Whitler v. Commonwealth*, 810 S.W. 2d 505 (Ky. 1991)

**PRESENT A DEFENSE****Federal:** 6th Amendment & 14th Amendment

## NOTES

- *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986)
  - *Washington v. Texas*, 388 U.S. 14 (1976) (right to present witness)
  - *Chambers v. Mississippi*, 410 U.S. 284 (1973) (presenting defense trumps evidence rules)
- Kentucky:** KY Constitution Section 11
- *Beaty v. Commonwealth*, 125 S.W. 3d 196 (Ky.2003) (right to due process includes “the right to present a defense”)

**PRIVACY**

**Federal:** 5th Amendment & 14th Amendment

- *Lawrence v. Texas*, 539 U.S. 558 (2003) (Due process protects personal decisions re: marriage, procreation, contraception, family relationships, child rearing, and education)
- Kentucky:** KY Constitution Sections 1, 2, 3
- *Commonwealth v. Wasson*, 842 S.W. 2d 487 (Ky.1992)

**PUBLIC TRIAL**

**Federal:** 6th Amendment

- *Waller v. Georgia*, 467 U.S. 39 (1984)
- Kentucky:** KY Constitution Section 11
- *Lexington Herald-Leader Co. v. Meigs*, 660 S.W. 2d 658 (Ky. 1983)

**RIGHT OF APPEAL**

**Federal:** None

- *Griffin v. Illinois*, 351 U.S. 12 (1956) (if state grants appeal, it must afford due process and equal protection to poor appellants)
- Kentucky:** KY Constitution Section 115
- *Fraser v. Commonwealth*, 59 S.W. 3d 448 (Ky. 2001)
  - *Stahl v. Commonwealth*, 613 S.W. 2d 617 (Ky. 1981)

**SEARCH & SEIZURE**

**Federal:** 4th Amendment

- *Terry v. Ohio*, 392 U.S. 1 (1968) (prohibition against unreasonable searches)
- Kentucky:** KY Constitution Sections 1, 10
- *Commonwealth v. Robey*, 337 S.W. 2d 34 (Ky. 1960)
  - *Holbrook v. Knopf*, 847 S.W. 2d 52 (Ky. 1993)
  - *Colbert v. Commonwealth*, 43 S.W. 3d 777 (Ky. 2001)

**SELF INCRIMINATION**

**Federal:** 5th Amendment

*Griffin v. California*, 380 U.S. 609 (1965) (treating silence as “substantive evidence of guilt” violates 5th Amendment).

**Kentucky:** KY Constitution Section 11

- *Jones v. Commonwealth*, 303 Ky. 666, 198 S.W. 2d 969 (1947)
- *Mace v. Morris*, 851 S.W. 2d 457 (Ky. 1993)

**SPEEDY TRIAL**

**Federal:** 6th Amendment

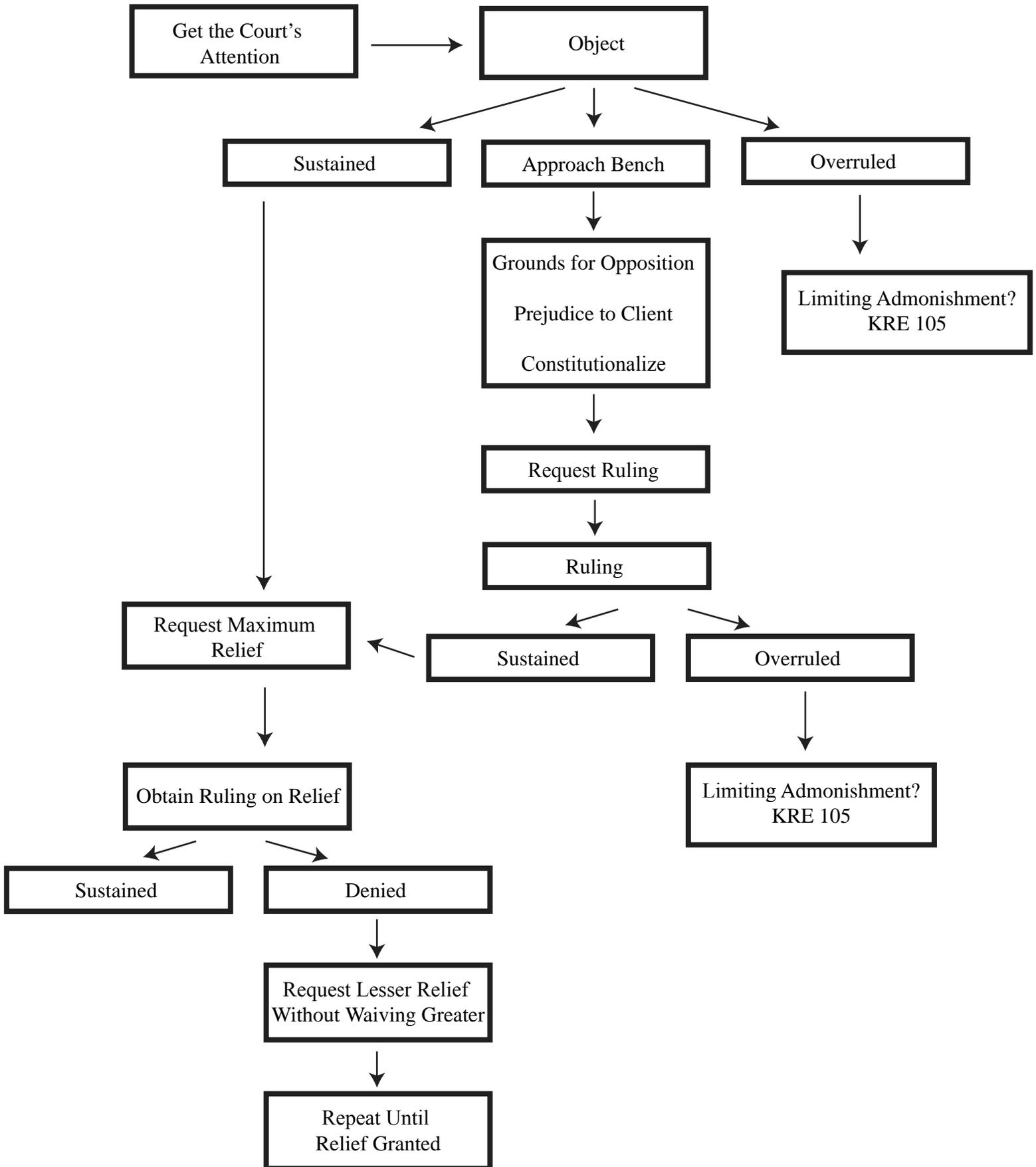
- *Barker v. Wingo*, 407 U.S. 514, 530 (1972)
- Kentucky:** KY Constitution Section 11
- *Hayes v. Ropke*, 416 S.W. 2d 349 (Ky. 1967)

**UNANIMOUS VERDICT**

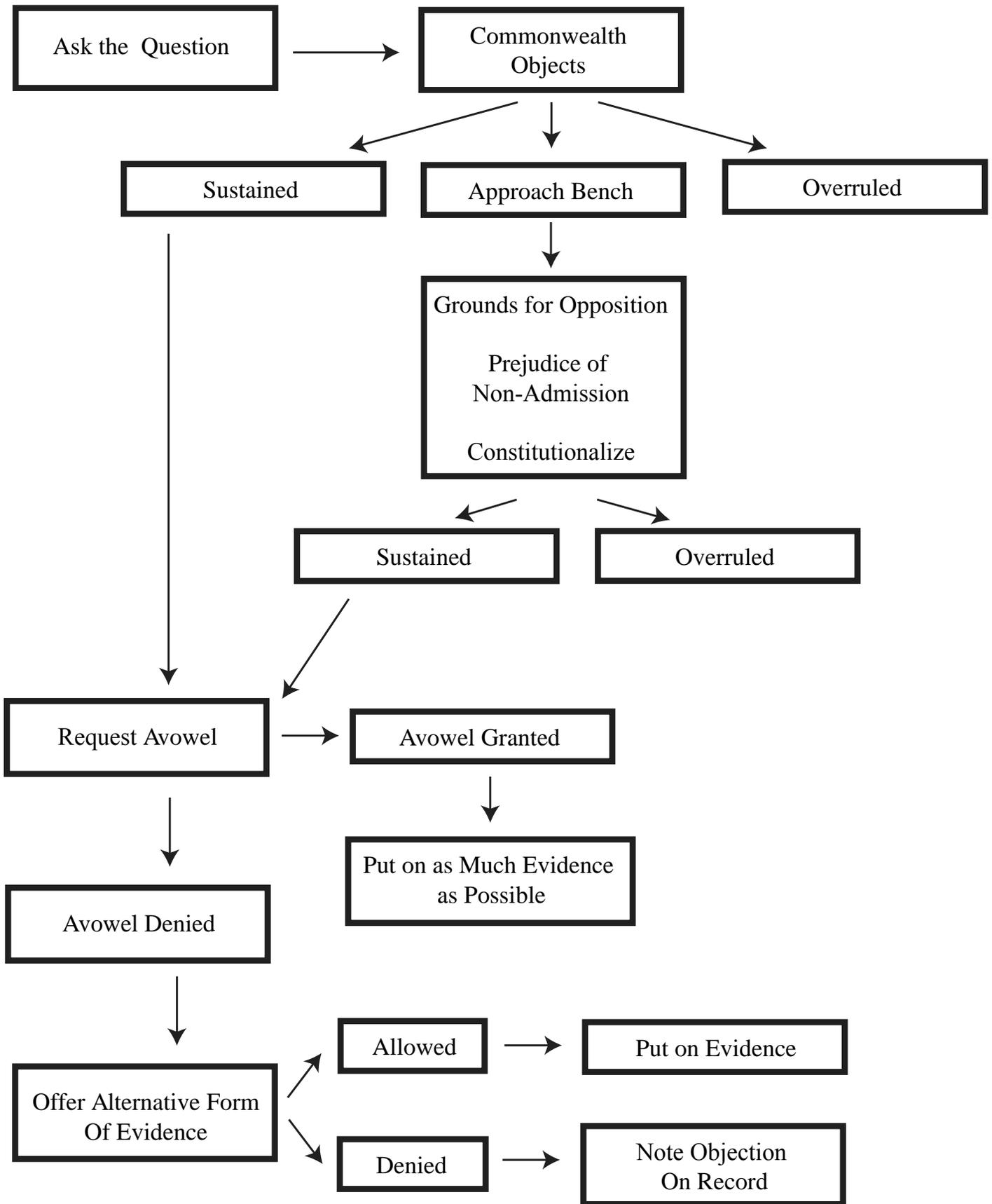
**Federal:** None

- *Johnson v. La.*, 406 U.S. 356 (1972) (no fed. right to unanimous verdict but have right to majority verdict)
- Kentucky:** KY Constitution Section 7
- *Miller v. Commonwealth*, 77 S.W. 3d 566 (Ky. 2002)

# EXCLUDING EVIDENCE



**ADMITTING EVIDENCE**



**CROSS-EXAMINATION**

## NOTES

**Scope**

The Kentucky Rules of Evidence embody a rule of wide open cross-examination and allow questioning concerning any matter relevant to any issue in the case, subject to judicial discretion regarding the control of the interrogation of witnesses and the production of evidence. *KRE 611, Derossett v. Commonwealth*, 867 S.W.2d 195 (Ky. 1993).

The credibility of a witness may always be questioned. *KRE 607* says: “The credibility of a witness may be attacked by any party, including the party calling the witness.” *KRE 611(b)* says: “A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” Section 11 of the Kentucky Constitution and the Sixth Amendment of the United States Constitution preserve the right to confront witnesses.

According to *KRE 611(a)*, cross-examination may be limited by the court in order to, “(1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment.” The question is then, when do such limitations violate fundamental constitutional rights at stake?

Any refusal to allow cross-examination on bias when the witness’ testimony is crucial to the prosecution’s case constitutes reversible error. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111 (1974), *Commonwealth v. Cox*, 837 S.W.2d 898 (Ky. 1992). In *Cox* the defendant was not allowed to conduct any cross-examination of the witness. Furthermore, the denial of effective cross-examination requires automatic reversal and prejudice need not be demonstrated. *Eldred v. Commonwealth*, 906 S.W.2d 694, 702 (Ky. 1994), *overruled on other grounds*. Since a limitation on impeachment impinges on a defendant’s right to confrontation, a court should err on the side of allowing impeachment. *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003).

**Legal Standard**

In *Weaver v. Commonwealth*, 955 S.W.2d 722, 726 (Ky. 1997), the court held that, in order for the right to confront to be satisfied, the jury must be given enough information to make the desired inference. In *Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004), and *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997), the court held that “So long as a reasonably complete picture of the witness’ veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries.” *Maddox* at 721, quoting *U.S. v. Boylan*, 898 F.2d 230, 254 (1st Cir. 1990). In *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003), the court held that a defendant must be allowed “reasonable” cross-examination in order to demonstrate the witness’ bias, animosity, or any other reason why the witness might testify falsely. In *Spears v. Commonwealth*, 558 S.W.2d 641, 642 (Ky. App. 1977), the court held that “In weighing the testimony the jury should be in possession of all facts calculated to exert influence on a witness.”, quoted in *Davenport v. Commonwealth*, 177 S.W.3d 763, 768 (Ky. 2005). It is generally reversible error to refuse to allow cross-examination when “the facts clearly support an inference that the witness was biased, and when the potential for bias exceeds mere speculation.” *Davenport, supra*, at 769.

The test on review of a court’s refusal to allow cross-examination is whether “a reasonable jury might have received a significantly different impression of the witness’ credibility had defense counsel been permitted to pursue his proposed line of cross-examination.” *Davenport v. Commonwealth*, 177 S.W.3d 763 (Ky. 2005), *Commonwealth v. Cox*, 837 S.W.2d 898, 901 (Ky. 1992), quoting *Olden v. Kentucky*, 488 U.S. 227, 232, 109 S.Ct. 480, 483, 102 L.Ed.2d 513, 520 (1988), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 683 (1986).

**Parole or Probation**

Refusal to allow cross-examination on the fact that the witness was on probation was reversible error when the witness was crucial to Commonwealth’s case, and the witness’s testimony

## NOTES

lacked corroboration. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), *Commonwealth v. Cox*, 837 S.W.2d 898 (Ky. 1992). But compare *Davenport, supra*, in which the witness' probation was in another county and his testimony was corroborated by other prosecution witnesses.

**Pending Charges**

The general rule is that evidence that a witness has been arrested or charged with a criminal offense, as opposed to evidence of a conviction, is not admissible for purposes of attacking the witness's credibility. See *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982). An exception to this rule is that a defendant may question a witness concerning criminal charges against him to demonstrate a motive to curry favorable treatment from the prosecution. *Spears v. Commonwealth*, 558 S.W.2d 641 (Ky. App. 1977), *Star v. Commonwealth*, 313 S.W.3d 30 (Ky. 2010). The trial court should allow defense counsel to question a key prosecution witness about the possibility of a deal with the Commonwealth. *Williams v. Commonwealth*, 569 S.W.2d 139 (Ky. 1978). Pending charges in another county, however, are not admissible for this purpose when the prosecutor is not in any position to grant any leniency to the witness. *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002), see also *Davenport, supra*.

**Procedure for Impeaching with Prior Inconsistent Statement**

1. Ask to approach the witness
2. Show the document to the prosecution (if there is a document)
3. Lay the foundation (don't be afraid to be elaborate)
  - Do you recall meeting with, talking with...
  - On (the date)
  - (Two weeks) after the (event); closer to the time of the actual event
  - You were under oath to tell the truth
  - It was important that you tell the truth
  - And you wanted to tell the truth
4. Confront the witness with the statement
  - You said, told the officer, etc.
  - (If in a document, show it to the witness)
5. The witness either then acknowledges the statement or not.
  - If the witness acknowledges making the prior statement, she must be allowed to explain the difference.
  - If the witness acknowledges that the prior statement was more accurate, there is no need to examine further because the witness has adopted the statement.

A hostile witness may not escape impeachment with a prior inconsistent statement simply by saying, "I don't remember." *Wise v. Commonwealth*, 600 S.W.2d 470 (Ky. App. 1978), *United States v. Hadley*, 431 F.3d 484, 512 (6th Circuit 2005).

Remember when it comes time for closing argument that in Kentucky the prior inconsistent statement may be argued as substantive evidence, i.e., you can argue the truth of the matter asserted by the statement. *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969).

KRE 613 uses the word "different." KRS 801(a)(1) uses the word "inconsistent." Both imply that details have been added, changed, or deleted. The two statements don't have to be strictly contradictory.

**DIRECTED VERDICTS****Legal Standard**

The test for directed verdict at trial is "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the

credibility and weight to be given to such testimony.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

“[T]he trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.” *Benham, supra*, at 187-188. See also Susan Balliet’s article: “Directed Verdicts in Kentucky: What’s Reasonable?” *The Advocate*, vol. 29, no. 3, July 2007, pp. 5-9. “[S]ince the jury is the sole judge of the credibility of the witnesses, it is never proper for the court to direct a verdict of guilty where there is a plea of not guilty, notwithstanding the fact that the evidence of his guilt may be convincing and wholly uncontradicted.” *Bardin v. Commonwealth*, 231 S.W. 208, 209 (1921).

### **Must Be Specific**

An unspecific, general motion for directed verdict will be viewed on appeal as little better than no motion at all. In order to preserve the issue for appeal, the motion must specify the grounds for the motion. Failure to state a specific ground gives the appellate court nothing to rule on. CR 50.01 says, in part: “A motion for directed verdict shall state the specific grounds therefore.” *Pate v. Commonwealth*, 134 S.W.3d 593 (Ky. 2004), *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005).

### **No Prosecution Appeal**

When a trial court grants a motion for directed verdict, an appeal by the prosecutor violates the defendant’s right of protection against double jeopardy. A directed verdict is an acquittal of the charges and a dismissal of the case with prejudice on the merits of the defendant’s factual guilt or innocence. *Cozzolino v. Commonwealth*, 395 S.W.3d 485 (Ky. App. 2012).

According to *R.S. v. Commonwealth*, 423 S.W.3d 178 (Ky. 2014), the proper motion for a directed verdict in a bench trial is a motion to dismiss under CR 41.02(2). The rule does not require that all evidence be evaluated in the light most favorable to the prosecution.

Remember that if the prosecutor opens on evidence prejudicial to the defendant but fails to later introduce evidence to support it, the proper remedy is a motion for mistrial. *Williams v. Commonwealth*, 602 S.W.2d 148 (Ky. 1980).

## **V. THE DEFENSE CASE**

### **RIGHT TO PRESENT A DEFENSE**

#### **Legal Standard**

“The... ‘right to present a defense’ is firmly ingrained in Kentucky jurisprudence, and has been recognized repeatedly by the United States Supreme Court. An exclusion of evidence will almost invariably be declared unconstitutional when it significantly undermines fundamental elements of a defendant’s defense.” *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky. 2005), quoting *Beaty v. Commonwealth*, 125 S.W.3d 196, 206-207 (Ky. 2003). “It is crucial to a defendant’s fundamental right to due process that he be allowed to develop and present any exculpatory evidence in his own defense, and we reject any alternative that would imperil that right.” *McGregor v. Hines*, 995 S.W.2d 384, 388 (Ky. 1999), (discussing physical evidence). “A trial court may only infringe upon this right when the defense theory is unsupported, speculative, and far-fetched and could thereby confuse or mislead the jury.” *Beaty*, at 207.

The defendant’s due process right to present a defense was violated when the court precluded the defendant from presenting evidence that the victim was a convicted felon and from recounting the statements the victim had made before, during and after he was shot. *Daugherty v. Commonwealth*, 467 S.W.3d 222 (Ky. 2015).

The right to present a defense includes the rights to: (1) be heard, (2) present evidence central to the defense, (3) call witnesses to testify, and (4) rebut evidence presented by the prosecution. 6th and 14th Amendments to the U.S. Constitution, Sections 2 and 11 of the Kentucky Constitution.

## NOTES

**Constitutional Significance**

The right to present a defense is a federal constitutional right to due process. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973.) “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment...or in the Compulsory Process or Confrontation clauses of the Sixth Amendment..., the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

As a constitutional right, the right to present a defense is more fundamental than any rule of evidence or procedure. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1972) (common law hearsay rules could not be used to deprive defendant of his right to present evidence that another person had confessed to the killing), *Green v. Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (“the hearsay rule may not be applied mechanistically to defeat the ends of justice”), *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (KY rule of criminal procedure could not be used to deprive defendant of his right to prove his confession was not credible), *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (black defendant was deprived of right to present a defense when trial judge ruled he was not allowed to cross-examine white complaining witness on her cohabitation with a black boyfriend), *U.S. v. Foster*, 128 F.3d 949 (6th Cir. 1997) (defendant deprived of right to present exculpatory grand jury evidence by trial court’s ruling that the witness was not “unavailable” under FRE 804(b)(1)), *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (defendant deprived of right to present a defense when not allowed to hire psychiatrist to rebut prosecution’s case for future dangerousness), *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (defendant deprived of right to present a defense when death sentence was imposed in part on basis of information in PSI report which was not disclosed to defendant and defendant had no opportunity to rebut). See also, *United States v. Scheffer*, 523 U.S. 303 (1998), *Holmes v. South Carolina*, 547 U.S. 319, 324-5 (2006), *Beaty and Dickerson, supra, Montgomery v. Commonwealth*, 320 S.W.3d 28 (Ky. 2010), and *McPherson v. Commonwealth*, 360 S.W.3d 207, 214 (Ky. 2012).

One should also remember *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), in which it was held that long-standing exceptions to the hearsay rule (such as statements against penal interest) could not be upheld at the expense of the basic right to confront. Finally, there are a few rules of procedure which give the court the power to exclude defense evidence which was not disclosed by a deadline. RCr 7.24 and 8.07 both give the court exclusionary power. Of course, a rule of procedure does not trump a Constitutional right to present a defense. If necessary, make sure to argue the right to present a defense, Constitutionalize it, and make sure your objection is on the record.

**Alternative Perpetrator**

The opportunity to present an “alternative perpetrator” defense is also fundamental to the right to present a defense and should be allowed if the defense can prove the alleged alternative perpetrator had both motive and opportunity, the defense does not waste the court’s time, nor is it likely to confuse or mislead the jury. “[I]f the evidence [that the crime was committed by someone else] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.” Failure to allow the defendant to make this defense was reversible error. *Beaty v. Commonwealth*, 125 S.W.3d 196, 209 (Ky. 2003), quoting John Henry Wigmore, *Evidence in Trials at Common Law*, § 139 (Tiller’s rev. 1983). See also *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), and *Blair v. Commonwealth*, 144 S.W.3d 801 (Ky. 2004). But see *Luna v. Commonwealth*, 460 S.W.3d 851 (Ky. 2015), in which the defendant could not prove motive and opportunity of the alleged alternative perpetrator and was not denied the right to present a complete defense when the court denied him the right to present the evidence concerning a former boyfriend of the victim.

**Defense Theories**

In Kentucky, a defendant generally cannot alternatively argue two mutually exclusive theories of defense such as self-defense and accident. *Grimes v. McAnulty*, 957 S.W.2d 223 (Ky. 1998). Nevertheless, a defendant can assert self-defense against charges of wanton murder, manslaughter, or reckless homicide. *Allen v. Commonwealth*, 5 S.W.3d 137, 139 (Ky. 1999), *Estep v. Commonwealth*, 64 S.W.3d 805, 811 (Ky.2002). A defendant can also deny commission of a criminal defense and alternatively seek the defense of entrapment. *Morrow v. Commonwealth*, 286 S.W.3d 206 (Ky. 2009). The Morrow decision should be examined closely by defense counsel, holding that, "... Kentucky courts are bound to instruct juries on the whole law of the case, *Ward v. Commonwealth*, 695 S.W.2d 404, 406 (Ky. 1985), including alternative instructions when supported by the evidence, *Hayes v. Commonwealth*., 625 S.W.2d 583, 584 (Ky. 1981)." Ask the court for any instructions which might be agreed upon by a jury based on the evidence. See, Instructions.

**Self-Representation**

A court has an affirmative duty to inquire into a defendant's expressed dissatisfaction with counsel if the defendant raises a substantial basis for that dissatisfaction. The scope of inquiry must be sufficient to establish that counsel is able and prepared to effectively assist the defendant. The court is not obligated to inform the defendant, sua sponte, of his right to hybrid representation. *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky.2010). When an indigent defendant seeks to displace his appointed counsel, he must show good cause such as a conflict of interest, a complete breakdown of communications, or an irreconcilable conflict. *Grady v. Commonwealth*, 325 S.W.3d 333 (Ky. 2010).

The warning a court should give a defendant, and the questions the court should ask when that defendant seeks to waive counsel and/or when the defendant requests hybrid or self-representation all fall under *Faretta v. California*, 422 U.S. 806 (1975) and more recently *Iowa v. Tovar*, 541 U.S. 77 (2004). The questions recommended by the Kentucky Supreme Court are listed in *Terry v. Commonwealth*, 295 S.W.3d 819, 824 (Ky. 2009). The inquiry must determine that the defendant is proceeding with "eyes open" to the specific dangers and possible consequences of the decision to forego counsel, and must include such factors as the defendant's education, experience, sophistication, the complexity of the charges or defenses, and the stage of the proceedings. Only a complete warning of the dangers of self-representation can establish the defendant choose to waive counsel knowingly, intelligently, and voluntarily. A strict "script" is not necessary as long as the court adequately determines the defendant is proceeding with "eyes open." *Grady v. Commonwealth*, 325 S.W.3d 333 (Ky. 2010).

The right to represent one's self is constitutional but it is not absolute and unfettered. The court must vigilantly protect that right and whether self-representation is in the best interests of the defendant or whether the defendant is skilled enough to represent himself are not relevant reasons to deny the defendant the right to self-representation. Nevertheless, the right can be lost when abused, and the trial was proper to deny the defendant the right when it was obvious the defendant asked to represent himself only for the purpose of delaying the proceedings and disrupting the court. *Hummel v. Commonwealth*, 306 S.W.3d 48 (Ky. 2010).

Appointment of stand-by counsel over the objections of the defendant is not a violation of the defendant's *Faretta* rights. However, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury and participation by stand-by counsel without the defendant's consent should not destroy the jury's perception that the defendant is representing himself. For example, allowing stand-by counsel to participate in bench conferences over the objection of the defendant violates that perception. *Allen v. Commonwealth*, 410 S.W.3d 125 (Ky. 2013).

Hybrid counsel is a legitimate alternative for a defendant, and he should not be told that his only two alternatives are to be represented by counsel or represent himself. *Mitchell v. Commonwealth*, 423 S.W.3d 152 (Ky. 2014).

## NOTES

## NOTES

## AVOWALS

**Legal Standard**

Both KRE 103(a)(2) and RCr 9.52 (now gone) used to require a question-and-answer avowal made between the attorney and the witness. It said: “the witness may make a specific offer of his answer to the question.” Kentucky courts enforced this requirement quite strictly in cases such as *Herbert v. Commonwealth*, 566 S.W.2d 798, 803 (Ky. App. 1978), *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996), and *Commonwealth v. Ferrell*, 17 S.W.3d 520, 524 (Ky. 2000), “an alleged error in the trial court’s exclusion of evidence is not preserved for appellate review unless the words of the witness are available to the reviewing court.”

Effective May 1, 2007, the rule changed. It now says: “the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” According to Professor Underwood, this rule change brought Kentucky much more in line with most federal courts and several other jurisdictions. He wrote: “After all, what matters is that the substance of the excluded evidence be apparent to the reviewing court.” Kentucky Evidence 2013-2014 Courtroom Manual, LexisNexis, p. 11. Attorney avowals are now sufficient in Kentucky, although KRE 103(b) still says that the court: “may direct the making of an offer in question and answer form.”

Avowals can also be made with documents which the court has excluded.

**Necessary to Preserve Error**

KRE 103(a) explicitly says that failure to make an avowal waives the issue of the excluded evidence. When evidence is being excluded, failure to make an avowal has exactly the same effect of never objecting when evidence is being introduced. For example, the error by the trial court in sustaining objections to cross-examination of a witness could not be a basis for reversal when the defendant failed to request an avowal, in *Jones v. Commonwealth*, 833 S.W.2d 839 (Ky. 1992). An avowal must be specific enough to allow appellate review of the decision to exclude the evidence. *Henderson v. Commonwealth*, 438 S.W.3d 335 (Ky. 2014).

**Failure to Allow**

It is prejudicial error for a trial court to deny a defendant the opportunity to make an avowal. *Jones v. Commonwealth*, 623 S.W.2d 226 (Ky. 1981), *Perkins v. Commonwealth*, 834 S.W.2d 182 (Ky. App. 1992). The accused has a right to make a record sufficient to permit appellate review of the alleged errors. *Powell v. Commonwealth*, 554 S.W.2d 386, 390 (Ky. 1977).

**DEFENDANT TESTIFYING****Right to Testify**

A defendant has a constitutional right to testify which cannot be waived by counsel or refused by a court. *Quarels v. Commonwealth*, 142 S.W.3d 73 (Ky. 2004). A defendant also has a statutory right to testify in his own behalf under KRS 421.225.

**Commenting on Failure to Testify**

KRS 421.225 also provides that the defendant’s failure to testify “shall not be commented upon or create any presumption against him.” “[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.” *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). The jury instruction saying that jurors should not draw any inferences of guilt from the defendant’s failure to testify is RCr 9.54(3), and is mandatory if requested.

**Commenting on Post-Arrest Refusal to Speak to Police**

It is improper to allow an officer to testify that the reason he did not interview the defendant was because the defendant had asked for a lawyer. *Spears v. Commonwealth*, 448 S.W.3d 781 (Ky. 2014). It was an abuse of discretion to admit a video showing the defendant’s “selective silence,” in which she asked for an attorney and agreed to answer some questions during her interview but

refused to answer others, in *Baumia v. Commonwealth*, 402 S.W.3d 530 (Ky. 2013). The Fifth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Baumia*, at 537, quoting *Griffin v. State of California*, 380 U.S. 609 (1965).

### Commenting on Pre-Arrest Failure to Make Denials

An "adoptive admission by silence" occurs when someone other than a party makes a statement in the presence of the party which the party could be expected to deny if untrue. Failure to deny the statement can be taken as an adoption of the statement. Prosecutors sometimes use this to argue that because your client did not deny involvement to the police (or another party) prior to arrest, his or her silence is admissible as evidence of guilt. E.g., *Marshall v. Commonwealth*, 60 S.W.3d 513, 521 (Ky. 2001). The Kentucky Supreme Court has made it clear that a simple failure to make a denial which might otherwise be expected in a certain situation is not in itself an adoptive admission by silence. KRE 801A(b)(2) requires an actual statement to be made by someone other than the party, which would normally provoke a denial by the party if untrue. As such, "silence is admissible only in conjunction with the accusatory out-of-court statement, because it is only in the context provided by the out-of-court statement that any meaning can be ascribed to the silent response." *Trigg v. Commonwealth*, 460 S.W.3d 322, 331 (Ky. 2015) (citing, *Commonwealth v. Buford*, 197 S.W.3d 66, 74 (Ky. 2006), See also *Beavers v. Commonwealth*, 612 S.W.2d 131 (Ky. 1980). It is not proper for the prosecutor to ask a witness about a client's failure to deny involvement when the client was not first asked a direct question, by the non-party, regarding their involvement. *Niemeyer v. Commonwealth*, 533 S.W.2d 218 (Ky. 1976), *overruled on other grounds*.

**Practive Tip:** While pre-arrest silence is not, by itself, admissible as hearsay under KRE 801A, the opinion in *Trigg* leaves unanswered the broader constitutional question of the admissibility of evidence regarding pre-arrest silence in general. OBJECT, and make a record.

A defendant is subject to the same impeachment as any other witness. *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003). If the defendant takes the stand to testify, he has waived his 5th Amendment protection against self-incrimination and may be cross-examined regarding his pre-arrest silence. *Gordon v. Commonwealth*, 214 S.W.3d 921 (Ky. App. 2006). If a defendant is being re-tried and testified at the first trial, an authenticated transcript of his prior testimony can be treated as "the equivalent of a deposition." RCr 7.22.

If the defendant decides not to testify because he will be impeached by evidence which should not be allowed into the trial, he cannot preserve his objection to the ruling allowing the evidence by placing his intended testimony in an avowal. The only way to preserve an error allowing improper impeachment of the defendant is for the defendant to testify and then object to the impeachment. *Hayes v. Commonwealth*, 58 S.W.3d 879 (Ky.2001).

When a defendant has made a confession, the confession has been suppressed, and the defendant then testifies in trial in a way inconsistent with his suppressed confession, the defendant, (1) can be impeached with the prior confession if the confession was obtained in violation of the Fifth Amendment right to remain silent. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). But (2), cannot be impeached with the prior confession if it was obtained in violation of the Fourth Amendment right against coerced involuntary confessions. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), *Michigan v. Harvey*, 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990), *Canler v. Commonwealth*, 870 S.W.2d 219, 221 (Ky.1994).

The defendant cannot be cross-examined concerning evidence which has been suppressed because of a defective warrant. *Roberts v. Commonwealth*, 250 S.W. 115 (Ky.1923).

A defendant cannot be impeached with a conviction which is still on appeal. *Tabor v. Commonwealth*, 948 S.W.2d 569 (Ky.1997).

Information given to a pretrial services officer by a defendant under RCr 4.08 is confidential and

## NOTES

cannot be used at trial without written consent of the defendant, unless one of the enumerated exceptions applies. *Couch v. Commonwealth*, 256 S.W.3d 7 (Ky.2008).

While testifying in a suppression hearing, the defendant cannot be cross-examined concerning any other issues in the case. KRE 104(d), *Shull v. Commonwealth*, 475 S.W.2d 469 (Ky.1971). A defendant's testimony to establish standing at a suppression hearing cannot be used against the defendant at trial unless the defendant testifies. A defendant is not required to make a "Hobson's choice" between establishing standing under the 4th Amendment and then being impeached with it, or maintaining his 5th Amendment right to remain silent and therefore waiving the suppression issue. *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), *Hayes*, supra, at 595-96.

When testifying in a probation revocation hearing regarding the circumstances surrounding new criminal charges, the probationer's testimony cannot be used as substantive evidence against him at any later criminal trial on the same conduct, and the court should advise the probationer of this. The testimony can be used to rebut or impeach if subsequent testimony from the defendant is inconsistent with that given in the hearing. *Barker v. Commonwealth*, 379 S.W.3d 116 (Ky.2012). The same does not apply to parole revocation hearings.

It is improper for the prosecutor to cross-examine the defendant regarding the criminal record of his companion at the time of the offense, and later refer to the companion as a "felon." *Rowe v. Commonwealth*, 50 S.W.3d 216. (Ky. App. 2001).

If the question of a client committing **perjury** arises during trial, Rule of Professional Conduct 3.3 requires defense counsel to bring the existence of a potential conflict to the attention of the court. Before the attorney does this, however, "she must in good faith have a firm basis in objective fact for her belief, beyond conjecture and speculation, that the client will commit perjury. ... Counsel must rely on facts made known to her by her client, not on a subjective belief that the client might be lying or that the client's consistent version of events differs from other evidence." Counsel must then state "all material acts" necessary to establish the conflict between herself and the client. Details are not necessary, "a clear statement of the nature of the problem will suffice." The court may allow defense counsel to ask the defendant, "What do you have to say to the jury?" and then allow the defendant to proceed in narrative form. Counsel should not abandon the defendant by leaving the courtroom. *Brown v. Commonwealth*, 226 S.W.3d 74, 84 (Ky. 2007).

Defense counsel may discourage a defendant from testifying to a version of events in a way different from his previous statements. For example, in *Bratcher v. Commonwealth*, 406 S.W.3d 865 (Ky. App. 2012), defense acted competently by advising the defendant not to testify to a version of events different from the one he gave in his taped statement to police. On the other hand, it is never proper for the court to inaccurately warn a defendant that his decision to testify is likely to result in a charge of perjury. KRS 523.070 excludes denial of guilt as a basis for a perjury charge. *Woolfolk v. Commonwealth*, 339 S.W.3d 411 (Ky. 2011).

The defendant cannot use an expert to testify to the defendant's hearsay statements, and thus use the expert to testify by proxy. *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). RCr 7.22 governs previous testimony. See also KRS 403.745(6) regarding previous statements in a hearing for a protective order.

## DEFENSE WITNESSES

### Truthfulness of Other Witnesses

A prosecutor cannot badger a defendant or other defense witnesses into characterizing prosecution witnesses as liars. Witnesses should not be asked to give opinions regarding the truthfulness of other witnesses, as that is the province of the jury. *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), citing *Howard v. Commonwealth*, 12 S.W.2d 324, 329 (Ky. 1928) : "Although to aid in the discovery of truth reasonable latitude is allowed in the cross-examination of witnesses, and the

method and extent must from the necessity of the case depend very largely upon the discretion of the trial judge, yet, where the cross-examination proceeds beyond proper grounds or is being conducted in a manner which is unfair, insulting, intimidating, or abusive, or is inconsistent with the decorum of the courtroom, the court should interfere with or without objection from counsel. The court not only should have sustained the objections to this character of examination, but should have admonished counsel against such improper interrogation.” (An exception to this is in *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), in which the jury was allowed to hear the detective calling the defendant a liar in order to establish the context of the defendant’s statements. The accusations of the officer were admitted as “verbal acts” and not for the truth of the matter asserted, and the defense was entitled to have the court admonish the jury to that effect upon request from the defendant.)

#### **Fifth Amendment**

Generally, the rule is that a witness cannot be called to testify if it is known that, upon being questioned, the witness will take the Fifth Amendment and refuse to answer. See, e.g., *Clayton v. Commonwealth*, 786 S.W.2d 866 (Ky. 1990). There is, however, an exception to that rule in cases in which the witness can be effectively cross-examined without being provoked to take the Fifth Amendment. A defense witness should not be excluded from trial merely upon the speculation that he or she might take the Fifth Amendment on cross-examination. It was reversible error to exclude the witness when the Commonwealth could have effectively cross-examined the witness without asking the questions which would have provoked the witness to invoke the Fifth Amendment privilege. *Combs v. Commonwealth*, 74 S.W.3d 738 (Ky. 2002). Excluding a defense witness is a drastic remedy, and the trial court has limited discretion in disallowing the evidence. *Id.*, at 743.

#### **Improper Cross**

A judgment of conviction will be reversed when the prosecutor persists in asking improper and prejudicial questions for the purpose of getting evidence before the jury which the law does not permit the jury to hear. *Stewart v. Commonwealth*, 213 S.W. 185 (Ky. 1919), *Nix v. Commonwealth*, 299 S.W.2d 609 (Ky. 1957), *Rollyson v. Commonwealth*, 320 S.W.2d 800 (Ky. 1959), *Vontrees v. Commonwealth*, 165 S.W.2d 145 (Ky.1942), *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845 (Ky. 1997). The prosecutor’s persistent questioning about matters excluded by the court when a motion in limine was granted to the defendant required reversal in *Cole v. Commonwealth*, 686 S.W.2d 831 (Ky. App. 1985).

A prosecutor should not be allowed to inject false issues into the case during cross-examination. Reversal was required in *Woodford v. Commonwealth*, 376 S.W.2d 526 (Ky. 1964), when the prosecutor injected the false issue of a police chase. It was required in *Coates v. Commonwealth*, 469 S.W.2d 346 (Ky. 1971), when the prosecutor injected the false issue of whether the defendant had trafficked in narcotics while in prison. It was required in *Pace v. Commonwealth*, 636 S.W.2d 887 (Ky. 1982), when the prosecutor asked questions on cross-examination which were based on a factual predicate not supported by the evidence, concerning the time the defendant left his home. It was required in *McClellan v. Commonwealth*, 715 S.W.2d 464 (Ky. 1986), when the prosecutor cross-examined a defense witness concerning whether the defendant was remorseful for killing the wrong man, when there was no evidence the defendant had ever said he killed the wrong person.

#### **Intimidating Defense Witnesses**

Prosecutorial misconduct required reversal of a murder conviction when two witnesses informed the prosecutor that they had lied in grand jury testimony and the prosecutor then promised both that he would not prosecute for perjury if they testified truthfully at trial; and then kept the promise to the one witness he called but repudiated the promise to the other who was proposed as a defense witness, causing that second witness to decline to appear and preventing the defendant from presenting exculpatory evidence. *Cash v. Commonwealth*, 892 S.W.2d 292 (Ky. 1995). Compare, *Rushin v. Commonwealth*, 2003 WL 22359522, Ky. App., Oct. 2003, *unpublished*,

## NOTES

in which the court found no prosecutorial misconduct when the Commonwealth threatened to indict a defense witness for perjury if she contradicted her sworn testimony to the grand jury, but the threat did not involve breaking any promise that had been made to the witness. On the other hand, it was a violation of due process and a substantial interference with the witness' free and unhampered choice to testify when the prosecutor threatened to revoke the witness' immunity if he testified at trial. *U.S. v. Foster*, 128 F.3d 949 (6th Cir. 1997).

Reversal is required only when a judge's or prosecutor's conduct interfered substantially with a witness's free and unhampered choice to testify. If some other reason motivated the witness' choice not to testify or if the witness did indeed testify for the defendant anyway, then threats are deemed harmless. See *Hillard v. Commonwealth*, 158 S.W.3d 758 (Ky. 2005), in which an objection to the prosecutor subpoenaing defense witnesses to his office and warning them about perjury was not preserved for review.

### **DIRECTED VERDICTS, RENEWING**

#### **Legal Standard**

The test for directed verdict at trial is "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

"[T]he trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Benham, supra*, at 187-188. See also Susan Balliet's article: "Directed Verdicts in Kentucky: What's Reasonable?" *The Advocate*, vol. 29, no. 3, July 2007, pp. 5-9.

The test for directed verdict on appellate review is, upon the trial court's denial of a properly preserved directed verdict motion, it would still be "clearly unreasonable for a jury to find the defendant guilty." *Benham* at 187, citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

#### **Must Be Specific**

An unspecific, generalized motion for directed verdict will be viewed on appeal as little better than no motion at all. In order to preserve the issue for appeal, the motion must specify the grounds for the motion. Failure to state a specific ground gives the appellate court nothing to rule on. Also, CR 50.01 says, in part: "A motion for directed verdict shall state the specific grounds therefore." *Pate v. Commonwealth*, 134 S.W.3d 593 (Ky. 2004), *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005). Even if your objection is simply that the evidence is insufficient, try to note which element of the offense is involved (age of victim, value of property, etc.).

#### **Timing**

A motion for directed verdict may be made at the end of the Commonwealth's case but must be made at the close of all the evidence. *Kimbrough v. Commonwealth*, 550 S.W.2d 525 (Ky. 1977), *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998). See also *Early v. Commonwealth*, 470 S.W.3d 729 (Ky. 2015). If a specific motion was made at the end of the Commonwealth's case, a later renewal of the motion "on the same grounds" will preserve the issue without need to repeat the specifics. *Hill v. Commonwealth*, 125 S.W.3d 221, 230 (Ky. 2004). If no defense evidence is presented, the motion need not be renewed because the court has heard no additional evidence. *Scruggs v. Commonwealth*, 566 S.W.2d 405 (Ky. 1978). If the court hears any more evidence after the close of the Commonwealth's case-in-chief, then the motion for directed verdict must be renewed, whether the presentation of additional evidence ends with the defense case or with the Commonwealth's rebuttal evidence. *Baker, supra*. "In effect, therefore, a motion for directed verdict made only at the close of one party's evidence loses any significance once it is denied and the other party, by producing further evidence, chooses not to stand on it." *Kimbrough*, at 529.

**Instructions**

Sometimes, in order to preserve your motions for directed verdict, you have to object to the giving of instructions also. When this is necessary depends upon whether your client may be guilty of a lesser included offense.

Kentucky courts have clearly interpreted a motion for directed verdict as a motion for acquittal on everything, i.e., on all counts. In *Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky. 1978), the court said that a directed verdict is only appropriate, “when the defendant is entitled to complete acquittal i.e. when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses.” Therefore, when your defense is that the evidence is insufficient to sustain a guilty verdict on any charge, your motions for directed verdict are sufficient to preserve the claim on appeal. See *Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006), *Noakes v. Commonwealth*, 354 S.W.3d 116 (Ky. 2011), holding that “a limited directed verdict does not exist,” at 119.

On the other hand, when the evidence may support a finding of guilt on a lesser included offense, then the court cannot properly grant a directed verdict (i.e., a complete acquittal). The proper procedure is then to object to the giving of instructions on the greater offense. This will preserve the issue of the sufficiency of the evidence as to any particular charge. “The proper procedure for challenging the sufficiency of evidence on one specific count is an objection to the giving of an instruction on that charge.” *Seay v. Commonwealth*, 609 S.W.2d 128, 130 (Ky. 1980). “[T]hat rule applies...when there are two or more charges and the evidence is sufficient to support one or more, but not all, of the charges. In that event, the allegation of error can only be preserved by objecting to the instruction on the charge that is claimed to be insufficiently supported by the evidence.” *Miller v. Commonwealth*, 77 S.W.3d 566, 577 (Ky. 2002), *Campbell v. Commonwealth*, 564 S.W.2d 528, 530-31 (Ky. 1978), *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977). It then becomes necessary to object to giving instructions on the greater charge and to tender to the court instructions on the lesser offense which may be supported by the evidence. *Kimbrough v. Commonwealth*, 550 S.W.2d 525 (Ky. 1977), *Campbell v. Commonwealth*, 564 S.W.2d 528 (Ky. 1978), *Baker v. Commonwealth*, 973 S.W.2d 54 (Ky. 1998), *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002), *Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006).

Once the motion for directed verdict was granted at the close of the prosecution’s case, it was a violation of double jeopardy to reinstate the charge at the close of all the evidence, because the defendant had been acquitted of the charge when the court granted the directed verdict at the close of the prosecution’s case. *Beaumont v. Commonwealth*, 295 S.W.3d 60 (Ky. 2009).

**Guilty Verdict**

It is never proper for a trial court to direct a verdict of guilty when there is a plea of not guilty, despite the fact that evidence of the defendant’s guilt may be both convincing and entirely uncontradicted. *Taylor v. Commonwealth*, 125 S.W.3d 216 (Ky. 2004).

**No Prosecution Appeal**

When a trial court grants a motion for directed verdict, an appeal by the prosecutor violates the defendant’s right of protection against double jeopardy. A directed verdict is an acquittal of the charges and a dismissal of the case with prejudice on the merits of the defendant’s factual guilt or innocence. *Cozzolino v. Commonwealth*, 395 S.W.3d 485 (Ky. App. 2012).

According to *R.S. v. Commonwealth*, 423 S.W.3d 178 (Ky. 2014), the proper motion for a directed verdict in a bench trial is a motion to dismiss under CR 41.02(2). The rule does not require that all evidence be evaluated in the light most favorable to the prosecution.

**VI. TO THE JURY****INSTRUCTIONS****GENERAL REQUIREMENTS****The Judge's Role is to Inform the Jury of the Law**

“Educating the jury on legal concepts is the function of the trial court.” *Rogers v. Commonwealth*, 315 S.W.3d 303, 307 (Ky. 2010). See also RCr 9.54(1): “It shall be the duty of the court to instruct the jury in writing on the law of the case....” Written jury instructions take precedence over any arguably contradictory oral statements made by the court, but defense counsel should object to any oral statements which contradict the written instructions. *McCloud v. Commonwealth*, 286 S.W.3d 780 (Ky. 2009).

**The Judge Must Instruct on the “Whole Law of the Case”**

“In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony.” *Sanders v. Commonwealth*, 301 S.W.3d 497, 500 (Ky. 2010), see also *Commonwealth v. Collins*, 821 S.W.2d 488 (Ky. 1991), *Gabow v. Commonwealth*, 34 S.W.3d 63 (Ky. 2000), *overruled on other grounds*. Jury instructions must be complete, and the defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions. *Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006).

**Lesser Included Offenses**

“When the prosecution adduces evidence warranting an inference of a finding of a lesser degree of the charged offense, the court should instruct on the lesser degree even though the defendant presents the defense of alibi.” *Reed v. Commonwealth*, 738 S.W.2d 818, 822-23 (Ky. 1987).

“Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence, that duty does not require an instruction on a theory with no evidentiary foundation. An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant’s guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.” *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). See also RCr 9.54(1). See below for a further discussion of lesser included offenses.

**Affirmative Defenses**

“[W]here a defendant admits he committed the offense charged and attempts to justify or excuse his act, his theory of the case must be presented to the jury in an appropriate instruction. . . . The jury instructions must be complete and the defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions.” *Hayes v. Commonwealth*, 870 S.W.2d 786, 788 (Ky. 1993)

This includes when defenses are presented in the alternative. Kentucky courts are bound to instruct on the whole law of the case, including alternative instructions when supported by the evidence.” *Morrow v. Commonwealth*, 286 S.W.3d 206, 213 (Ky. 2009) (Allowing the defendant to deny elements of the offense and assert a claim of entrapment.)

A client is not required to testify to invoke an affirmative defense, “but there must be sufficient other evidence of record to justify an instruction on [that defense.]” *Saxon v. Commonwealth*, 315 S.W.3d 293, 301 (Ky. 2010). See “Specific Defenses” for a additional information on affirmative defenses.

**Interpretation of Evidence**

Instructions cannot direct the jury on how to interpret the evidence. “[A]s a general matter, evidentiary matters should be omitted from the instructions and left to the lawyers to flesh out in

closing arguments.” *Harp v. Commonwealth*, 266 S.W.3d 813, 819 (Ky. 2008).

NOTES

### **Elements of the Offense**

Instructions should clearly instruct the jury on the elements of the offense. “[J]ury instructions should tell the jury what it must believe from the evidence in order to resolve each dispositive factual issue while still providing enough information to a jury to make it aware of the respective legal duties of the parties. . . . But instructions must not be so bare bones as to be misleading or misstate the law.” *Harp v. Commonwealth*, 266 S.W.3d 813, 819 (Ky. 2008).

Every element of the offense must be submitted to the jury. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the proscribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000).

### **Presumption of Innocence**

The Court is required to instruct on the presumption of innocence. In every case the jury shall be instructed substantially as follows: “The law presumes the defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him or her. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he or she is guilty. If upon the whole case you have a reasonable doubt that he or she is guilty, you shall find him or her not guilty.” RCr. 9.56(1).

### **Right to Remain Silent**

The instructions must contain the defendant’s right to remain silent, if requested. “The instructions shall not make any reference to a defendant’s failure to testify unless so requested by the defendant, in which event the court shall give an instruction to the effect that a defendant is not compelled to testify and that the jury shall not draw any inference of guilt from the defendant’s election not to testify and shall not allow it to prejudice the defendant in any way.” RCr 9.54(3).

### **Missing Evidence Instruction**

You may be entitled to a missing evidence instruction where the Commonwealth has destroyed evidence. It is proper to give an instruction which reads: “If you believe from the evidence that there existed [missing evidence] and that agents or employees of the Commonwealth intentionally destroyed it, you may, but are not required to, infer that the [missing evidence] would be, if available, adverse to the Commonwealth and favorable to the Defendant.” *Johnson v. Commonwealth*, 892 S.W.2d 558, 561 (Ky. 1994).

A missing evidence instruction may be warranted where the evidence is missing. See Coopers Jury Instructions. § 2.06A: “The Commonwealth has lost or released [several items of] evidence involved in this case [including][specifically][missing evidence]. In your deliberations, you may infer, but you are not required to infer, that this evidence, if available now, would be favorable to the defendant’s case.”

This may apply if the missing evidence is a witness. If requested, it would have been proper to give instruction that the jury “should draw no inference from the absence of a witness, because he was unavailable to either side.” *Clayton v. Commonwealth*, 786 S.W.2d 866, 868 (Ky. 1990)

## **PRESERVATION OF ERROR**

### **Requirement and Sufficiency of Objection**

“No party may assign as error the giving or the failure to give an instruction unless the party’s position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.” RCr 9.54(2).

A general objection to the giving of an instruction did not preserve error related to the contents of the instruction which was given. *Shelton v. Commonwealth*, 392 S.W.3d 433 (Ky. App. 2012); See also *McCranney v. Commonwealth*, 449 S.W.2d 914 (Ky. 1970).

## NOTES

Any objection to the jury instructions is waived once the jury begins deliberations. *Moran v. Commonwealth*, 399 S.W.3d 35 (Ky. App. 2013).

**Sufficiency of Tendered Instructions**

Tendering an instruction and arguing to the court in support of the instruction is not sufficient to preserve the objection. A party must specifically object to the instructions given by the court before the court gives those instructions. *Commonwealth v. Collins*, Ky., 821 S.W.2d 488 (Ky. 1991). Tendered instructions did not preserve error where the instructions were filed with a disclaimer, were not mentioned during the instruction conference, and no objection to the instructions were made. *Smith v. Commonwealth*, 370 S.W.3d 871 (Ky. 2012).

The court's failure to include an instruction requiring the jury to find the defendant guilty of manslaughter rather than murder if they had a reasonable doubt about whether the defendant was acting under an extreme emotional disturbance "was not preserved for appeal because Appellant did not object to the instructions on these grounds, make an appropriate motion, or tender such an instruction." *Sherroan v. Commonwealth*, 142 S.W.3d 7, 23 (Ky. 2004). In order to preserve the claim the defendant must seek an appropriate reasonable doubt instruction. It is not sufficient to seek to add the required language into the manslaughter instruction. *Elery v. Commonwealth*, 368 S.W.3d 78 (Ky. 2012)

An error in a defense tendered instruction was still preserved for review where the defendant specifically objected to that aspect of the instruction. *Elery v. Commonwealth*, 368 S.W.3d 78 (Ky. 2012).

**Effect of Failure to Preserve**

Unpreserved error in failing to give an instruction is not reviewable on appeal. *Bartley v. Commonwealth*, 400 S.W.3d 714 (Ky. 2013); *Martin v. Commonwealth*, 409 S.W.3d 340 (Ky. 2013); *Roberts v. Commonwealth*, 410 S.W.3d 606 (Ky. 2013). Unpreserved error in a defense tendered instruction is not reviewable on appeal. *Thornton v. Commonwealth*, 421 S.W.3d 372 (Ky. 2013); *Noakes v. Commonwealth*, 354 S.W.3d 116 (Ky. 2011). Unpreserved error when the error was known to defense counsel at the time the instructions were agreed to and defense counsel did not object is not reviewable on appeal. *Graves v. Commonwealth*, 384 S.W.3d 144 (Ky. 2012). Unpreserved error in a court instruction is reviewable on appeal only as palpable error. *Owens v. Commonwealth*, 329 S.W.3d 307 (Ky. 2011).

Erroneous or defective jury instructions are presumptively prejudicial and subject to harmless error analysis. They will be analyzed for palpable error when the error is unpreserved and the instructions allow the jury to find guilt under the instructions which do not, on their face, constitute the crimes charged. *Stewart v. Commonwealth*, 306 S.W.3d 502 (Ky. 2010).

**UNANIMOUS VERDICT**

Multiple theories in the same instruction are permitted. Alternate legal theories in the same instruction, when both alternatives are supported by the evidence do not violate the requirement of a unanimous verdict. *Smith v. Commonwealth*, 370 S.W.3d 871 (Ky. 2012); *Buchanan v. Commonwealth*, 399 S.W.3d 436 (Ky. 2012).

**Prohibited Instructions**

The following situations violate the defendant's right to a unanimous verdict:

Different factual offenses in the same instruction. *Kingrey v. Commonwealth*, 396 S.W.3d 824 (Ky. 2013) (date range in instructions could have related to two separate instances of unlawful transaction with a minor); *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013) (date range in instructions could have related to two separate acts of criminal abuse); *Little v. Commonwealth*, 422 S.W.3d 238 (Ky. 2013) (instructions failed to differentiate between two different acts of wanton endangerment). When a defendant is charged with multiple counts of the same offense, the instructions themselves must factually differentiate each count. This error cannot be cured by the Commonwealth differentiating the counts during closing argument. *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008), *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009), *Banks v.*

*Commonwealth*, 313 S.W.3d 567 (Ky. 2010).

Not requiring the jury to determine an element of the offense which effects the sentencing range until sentencing. *Rodriguez v. Commonwealth*, 396 S.W.3d 916 (Ky. 2013) (In which the judge did not submit the age of the victim to the jury until sentencing.)

Separate instructions which do not differentiate between offenses. *Alford v. Commonwealth*, 338 S.W.3d 240 (Ky. 2011) (Finding no error because the instructions differentiated between what physical conduct would constitute which charge – rape in count one and sodomy in count two.) Instructions on alternative legal theories where one is not supported by the evidence. *Acosta v. Commonwealth*, 391 S.W.3d 809 (Ky. 2013); *Smith v. Commonwealth*, 366 S.W.3d 399 (Ky. 2012); *Mason v. Commonwealth*, 331 S.W.3d 610 (Ky. 2011)

## DEFENSES

### Defense Theory of the Case

The rule is that the defendant's contention that he is not guilty is adequately presented to the jury in that part of the instructions requiring him to be acquitted unless he is proven guilty beyond a reasonable doubt. But when he admits one or more of the essential elements of the crimes charged but attempts to avoid conviction by proving facts or circumstances in excuse (i.e., relies on an affirmative defense), "such defendant is entitled to a concrete or definite and specific instruction on the defendant's theory of the case." *Hayes v. Commonwealth*, 870 S.W.2d 786, 788 (Ky. 1993). See also, e.g., *Slaven v. Commonwealth*, 962 S.W.2d 845 (Ky. 1997) (intoxication), *Sanborn v. Commonwealth*, 754 S.W.2d 534, 549-550 (Ky. 1988), *Kohler v. Commonwealth*, 492 S.W.2d 198 (Ky. 1973), *Rudolph v. Commonwealth*, 504 S.W.2d 340 (Ky. 1974), and *Taylor v. Commonwealth*, 995 S.W.2d 355 (Ky. 1999). "All substantive law related to criminal responsibility, including general principles of liability, accountability, justification and responsibility ... is now statutory, and instructions should be stated within the context of the statutory framework." *McGuire v. Commonwealth*, 885 S.W.2d 931, 936 (Ky. 1994).

### Includes Alternative Theories

In *Morrow v. Commonwealth*, 286 S.W.3d 206 (Ky. 2009) the court has re-emphasized the duty to give instructions on the whole law of the case, including alternative theories, even if that might result in inconsistent defense instructions.

### Defendant Not Required to Testify

"The defendant need not testify in order to invoke [an affirmative defense] but there must be sufficient other evidence of record to justify an instruction on [that defense.]" *Saxton v. Commonwealth*, 315 S.W.3d 293, 301 (Ky. 2010); *Wyatt v. Commonwealth*, 219 S.W.3d 751 (Ky. 2007) (a defendant does not have to testify to obtain an entrapment instruction if evidence supports it from prosecution or other defense witnesses); *Saxton v. Commonwealth*, 315 S.W.3d 293 (Ky. 2010).

### Burden of Proof

When something is identified as a defense (choice of evils, self-defense, intoxication, etc.) the defendant has the burden of production to justify an instruction on the defense. Once that burden has been met, the burden of proof is on the prosecution to prove the absence of the defense beyond a reasonable doubt. That burden requires the instructions to include negating the defense as an element of the offense. *LaPradd v. Commonwealth*, 334 S.W.3d 88 (Ky. 2011); See KRS 500.070.

This does not apply to "exculpation" defenses (e.g. insanity), where the defendant bears the burden to prove the defense by a preponderance of the evidence.

### Specific Defenses: Justification

**Choice of Evils-** KRS 503.030.

**Self Defense** - KRS 503.050, 503.055. "Once a defendant produces evidence that he acted in

NOTES

## NOTES

self-protection, the burden of proof as to that issue shifts to the Commonwealth and is assigned by including as an element of the instruction on the offense ‘that he was not privileged to act in self-protection.’” *Estep v. Commonwealth*, 64 S.W.3d 805, 811 (Ky. 2002). Defense of self-protection is available for crimes with mental states other than intent, i.e. wanton murder, second degree manslaughter and reckless homicide and, if sufficient proof is presented, the absence of self-protection must be included in those instructions. See also *Elliot v. Commonwealth*, 976 S.W.2d 416 (Ky. 1998).

An actual mistaken belief in the need to use self-protection that is not wantonly or recklessly held requires acquittal. *Commonwealth v. Hager*, 41 S.W.3d 828, 836 (Ky. 2001).

A murder instruction which, even though properly including absence of self-defense as an element, required the jury to find the defendant guilty before considering the nature of self-defense, was erroneous. *Commonwealth v. Hager*, 41 S.W.3d 828, 836 (Ky. 2001).

The defendant was entitled to instructions on self-defense, even though he did not testify, and evidence supporting his belief in the need for the use of force was not strong or free from contradiction. *Hilbert v. Commonwealth*, 162 S.W.3d 921 (Ky. 2005).

The defendant was not entitled to a self-defense instruction on multiple assailants, where the defense theory was that each assailant posed an individual threat, and the instructions permitted a finding of self-defense on that theory. *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013)

An instruction on provocation must include language that the defendant acted with intent to cause injury to the victim. *Barker v. Commonwealth*, 341 S.W.3d 112 (Ky. 2011).

The Commonwealth is not entitled to a “no duty to retreat” instruction on behalf of the victim, where the victim was on his own property at the time of the incident. *Jones v. Commonwealth*, 366 S.W.3d 376 (Ky. 2011).

A judge can give wanton and intentional murder instructions even if the defendant claims self-defense. *Allen v. Commonwealth*, 5 S.W.3d 137 (Ky. 1999).

Defenses of self-defense and accident are mutually exclusive. *Grimes v. McAnulty*, 957 S.W.2d 223 (Ky. 1997).

**Imperfect Self-Defense** - Evidence of imperfect self-defense would justify an instruction on reckless homicide or manslaughter second, but not wanton murder. *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013); *Commonwealth v. Rose*, 725 S.W.2d 588 (Ky. 1987) *overruled on other grounds*.

Actual mistaken belief in the need to use self-defense that is wantonly or recklessly held, requires an instruction on second degree manslaughter or reckless homicide. The instruction on imperfect self-defense was flawed when it asked whether the defendant was mistaken in his need to protect himself rather than his belief in the need to protect himself. “[F]ocus of the penal code is on the defendant’s actual subjective belief in the need for self-protection and not on the objective reasonableness of that belief.” *Commonwealth v. Hager*, 41 S.W.3d 828, 836 (Ky. 2001).

### Specific Defenses: Responsibility

**Insanity** - KRS 504.020. “[T]his Court has repeatedly held that the burden of proof on insanity does not shift to the Commonwealth. In fact, we recently dealt with this issue in *Star v. Commonwealth*, and reaffirmed this principle, noting the long-standing rule in Kentucky is that “[t]he burden of proof as to the question of a defendant’s sanity at the time of a homicide never shifts from the defendant. *Star v. Commonwealth*, 313 S.W.3d 30, 35 (Ky.2010),” quoted in *Thornton v. Commonwealth*, 421 S.W.3d 372, 377 (Ky. 2013).

It was not error for the trial court to include the statutory definition of mental illness instructions where the defendant raised an insanity defense. *Noakes v. Commonwealth*, 354 S.W.3d 116 (Ky. 2011).

The defendant was not entitled to an instruction on the consequences of a verdict of not guilty by reason of insanity. *Edwards v. Commonwealth*, 554 S.W.2d 380 (Ky. 1977).

RCr 9.55 states: “On request of either party in a trial by jury of the issue of the absence of criminal responsibility for criminal conduct, the court shall instruct the jury at the guilt/innocence phase as to the dispositional provisions applicable to the defendant if the jury returns a verdict of not criminally responsible by reason of mental illness or retardation, or guilty but mentally ill.”

### Specific Defenses: Liability

**Intoxication** - KRS 501.080. “Intoxication is a defense to a criminal charge only if such condition either:(1) Negatives the existence of an element of the offense; or (2) Is not voluntarily produced and deprives the defendant of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.” KRS 501.080.

Evidence of alcohol or drug use is not enough. “There must be something in the evidence reasonably sufficient to support a doubt that the defendant knew what he was doing.” *Jewell v. Commonwealth*, 549 S.W.2d 807, 812 (Ky. 1977), *overruled on other grounds* .

Cases where evidence supported an intoxication instruction: *Jewell, supra* (defendant claimed at trial he was not drunk but could not remember the crime; others testified he was drunk); *Nichols v. Commonwealth*, 142 S.W.3d 683 (Ky. 2004); *Brown v. Commonwealth*, 575 S.W.2d 451 (Ky. 1978); *Mishler v. Commonwealth*, 556 S.W.2d 676, 680 (Ky. 1977) (finding reversible error in the denial of an intoxication instruction even where the defendant’s convenient memory loss during the actual commission of offense was preposterous. The jury should have been able to consider and decide for itself).

**Ignorance or mistake** - KRS 501.070. Mistake of fact which negates the existence of a mental state which is an essential element of the offense requires the court to instruct on this defense. The mistake must be reasonable and the act justified must be taken under bona fide mistaken belief. *Cheser v. Commonwealth*, 904 S.W.2d 239 (Ky. App. 1994), *overruled on other grounds*. Duress- KRS 501.090. The defendant was entitled to an instruction on duress based on his own testimony that the co-defendant threatened his life even though the factual predicate for his claim was implausible at best. *Taylor v. Commonwealth*, 995 S.W.2d 355 (Ky. 1999).

**Innocent Possession** –KRS 218A.220. KRS 218A.220 creates a right to instructions on “innocent possession” when the defense is that the drugs were confiscated and held to be turned over to police and when the facts are sufficient to warrant the instruction. *Commonwealth v. Adkins*, 331 S.W.3d 260 (Ky. 2011). (One may also possess pornography on a computer without knowing it. See, e.g., *Crabtree v. Commonwealth*, 455 S.W.3d 390 (Ky. 2014) in which a motion for directed verdict should have been granted on charges of possession of pornography on a computer because the evidence did not show the defendant would have had to know the pornography was on the computer.)

**Entrapment** - KRS 505.010. In a trafficking case, the defendant was entitled to an instruction on entrapment since his testimony that he (1) never transferred drugs before, (2) only knew where to locate cocaine because of his prior usage, and (3) received no benefit from his participation in the transfer of cocaine other than satisfying an undercover police informant for whom he had feelings, supports his entrapment defense. *Farris v. Commonwealth*, 836 S.W.2d 451 (Ky. App. 1992).

If a defendant claiming an entrapment defense satisfies the burden to demonstrate that he was induced to engage in the criminal conduct by a government agent seeking to obtain evidence against him for the purpose of criminal prosecution, the burden then shifts to the prosecution to prove beyond a reasonable doubt that the defendant was predisposed to engage in the criminal act prior to inducement by the government or its agent. Evidence supported the finding that the defendant, induced by the government informant to engage in a transaction involving sale of prescription drugs, was not predisposed to engage in drug trafficking, and thus defendant was

## NOTES

entitled to a jury instruction on an entrapment defense in a prosecution for complicity to commit first degree trafficking in a controlled substance. Although there were rumors that the defendant had been involved in the drug trade, the defendant, employed as a part-time deputy jailer at the time of his arrest, had never been in any trouble prior to his arrest, he repeatedly indicated to the informant that he did not sell drugs and was not involved in drugs, and he was not initially named by the informant as being among the people known to have involvement in the drug trade. *Morrow v. Commonwealth*, 286 S.W.3d 206. (Ky. 2009).

### LESSER INCLUDED OFFENSES

#### Definition

KRS 505.020(2): A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

- It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
- It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property[,] or public interest suffices to establish its commission

Kentucky does not use a “same elements” test, but rather a fact based approach. *Hall v. Commonwealth*, 337 S.W.3d 595 (Ky. 2011).

#### When Required

Lesser included offenses are not technically defenses to any charge, but the defendant is entitled to instructions on them because, in fact and principle, lesser included offenses are defenses against conviction of a higher charge. A judge is required to give instructions on lesser included offenses under his obligation to instruct on the whole law of the case, but does not have to offer them sua sponte, nor does he have to give them in the absence of an evidentiary foundation. See, e.g., *Ward v. Commonwealth*, 695 S.W.2d 404, 406 (Ky. 1985); *Trimble v. Commonwealth*, 447 S.W.2d 348 (Ky. 1969); *Martin v. Commonwealth*, 571 S.W.2d 613 (Ky. 1978); *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977); *Clifford v. Commonwealth*, 7 S.W.3d 371 (Ky. 1999). An instruction on lesser included offenses is also required when it is the prosecution that presents evidence which might support such an instruction. *Commonwealth v. Collins*, 821 S.W.2d 488 (Ky. 1991).

The defendant was entitled to lesser included offense instruction where the jury could have had reasonable doubt as to greater offense but believe that the defendant was guilty of the lesser beyond a reasonable doubt. Differences in the level of injuries are usually sufficient to establish an entitlement to a lesser offense instruction. *Swan v. Commonwealth*, 384 S.W.3d 77 (Ky. 2012).

Differences in mental state will justify a lesser included offense instruction only if a juror could have a reasonable doubt that the defendant possessed the greater mental state, but still believe beyond a reasonable doubt that he possessed the lesser mental state. *Hudson v. Commonwealth*, 385 S.W.3d 411 (Ky. 2012).

The Commonwealth cannot avoid a lesser included offense instruction merely through artful pleading. So, for example, a defendant charged with wanton murder could get an “intent to injure” instruction for manslaughter in the first degree, even though the mental states were different, so long as the jury could have a reasonable doubt as to the greater and believe in the lesser beyond a reasonable doubt. *Allen v. Commonwealth*, 338 S.W.3d 252 (Ky. 2011).

“When the prosecution adduces evidence warranting an inference of a finding of a lesser degree of the charged offense, the court should instruct on the lesser degree even though the defendant presents the defense of alibi.” *Reed v. Commonwealth*, 738 S.W.2d 818, 822-23 (Ky. 1987).

**Proper Procedure**

A defendant who submits a lesser included offense instruction has also waived objections to sufficiency of the evidence for the greater offense, unless the defendant objects to the giving of an instruction on the greater offense. *Seay v. Commonwealth*, 609 S.W.2d 128, 130 (Ky. 1980).

**Effect of Requesting or Failing to Request**

RCr 9.54 imposes upon the party the duty to inform the trial court of its preferences regarding “the giving or the failure to give” a specific jury instruction. Therefore, when the allegation of instructional error is that a particular instruction should have been given but was not or that it should not have been given but was given, RCr 9.54 operates as a bar to appellate review unless the issue was fairly and adequately presented to the trial court for its initial consideration. *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013).

**Specific Offenses**

Assault in the first degree can be a lesser included offense of attempted murder. *Perry v. Commonwealth*, 839 S.W.2d 268 (Ky. 1992); *Hall v. Commonwealth*, 337 S.W.3d 595 (Ky. 2011)

Theft can be lesser included offense of robbery. *Jordan v. Commonwealth*, 703 S.W.2d 870 (Ky. 1981)

Receiving can be a lesser included offense of theft. *Conklin v. Commonwealth*, 799 S.W.2d 582 (Ky. 1990).

A defendant who submits a lesser included offense has waived any objection to conviction for that offense. Example: Submitting a misdemeanor instruction as a lesser included offense waives the one-year statute of limitations on prosecution of a misdemeanor contained in KRS 500.050(2). *Commonwealth v. Oliver*, 253 S.W.3d 520 (Ky. 2008).

Possession of a controlled substance is a lesser included offense of trafficking. *Jackson v. Commonwealth*, 633 S.W.2d 61 (Ky. 1982).

The evidence supported a jury instruction on the lesser-included offense of unlawful possession of a methamphetamine precursor in the prosecution for manufacturing methamphetamine. The officer testified that a plastic jar of salt was seized from the defendant’s home and later destroyed, the officer could not describe the salt with any detail, and the salt was not tested to determine if it was the salts of isomers of ephedrine, pseudoephedrine, or phenylpropanolamine. *Burd v. Commonwealth*, (Ky. 2012) 2012 WL 5289418, Ky., Oct. 2012, *unpublished*.

There is no such thing as attempted wanton murder or attempted manslaughter 1st (when there is no evidence of extreme emotional disturbance) for the same reason in each case: one cannot intentionally attempt to commit an unintentional act. *Prince v. Commonwealth*, 987 S.W.2d 324 (Ky. App. 1997), *Holland v. Commonwealth*, 114 S.W.3d 792 (Ky. 2003), *Hall v. Commonwealth*, 337 S.W.3d 595 (Ky. 2011).

**COMPLICITY AND FACILITATION****Complicit Conduct**

A person is liable under a complicity theory when (with the appropriate mental state) he:

- (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
- (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so. KRS 502.020.

**Complicit Mental State**

The complicity statute has two theories of liability, which are based on the mental state of the defendant:

## NOTES

**Complicity to Act**

Applicable only to offenses where the conduct constitutes the offense (e.g. theft). *Tharp v. Commonwealth*, KRS 40 S.W.3d 356 (Ky. 2001). It requires that the defendant engaged in complicit conduct “with the intention of promoting or facilitating the commission of the offense.” KRS 502.020(1).

**Complicity to Result**

Applicable only to offenses where “causing a particular result is an element of the offense” (e.g., murder). *Tharp*, supra. It requires the defendant to act “with the kind of culpability with respect to the result that is sufficient for the commission of the offense. KRS 502.020(2).

The mental state must be included in a complicity instruction. *Young v. Commonwealth*, 426 S.W.3d 577 (Ky. 2014).

**When Complicity Applies**

The complicity statute only applies where the defendant’s conduct meets the requirements of KRS 502.020 but is not sufficient to constitute the principal offense. So, for example, a person who acts as a middleman between drug distributor and drug dealer, transferring controlled substances from the former to the latter, is not entitled to a complicity instruction, because the offense of trafficking was complete when the transfer was made. *Commonwealth v. Day*, 983 S.W.2d 505 (Ky. 1999).

**Intent Element Required**

Failure to include the element of intent in complicity instructions is reversible error. *Harper v. Commonwealth*, 43 S.W.3d 261 (Ky. 2001). An instruction which requires that the jury make only a finding of the intent of the principal actor, and not the defendant, is palpable error. *Staples v. Commonwealth*, 454 S.W.3d 803 (Ky. 2014). However, failure to include the intent element in an instruction defining the offense was cured by an instruction defining complicity as “Complicity—means that a person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he solicits commands or engages in a conspiracy with such other person to commit the offense, or aids, counsels, or attempts to aid such person in planning or committing the offense”. *Delacruz v. Commonwealth*, 324 S.W.3d 418, 421 (Ky. App. 2010).

**Difference Between Facilitation and Complicity**

“Under either statute [complicity or facilitation], the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance. Facilitation reflects the mental state of one who is ‘wholly indifferent’ to the actual completion of the crime.” *Thompkins v. Commonwealth*, 54 S.W.3d 147, 150-51 (Ky. 2001).

Facilitation is a Lesser Included Offense of Complicity - “[A]n instruction on facilitation as a lesser-included offense of complicity is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant’s guilt of the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.” *Dixon v. Commonwealth*, 263 S.W.3d 583, 586 (Ky. 2008).

**SENTENCING****PFO**

The Court has found palpable error where a criminal defendant was convicted of being a PFO when the facts necessary to convict him thereof, although capable of being proved, were not in the jury instructions. See *Carver v. Commonwealth*, 303 S.W.3d 110, 123 (Ky. 2010); *Sanders v. Commonwealth*, 301 S.W.3d 497, 499–500 (Ky. 2010).

The Court has also found palpable error where the facts necessary to convict the defendant

of being a first-degree PFO were incapable of being proved because the Commonwealth only offered proof that the defendant had been convicted of one felony before the commission of the underlying offense. *Blane v. Commonwealth*, 364 S.W.3d 140, 154 (Ky. 2012).

An instruction on being a first-degree persistent felony offender, stating that defendant's prior offenses had been "committed as a persistent felony offender, second-degree," was error. Whether the defendant had PFO status at the time of his prior convictions was immaterial to the first-degree PFO charge against defendant. *Owens v. Commonwealth*, 329 S.W.3d 307 (Ky. 2011).

An erroneous instruction allowing conviction of being a first-degree persistent felony offender (PFO) based on prior convictions for misdemeanor third-degree arson and felony theft was palpable error requiring reversal, although the defendant could have been convicted as PFO if the jury had been properly instructed. *Carver v. Commonwealth*, 303 S.W.3d 110 (Ky. 2010).

A defendant is entitled to an instruction on the defendant's failure to testify under RCr 9.54(3), upon request, in a persistent felony offender proceeding. *Hibbard v. Commonwealth*, 661 S.W.2d 473 (Ky. 1983).

### **Combined TIS/PFO Sentencing**

If the accused is also charged as a persistent felony offender (PFO), the penalty phase and a PFO phase can be combined and the jury in the combined bifurcated hearing could be instructed to (1) fix a penalty on the basic charge in the indictment, (2) determine then whether the defendant is guilty as a PFO, and if so, (3) fix the enhanced penalty as a persistent felony offender. This is the better practice for trial courts to follow during the penalty phase. *Owens v. Commonwealth*, 329 S.W.3d 307 (Ky. 2011).

### **Consecutive/Concurrent Recommendation**

Although not binding on a trial judge, a jury "shall recommend" whether a defendant's sentences should run concurrently or consecutively. This Court has recognized that due process entitles a defendant to this jury recommendation, which "is far from meaningless or pro forma, and ... has 'significance, meaning, and importance.'" *Davis v. Commonwealth*, 365 S.W.3d 920, 922 (Ky. 2012), citing KRS 532.055 (2) and *Lawson v. Commonwealth*, 85 S.W.3d 571, 584 (Ky. 2002), *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008).

Instructions to the jury discussing penalty ranges are not permissible during the guilt phase. *Day v. Commonwealth*, 361 S.W.3d 299 (Ky. 2012).

## **MISCELLANEOUS**

### **Reasonable Doubt**

RCr 9.56 explicitly prohibits instructing the jury on the definition of "reasonable doubt." For a review of existing authority see *Smith v. Commonwealth*, 410 S.W.3d 160 (Ky. 2013).

### **Interrogatories**

Trial courts may use fact-based interrogatories (special verdicts) in the jury instructions in a criminal case if, and only if, the interrogatories are accompanied by verdict forms which authorize the return of general verdicts. The interrogatories cannot take a jury step-by-step to any one verdict, and the court cannot direct a general verdict of guilty based upon the jury's answer to the interrogatories. They should be used only sparingly and with due consideration of the defendant's rights to due process. *Commonwealth v. Durham*, 57 S.W.3d 829 (Ky.2001).

## NOTES

**Checklist of objections to certain jury instructions**

- Did you tender instructions or object to instructions to preserve error? RCr 9.54.
  - Did you tender instructions with “a disclaimer,” waive them, or not object to the final instructions? See *Smith v. Com.*, 370 S.W.3d 871 (Ky. 2012).
- Are you specific with your objections to the instructions?
- Did you make sure your objection to a particular instruction is on the record?
  - If the conference is in chamber’s and not recorded, repeat objection in court
- Does the instruction instruct the jury on every element of the offense?

**Object if:**

- Multiple jury instructions are identical. *Miller v. Com.*, 283 S.W.3d 690 (Ky. 2009).
- An instruction has multiple theories. *Travis v. Com.*, 327 S.W.3d 456 (Ky. 2010).
- Multiple theories in definition. *Carver v. Com.*, 328 S.W.3d 206 (Ky. App. 2010).
- A presumption of innocence instruction is not given.
- The defendant’s right to remain silent instruction is requested and not given.
- The judge does not grant a missing evidence instruction. See *Johnson v. Com.*, 892 S.W.2d 558 (Ky. 1994).
- In an instruction for complicity, the instruction lacks an element regarding the Defendant’s intent to promote for facilitate the commission of the offense.
- An instruction includes *mens rea* for a result or conduct.
  - “A person acts intentionally with respect to a result or to a conduct...” The “conduct” language is immaterial to results-only crimes.
- The judge refuses to instruct on facilitation as a lesser included offense to complicity when there is evidence of the defendant being “wholly indifferent’ to the actual completion of the crime.” See *Thompkins v. Com.*, 54 S.W.3d 147, 150-51 (Ky. 2001).
- Your jurisdiction follows Cooper’s, but the Cooper’s instruction doesn’t track the statute.

**Checklist for drafting instructions**

- Do not rely on Cooper’s
  - “The works of Palmore and Cooper, or any other established authorities, while invaluable, are not holy writs.” *Commonwealth v. Leinenbach*, 351 S.W.3d 645, 646 (Ky. 2011).
- Do your own instructions before trial. If available, let co-counsel do it.
- Ensure the instructions are filed in the record, not sealed.
- Insert the definitions into the instructions, not a separate definitions section.
- You must have a jury finding on every essential element of the crime.
  - e.g., whether an item is a dangerous instrument or deadly weapon.

**Instructions for Specific Crimes**

- Tampering with physical evidence instructions - must specifically identify the evidence being tampered with. *Owens v. Com.*, 329 S.W.3d 307 (Ky. 2011).
- Escape 2nd degree – must include the element of escape from detention center. *Lawton v. Com.*, 354 S.W.3d 565 (Ky. 2011).
- Fleeing and Evading 1st Degree (DV) – must include the definition of “unmarried couple.” *Wright v. Com.*, 391 S.W.3d 743 (Ky. 2012).
- Incest – must include the age element as part of guilt phase instructions. *Rodriguez v. Com.*, 396 S.W.3d 916 (Ky. 2013).
- Criminal abuse – no requirement of a specific instruction describing the defendant’s duty to care for the victim, *Bartley v. Commonwealth*, 400 S.W.3d 714 (Ky. 2013).
- Drug paraphernalia – improper to instruct on possession of “crack pipes and/or foil”, where there is no evidence of foil. *Jackson v. Commonwealth*, 343 S.W.3d 647 (Ky. 2011) (finding no palpable error). No requirement to use the word “knowingly.” *Perdue v. Commonwealth*, 411 S.W.3d 786 (Ky. App. 2013).

- Assault in the 3d Degree – instruction must include element that the defendant knew victim was a police officer acting in the course of his duties, *Mullikan v. Commonwealth*, 341 S.W.3d 99 (Ky. 2011).
- Rape – where the jury instructions did not include both age and forcible compulsion, the offense was a Class B felony, notwithstanding that age was undisputed. *Newman v. Commonwealth*, 366 S.W.3d 435 (Ky. 2012).
- Drug Possession cases – where the facts would support a theory that the defendant possessed drugs only with intent to turn them over to law enforcement, the defendant is entitled to an “innocent possession” instruction. *Commonwealth v. Adkins*, 331 S.W.3d 260 (Ky. 2011).
- Robbery – the defendant is entitled to an instruction requiring the jury to find that he intended the co-defendant to complete the robbery. *Goncalves v. Commonwealth*, 404 S.W.3d 180 (Ky. 2013).

#### Other Instructions

- An instruction on EED is only appropriate if there is definite, non-speculative evidence of a “triggering event” which causes an emotional disturbance. *Driver v. Commonwealth*, 361 S.W.3d 877 (Ky. 2012).
- A criminal facilitation instruction is generally only proper where the defendant is charged as an accomplice, not as the principal offender. *Roberts v. Commonwealth*, 410 S.W.3d 606 (Ky. 2013).

#### Differentiating Between “Result” Offenses and “Act” Offenses

If crime is a “result” offense (assault, murder) then a complicity to the result instruction should be used. If the crime is an “act” offense, then complicity to the act instruction should be used. *Peacher v. Commonwealth*, 391 S.W.3d 821 (Ky. 2013).

It is often necessary to determine whether the offense charged is a “result” offense, or an “act” offense (sometimes referred to as a “conduct” offense). The distinction is easily stated but sometimes hard to apply. If the offense is defined in terms of causing a particular result, i.e., causing death or causing property damage, it is a result offense. All other crimes are defined in terms of engaging in particular conduct, e.g. stealing, and are regarded as “act” or “conduct” offenses.

#### Mental State Instructions

Almost every offense has a required mental state, which is either expressly stated in the statute, or implied by the context. See KRS 501.040 (providing that even when no mental state is stated, one may be required by context). However, the precise formulation of the mental state depends upon whether the offense is a result offense or an act offense.

Proper definitions are as follows:

If the judge offers instructions inconsistent with the instructions listed above, object on the grounds that the instructions deny your client a unanimous verdict. See *Commonwealth v. Whitmore*, 92 SW3d 76 (Ky. 2002) (The instruction defining “trafficking” to include several theories not supported by the evidence denied the defendant a unanimous verdict).

**Practice Tip:** Tendering Instructions. Any instructions requested and denied by the court should be tendered and placed in the record for review. (Beware that some judges do not automatically place tendered instructions into the record.) If you object to giving instructions on a specific charge but then tender instructions on that charge anyway, state for the record that you are not waiving your objection to the giving of instructions but that, if the court is going to give instructions, these are the instructions you would move the court to adopt.

**Practice Tip:** Jury Instruction Conferences. Jury instruction conferences often take place in the judge’s chambers and are not on the record. Many judges then go back on the record regarding the matter of instructions once everyone returns to the courtroom. If the judge does not do this you should either move the court to put the conferences on the record or, once you return into the courtroom, state for the record; (1) whether you tendered instructions, and (2) any objections you made to the giving of instructions or to the contents of any instructions.

**Legal Standard**

The prosecutor is given wide latitude in closing argument, *Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky. 2002), *Bowling v. Commonwealth*, 873 S.W.2d 175 (Ky.1993), but the prosecutor may not cajole or coerce the jury to reach a verdict. *Lycans v. Commonwealth*, 562 S.W.2d 303 (Ky. 1978). Except in extraordinary circumstances, a proper ruling is usually to remind the jury that argument of counsel is not evidence and that the jury is charged with the duty to recall the evidence. *Commonwealth v. Petry*, 945 S.W.2d 417 (Ky. 1997). The standard for reversal in cases of prosecutorial misconduct during closing argument is either: (1) misconduct which is “flagrant,” or (2) the proof of the defendant’s guilt is not overwhelming and defense counsel objected and the trial court refused to sustain the objection or cure the error with a sufficient admonition to the jury. *Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky. 2002), *U.S. v. Dakota*, 188 F.3d 664 (6th Cir. 1999).

Nevertheless, prosecutorial misconduct can also have a cumulative effect throughout a trial. In that case, the test on appeal is the overall fairness of the trial, not the personal culpability of the prosecutor. The misconduct must be so serious as to render the entire trial fundamentally unfair. *Soto v. Commonwealth*, 139 S.W.3d 827 (Ky. 2004), *U.S. v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), *Summitt v. Bordenkircher*, 608 F.2d 247 (6th Cir. 1979).

**Object!**

Notice that the legal standard for misconduct during closing arguments requires that defense counsel object to the improper argument. Failure to object waives the issue on appeal. *Johnson v. Commonwealth*, 892 S.W.2d 558, 562 (Ky. 1994), *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003), *Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky. 2002). Counsel must make a contemporaneous objection (RCr 9.22) to the improper argument and move for a mistrial. Counsel should always invoke Section 2 of the Kentucky Constitution and the Due Process Clause of the 14th Amendment to the U.S. Constitution to support the objection and motion for mistrial. Counsel should resist the judge’s offer to give the jury a “curative” instruction or an admonition, rather than grant a mistrial. Counsel should point out that such an instruction or admonition is insufficient to cure the prejudice. (See “Admonitions.”).

In fact, some decisions from the Kentucky Supreme Court have made it clear that the court may have reversed the defendant’s convictions if only counsel for the defendant had objected during closing argument.

In *Brewer v. Commonwealth*, 206 S.W.3d 343, 351 (Ky. 2006) the prosecutor told the jury they needed to “send a message” to the community by convicting the defendant. Defense counsel did not object. The court said: “Lest this opinion be misconstrued, we do find that the Commonwealth’s exhortation to this jury to ‘send a message’ to the community was improper. We strongly urge the prosecutors throughout the Commonwealth to use extreme caution in making similar arguments. Indeed, had a timely objection been made, we may have found the Commonwealth’s comments to constitute reversible error.”

And in *Scott v. Commonwealth*, 2006 WL 3751391, Ky., Dec. 2006, *unpublished*, the prosecutor again argued that the jury should “send a message.” The court said that, “...had the issue been preserved, a more rigorous analysis would have been required. Thus, while such comments do not constitute manifest error in the instant case, we note that, generally, any benefit the Commonwealth perceives in utilizing such an argument is far outweighed by the risk of reversal on appeal.”

Compare those two cases with *Barnes*, supra, in which in court sustained 29 objections by defense counsel during the prosecutor’s closing argument, and admonished the jury 11 times. Nevertheless, the conviction was still reversed because the court refused to sustain an objection to the prosecutor’s statement to the jury that finding the defendant innocent would be the only crime greater than the murder itself.

What if the trial court forbids attorneys to object during closing arguments? “We cannot hold trial counsel strictly accountable to the rules regarding making contemporaneous objections when the record suggests counsel was repeatedly denied a reasonable opportunity to make a record.” *Alexander v. Commonwealth*, 864 S.W.2d 909, 915 (Ky. 1993). Think about starting the trial with a detailed motion in limine regarding improper argument during closing, and if possible, offer to make avowals of the grounds for your objections.

### **Request Relief!**

If an objection is overruled, the contemporaneous objection (RCr 9.22) preserves the issue on appeal. On the other hand, if an objection is sustained, there is no further issue preserved for appeal unless the defendant also then requests a mistrial or admonition which is then denied. “An admonition is appropriate only if the objection is sustained.” Barnes, *supra*, at 568. “In the absence of a request for further relief, it must be assumed that appellant was satisfied with the relief granted, and he cannot now be heard to complain.” *Baker v. Commonwealth*, 973 S.W.2d 54, 56 (Ky. 1998). “[M]erely voicing an objection, without a request for a mistrial or at least an admonition, is not sufficient to establish error once the objection is sustained.” *Hayes v. Commonwealth*, 698 S.W.2d 827, 829 (Ky. 1985). See also *Wallace v. Commonwealth*, 478 S.W.3d 291 (Ky. 2016), in which the defense failed to request either and the prosecutorial misconduct was not preserved for review. So request further relief!

The exact same situation obtains when a trial court offers an admonition and the defendant declines to accept it. If you request a mistrial and the court offers an admonition, accept the admonition if you want to, but make clear you are not waiving your motion for a mistrial.

## **IMPROPER CLOSING ARGUMENTS, EXAMPLES**

The following is meant to be illustrative but not exhaustive.

### **Defining Reasonable Doubt**

Counsel is not allowed to define reasonable doubt. *Commonwealth v. Callahan*, 675 S.W.2d 391 (Ky. 1984). Nevertheless, pointing out that “beyond a reasonable doubt” is different from “beyond a shadow of a doubt” is not an attempt to define reasonable doubt. It is, rather, simply to point out the obvious. *Howell v. Commonwealth*, 163 S.W.3d 442 (Ky. 2005).

However, the use of an analogy is an attempt to define reasonable doubt, and it violates the 14th Amendment safeguard “against the dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” See, e.g., *Rice v. Commonwealth*, 2006 WL 436123, Ky., Feb 2006, *unpublished*, in which the prosecutor used the example, during voir dire, of deciding to marry someone. See also *Marsch v. Commonwealth*, 743 S.W.2d 830 (Ky.1988) in which the prosecutor, during voir dire, used the example of himself as a hypothetical witness to an auto accident. “In all those cases [where this court found an impermissible attempt to define ‘reasonable doubt’], some attempt was made to use other words to convey to the jury the meaning of ‘beyond a reasonable doubt’.” *Howell, supra*, at 447, quoting *Simpson v. Commonwealth*, 759 S.W.2d 224, 226 (Ky. 1988).

Reversal was required when the strength of the evidence against the defendant was weak, the prosecutor defined reasonable doubt in such a way as to lower the standard, and the court’s admonition did not cure the error, in *Rodgers v. Commonwealth*, 314 S.W.3d 745 (Ky. App. 2010). The prosecutor lowered the standard by saying, “If any of you find yourself in the jury room saying to yourself or thinking that ‘yeah, I know the defendant did it, but I just don’t think the Commonwealth proved their case,’ well, I submit to you that if you know he did it, then this case was proven.”

### **Arguing Legal Presumptions**

The primary purpose of a statutory presumption for the Commonwealth is to enable the Commonwealth to overcome a directed verdict. A statutory presumption for the Commonwealth should not be used to compel an inference from a jury. They should not be included in jury

## NOTES

instructions in any way which might lead a jury to infer that the Commonwealth need not prove every element of the offense beyond a reasonable doubt. *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), *Commonwealth v. Collins*, 821 S.W.2d 488 (Ky. 1991), *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978). Of course, the great exception to the rule that juries are not instructed on presumptions is that juries in every criminal case must be instructed on the presumption of innocence. RCr 9.56 (1).

**Irrelevant Matters**

A lawyer shall not knowingly or intentionally allude to any matter that the lawyer does not reasonably believe is relevant. SCR 3.130-3.4(e).

**Matters Not in Evidence**

A lawyer shall not knowingly or intentionally allude to any matter that will not be supported by admissible evidence. SCR 3.130-3.3(e).

A prosecutor may not mention facts prejudicial to the defendant that have not been introduced into evidence. *Johnson v. Commonwealth*, 450 S.W.3d 696 (Ky. 2014), *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky.1992), *Bowling v. Commonwealth*, 279 S.W.2d 23 (Ky. 1955).

It was error for the prosecutor to argue there was a vast store of incriminating evidence which the jury was not allowed to hear because of the rules of evidence. *Mack v. Commonwealth*, 860 S.W.2d 275 (Ky.1993).

Where the trial court ruled that part of a tape recording was not admissible, it was error for the prosecutor to tell the jury he “wished” it could have heard those parts that had been excluded. *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982).

**Misstatements of Law, Evidence**

It was improper for the prosecutor to misstate the testimony of the psychologist both on cross-examination and in closing argument. *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984).

A prosecutor misstated the law on insanity when he told the jury the test was whether the defendant knew right from wrong. *Mattingly v. Commonwealth*, 878 S.W.2d 797 (Ky. App. 1994).

Reversal was required when the prosecutor, in cross-examination and in closing argument, depicted the DNA evidence as conclusively identifying the defendant when in fact the DNA expert testified to only a partial match with the defendant’s DNA and a partial match with someone else. The flagrant prosecutorial overreaching made the trial fundamentally unfair. *Duncan v. Commonwealth*, 322 S.W.3d 81 (Ky. 2010).

**Personal Opinions, Beliefs, Knowledge**

A lawyer shall not state a personal opinion as to the justness of a cause, the credibility of a witness or the guilt or innocence of an accused. SCR 3.130-3.4(e).

It is always improper for the prosecutor to suggest the defendant is guilty simply because he was indicted or is being prosecuted. *U.S. v. Bess*, 593 F.2d 749 (6th Cir. 1979).

It is improper for a prosecutor to tell the jury that he knows of his own personal knowledge that the persons referred to by the defendant’s alibi witness were “rotten to the core.” *Terry v. Commonwealth*, 471 S.W.2d 730 (Ky. 1971).

**Credibility and Character of Witnesses**

A lawyer shall not state a personal opinion as to the credibility of a witness, including the defendant. SCR 3.130-3.4(e).

The personal opinion of the prosecutor as to the character of a witness is not relevant and is not proper comment. *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982).

It is improper for a prosecutor to comment that he has known and worked with a police officer

for a long time, that the officer is honest and conscientious, and that the officer's word is worthy of belief. *Armstrong v. Commonwealth*, 517 S.W.2d 233 (Ky. 1974).

When the defendant is on trial for possession of a controlled substance, it is improper for a prosecutor to try to make the defendant appear to be involved in trafficking. *Jacobs v. Commonwealth*, 551 S.W.2d 223 (Ky. 1977).

It is error for the prosecutor to comment on the defendant's spouse's failure to testify. *Gossett v. Commonwealth*, 402 S.W.2d 857 (Ky. 1966).

#### **Failure of Accused to Testify**

The Commonwealth should not comment on the defendant's failure to testify. *Commonwealth v. Robertson*, 431 S.W.3d 430 (Ky. 2013).

A prosecutor violates a defendant's right to remain silent when he tells the jury, for example, that if the defendant, who was a passenger in the car, had really been innocent, he would have accused the other individual in the car of committing the crime. *Churchwell v. Commonwealth*, 843 S.W.2d 336 (Ky. App. 1992).

A prosecutor violates a defendant's right to remain silent when he tells the jury that the defendant would have denied ownership of the pouch containing drugs if he were innocent. *Green v. Commonwealth*, 815 S.W.2d 398 (Ky. App. 1991).

In a joint trial, counsel for the co-defendant may not comment on the defendant's failure to testify. *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977).

#### **Inflammatory, Abusive Language**

It is error for a prosecutor to make demeaning comments about the defendant and defense counsel. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988). The prosecutor must stay within the record and avoid abuse of the defendant and counsel. *Whitaker v. Commonwealth*, 183 S.W.2d 18 (Ky. 1944).

A prosecutor must not be permitted to make unfounded and inflammatory attacks on the opposing advocate. *U.S. v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

It is improper, for example, for a prosecutor to refer to a defendant as a "black dog of a night," "monster," "coyote that roamed the road at night hunting women to use his knife on," and "wolf." *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

A prosecutor may not encourage a verdict based on passion or prejudice, or for reasons not reasonably inferred from the evidence. *Bush v. Commonwealth*, 839 S.W.2d 550 (Ky. 1992). See also *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1991), *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky. 1989), *Ruppee v. Commonwealth*, 754 S.W.2d 852 (Ky. 1988), and *Estes v. Commonwealth*, 744 S.W.2d 421 (Ky. 1988).

#### **Local Prejudice**

Reversal was required when the prosecutor argued in closing argument, "If you want a Clark County lawyer to come over here to defend a Clark County thief who breaks into and steals from an Estill County place of business, then that is your business, and if you want that then you will find this thief here not guilty." *Taulbee v. Commonwealth*, 438 S.W.2d 777 (Ky. 1969).

#### **Golden Rule**

It is error for a prosecutor to urge jurors to put themselves or members of their families in the shoes of the victim. *Lycans v. Commonwealth*, 562 S.W.2d 303 (Ky. 1978).

#### **Send a Message**

In both *Commonwealth v. Mitchell*, 165 S.W.3d 129 (Ky. 2005), and *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006), the Kentucky Supreme Court clearly indicated it had lost patience with this form of argument but could not reverse the cases because defense counsel did not object and the argument did not rise to palpable error. However, in *McMahon v. Commonwealth*,

## NOTES

242 S.W.3d 348 (Ky. App. 2007), the court reversed the defendant's conviction for this kind of argument when defense did object and when there was no need for this type of argument because defense counsel had conceded there was sufficient evidence to convict. A prosecutor's "send a message" argument also required reversal in *Gaines v. Commonwealth*, 283 S.W.3d 243 (Ky. App. 2008).

"Send a message" language can be appropriate when addressing deterrence to the jury during penalty phase closing arguments. *Cantrell v. Commonwealth*, 288 S.W.3d 291 (Ky. 2009).

### **Jury Responsibilities**

A prosecutor may not minimize a jury's responsibility for its verdict or mislead the jury as to its responsibility. *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1992).

A prosecutor may not argue to jurors that a not guilty verdict (or a guilty verdict on a lesser-included offense) is a violation of their oath. *Goff v. Commonwealth*, 44 S.W.2d 306 (Ky. 1931), *Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky. 2002).

### **Effect of Verdict**

It is prosecutorial misconduct for a prosecutor to repeatedly refer the jury to the danger to the community if it turned the defendant loose. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

Neither the prosecutor, defense counsel, nor the court should relate to the jury the future consequences of a particular verdict anytime during a criminal trial. *Woodward v. Commonwealth*, 984 S.W.2d 477 (Ky. 1998).

It is error for a prosecutor to urge the jury to convict in order to protect community values, preserve civil order, or deter future lawbreaking. *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991). It is error for a prosecutor to tell the jury that if they do not convict, they have no right to complain when they become victims of crime. *Dennis v. Commonwealth*, 526 S.W.2d 8 (Ky. 1975).

It is error for a prosecutor to appeal to the community's conscience in the context of the war on drugs and to suggest that drug problems in the community would continue if the jury did not convict the defendant. *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991).

The Commonwealth is not at liberty to place upon the jury the burden of doing what is necessary to protect the community. *King v. Commonwealth*, 70 S.W.2d 667 (Ky. 1934).

It was improper for the prosecutor to comment on the consequences of a particular verdict when he suggested the victim's child would be spared from seeing the victim assaulted again in the future if the jury returned a verdict of guilty. *Driver v. Commonwealth*, 361 S.W.3d 877 (Ky. 2012).

### **Demonstrations**

A demonstration during closing argument may repeat evidence already offered but cannot introduce new evidence. For example, a prosecutor cannot reveal the scar of the complaining witness, have the complaining witness reenact the crime, or have the complaining witness and the defendant stand together for the purpose of comparing their height. See, e.g., *Price v. Commonwealth*, 59 S.W.3d 878 (Ky. 2001).

### **Reading Law to the Jury**

Counsel should not read extracts from the statutes or law books to the jury or offer dissertations on abstract rules of law. The only law counsel should argue is the jury instructions. *Broyles v. Commonwealth*, 267 S.W.2d 73 (Ky. 1954), *Reed v. Commonwealth*, 131 S.W. 776 (Ky. 1910).

## **CONTACT WITH JURORS**

KRS 29A.310(2) prohibits contact between jurors and witnesses or officers of the court after they have been sworn. If this occurs, the proper procedure is for the court to hold a hearing. *Henson*

*v. Commonwealth*, 812 S.W.2d 718 (Ky. 1991), see also *Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006). Likewise, jurors should not be contacted after they begin deliberations. KRS 29A.320(1), RCr 9.74. But see *Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006), in which a juror personally delivered a verdict to the judge's office in the mistaken belief that it was proper procedure.

After deliberations have begun, the officer in charge of the jury must swear to keep them together and to allow no one to communicate with them on any subject connected with the trial. RCr 9.68. The jury should not be placed in the custody of a sheriff or deputy who has been an important prosecution witness. *Sanborn v. Commonwealth*, 754 S.W.2d 534, 547 (Ky. 1988), citing *Turner v. Louisiana*, 379 U.S. 466, 473, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

### DELIBERATIONS

"[A]ny decision to allow the jury to have testimony replayed during its deliberations is within the sound discretion of the trial judge." *Baze v. Commonwealth*, 965 S.W.2d 817 (Ky. 1997). However, all information given to the jury after deliberations have begun must be given in open court, before the entire jury, in the presence of the defendant, and with counsel. RCr 9.74

Providing the jury with any evidence not admitted into evidence during trial requires automatic reversal, and no prejudice need be shown. *Mills v. Commonwealth*, 44 S.W.3d 366 (Ky.2001).

Jurors are entitled to use their notes during deliberations. *Barnett v. Commonwealth*, 317 S.W.3d 49 (Ky. 2010), *overruling Harper v. Commonwealth*, 694 S.W.2d 665 (Ky. 1985). However, failure to allow them to do so does not rise to the level of structural or palpable error. *McCleery v. Commonwealth*, 410 S.W.3d 597 (Ky. 2013).

Sworn depositions should not go into the jury room because the jury may give greater weight to the written testimony than to the "live" testimony at the trial. *Berrier v. Bizer*, 57 S.W.3d 271 (Ky. 2001), see also *Welborn v. Commonwealth*, 157 S.W.3d 608 (Ky. 2005).

Likewise, transcripts of trial testimony, in places where the record is transcribed instead of videotaped, cannot go back into the jury room, but must be read to the jury in open court. *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004).

Transcripts of a defendant's tape-recorded confession cannot go back into a jury room. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), *overruled on other grounds*.

The jury should not be allowed to take recorded testimonial witness statements into the jury room. *McAtee v. Commonwealth*, 413 S.W.3d 608 (Ky. 2013). The court should not allow the jury to listen to such statements in the defendant's absence, *McGuire v. Commonwealth*, 368 S.W.3d 100 (Ky. 2012). In *Napier v. Commonwealth*, 2014 WL 3973113, Ky. App., Aug. 2014, *unpublished*, it was palpable error to allow the jury to view a detective's recorded interview of a witness in the privacy of the jury room and without the defendant being present. The fact that the laptop was also "unclean" exacerbated the situation, because the jury must be denied access to materials not in evidence. See *Mills, supra*.

"Non-testimonial exhibits" may be allowed into the jury room. RCr 9.72, *Burkhart v. Commonwealth*, 125 S.W.3d 848 (Ky. 2004) (the exhibit was a surveillance video from a security camera). See also *McAtee v. Commonwealth*, 413 S.W.3d 608 (Ky. 2013). Non-testimonial exhibits may include video and audio recordings of drug transactions. *Springfield v. Commonwealth*, 410 S.W.3d 589 (Ky. 2013). In *Commonwealth v. Wright*, 463 S.W.3d 238 (Ky. 2015) allowing the jury to listen to the non-testimonial audio recording of a drug buy on the prosecutor's laptop was not reversible error even if the laptop could have allowed juror access to the Internet and other materials not in evidence. The mere possibility of such access is not itself sufficient grounds for denying the jury access to the evidence.

## NOTES

**Practice Tip:** Ask the court to do an in camera review of the contents of the prosecutor's laptop to verify that it is clean, especially if the prosecutor will not allow inspection by the defense. Ask that the jurors be admonished not to access any materials beyond those specifically the subject of their request.

Substituting jurors after the case has been submitted to the jury for deliberation (using a previously discharged alternate juror) requires that the court have a colloquy on the record to ascertain that the replacement juror was not tainted by outside contacts and that the court instruct the jury to start deliberations all over again. *Crossland v. Commonwealth*, 291 S.W.3d 223 (Ky. 2009).

An improper alteration of a jury verdict implicates manifest injustice and, as such, palpable error which affects the substantial rights of a party. It is not automatic grounds for reversal and a new trial if the error is one of form, such as a mistake on the form, rather than substance. When the jurors notified the court that the verdict it read was not the verdict they had chosen to convey, the court was right to allow the foreperson of the jury to alter the form in open court. *Buchanan v. Commonwealth*, 399 S.W.3d 436 (Ky. App. 2012).

### CONTINUANCE DURING TRIAL

A 14-day continuance after the first day of trial was not in itself a violation of due process absent a showing of prejudice, when the court admonished the jurors not to discuss the case, the case was not so complex that jurors would forget facts it heard, the most complex evidence was introduced after the delay, and no good alternative to the delay existed. *Knuckles v. Commonwealth*, 315 S.W.3d 319 (Ky. 2010).

### DEADLOCK, THE "ALLEN CHARGE"

See RCr 9.57(1). As explained in *Ali v. Commonwealth*, 2007 WL 1159953, Ky., April 2007, unpublished, this jury instruction is referred to as the "Allen charge," based on a case in which the United States Supreme Court approved instructions which might be given to a deadlocked jury. See *Allen v. U.S.*, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896). Some defense attorneys object to the giving of this charge in the belief that the charge has a tendency to make deadlocking pro-defendant jurors cave in and change their vote. If that is your concern, you should object to giving the instruction and move for a mistrial on the grounds that the jury should not be coerced into rendering a verdict. Of course, the argument gets stronger the more times the judge sends the jury back to keep deliberating. It is coercive to give the charge to a jury before the jury has indicated that it is deadlocked. *Bell v. Commonwealth*, 245 S.W.3d 738 (Ky. 2008), overruled on other grounds.

### POLLING THE JURY

KRS 29A.320(e) requires that the jury be sent back for further deliberations if, upon being polled, the jurors do not unanimously and unambiguously endorse the verdict. *King v. Commonwealth*, 465 S.W.3d 38 (Ky. App. 2015).

### UNANIMOUS VERDICT

A defendant is entitled to a unanimous verdict under the 6th Amendment and Section 7 of the Kentucky Constitution. *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). *Cannon v. Commonwealth*, 163 S.W.2d 15 (Ky. 1942). See also RCr 9.82(1). Unanimity becomes an issue when the jury is instructed that it can find the defendant guilty under either of two theories, since some jurors might find guilt under one theory, while others might find guilt under another. The rule is that if the evidence would support a conviction under either theory, the requirement of jury unanimity is satisfied. If the jury is instructed on a theory under which it could not have found guilt, however, then the requirement of unanimity is violated because, in that situation, there is no way to know that every juror voted for conviction under the proper theory. *Davis v. Commonwealth*, 967 S.W.2d 574 (Ky. 1998). See also *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978), *Hayes v. Commonwealth*, 625 S.W.2d 583 (Ky. 1981), *Carver v. Commonwealth*, 328

S.W.3d 206 (Ky. App. 2010), *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010).

NOTES

When a defendant is charged with multiple counts of the same offense, jury instructions which do not factually differentiate between the counts violate the requirement of a unanimous verdict. *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008), *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009), *Banks v. Commonwealth*, 313 S.W.3d 567 (Ky. 2010), *Martin v. Commonwealth*, 456 S.W.3d 1 (Ky. 2015), *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015). The defendant did not receive a unanimous verdict on a criminal abuse charge when the instructions failed to specify which injury or act the jury should consider. *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013). Likewise, the defendant failed to receive a unanimous verdict in *Kingery v. Commonwealth*, 396 S.W.3d 824 (Ky. 2013), when the instructions failed to distinguish factually between two alleged criminal acts, as well as in *Rodriguez v. Commonwealth*, 396 S.W.3d 916 (Ky. 2013) when the instructions did not require a unanimous finding by the jury that the victim was under 12 years of age at the time of the offense.

If the Commonwealth proceeds at trial on theories of both wanton and intentional murder, the instructions must require the jury to state under which theory they find the defendant guilty. *Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998), *Benjamin v. Commonwealth*, 266 S.W.3d 775 (Ky. 2008). The right to a unanimous verdict was denied the defendant when the jury could consider two different alleged victims for the same count of wanton endangerment. *Little v. Commonwealth*, 422 S.W.3d 238 (Ky. 2013).

If a defect in a verdict is merely formal, the defense must bring the error to the court's attention before the jury is discharged; but if the defect is one of substance, the error may be raised after the jury is discharged such as in a motion for a new trial. *Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83 (Ky. 1991).

## INCONSISTENT VERDICTS

### In the Same Trial

The test here is basically the same as in the case of unanimous verdicts: what matters is not the logical consistency of the verdicts but the sufficiency of the evidence. Inconsistent verdicts are tolerated as long as there was sufficient evidence for the jury to find guilt on the guilty verdicts it returned. *Commonwealth v. Harrell*, 3 S.W.3d 349 (Ky. 1999), *Fister v. Commonwealth*, 133 S.W.3d 480 (Ky. 2003), both citing *Dunn v. U.S.*, 284 U.S. at 393, 52 S.Ct. at 190, 76 L.Ed. at 358 (1932) and *U.S. v. Powell*, 469 U.S. at 67, 105 S.Ct. at 475, 83 L.Ed.2d at 467 (1984), for the proposition that "each count of an indictment should be regarded as a separate indictment, and thus consistency in a verdict is not necessary."

### In Separate Trials

Can a defendant charged with complicity be found guilty, as a matter of law, when all his co-defendants have already been tried and acquitted? The answer is "yes." KRS 502.030 says: "In any prosecution for an offense in which the criminal liability of the accused is based upon the conduct of another person pursuant to ... KRS 502.020, it is no defense that: (1) Such other person has not been prosecuted for or convicted of any offense based on the conduct in question, or has previously been acquitted thereof, or has been convicted of a different offense, or has an immunity to prosecution or conviction for such conduct...."

## TRUTH-IN-SENTENCING, KRS 532.055

### Nature of Prior Convictions

The jury may be informed of the "nature" of the defendant's prior convictions, but that term is generic, rather than specific, and is meant to include the "kind, sort, type, order, or general character of the offense." "The evidence of prior convictions is limited to conveying to the jury the elements of the crimes." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011) Reading indictments including the names of the victims and other details was error in *Webb v. Commonwealth*, 387 S.W.3d 319 (Ky. 2012). Detailed testimony by the victim of the defendant's

## NOTES

prior assault on her exceeded the scope of the statute. *Robinson v. Commonwealth*, 926 S.W.2d 853, 855 (Ky. 1996). Reversal of the penalty phase of the trial was required after egregious manifest injustice when evidence of prior offenses identified local victims and included three dismissed wanton endangerment charges. *Stansbury v. Commonwealth*, 454 S.W.3d 293 (Ky. 2015). Where age is an element of the crime, the jury should be informed of that through reference to the statute. *Newman v. Commonwealth*, 366 S.W.3d 435, 446 (Ky. 2012) Likewise, warrants and citations including factual information concerning the defendant's prior convictions also exceeded the scope of the statute. *Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998). But see also *Cuzick v. Commonwealth*, 276 S.W.3d 260 (Ky. 2009) in which citations were allowed to be read to the jury (strong dissent from 3 justices). An AOC Courtnet listing of prior offenses is not sufficiently reliable for use in sentencing hearings. *Finnel v. Commonwealth*, 295 S.W.3d 829 (Ky. 2009).

*Webb, supra*, sets out the proper procedure for introduction of evidence regarding the nature of prior crimes. The "first and preferred method" is to have the judge recite the elements of the prior offenses. If both parties agree, the prosecutor may read the elements of the offenses, but the jury should be told he or she is not testifying as a witness but only as an attorney reading agreed-upon, stipulated evidence. If the parties do not agree, the prosecutor may call a witness to testify to the elements of the previous crimes. *Webb*, at 329.

Unlike KRE 609, which limits the age of prior convictions used for impeachment to ten years, there is no age limit on prior convictions for the purposes of truth-in-sentencing. *McKinnon v. Commonwealth*, 892 S.W.2d 615 (Ky. App. 1995).

#### **Proof of Prior Convictions**

Proof of the defendant's prior convictions in the form of a certified computer printout from the Kentucky State Police was admissible and certified copies of the judgments of conviction themselves were not necessary, despite the best evidence rule, in a case in which there was no dispute whatsoever as to the defendant's prior convictions. *Hall v. Commonwealth*, 817 S.W.2d 228 (Ky. 1991), *overruled on other grounds*. However, similar records from another state were improperly admitted, requiring reversal, when the records were not certified as required by KRS 422.040 and when no witness could testify that the records met the requirements of the business record exemption to the hearsay rule. *Robinson v. Commonwealth*, 926 S.W.2d 853 (Ky. 1996). Prior convictions were not properly established when the clerk authenticated the case jacket, citation, and dockets, but failed to authenticate or testify that the charges resulted in convictions. *Lisle v. Commonwealth*, 290 S.W.3d 675 (Ky. App. 2009). Courtnet records are neither reliable nor an official court record for the purpose of proving prior convictions. *Finnel v. Commonwealth*, 295 S.W.3d 829 (Ky. 2009).

It is error to allow the introduction of prior convictions which are still pending on direct appeal or have been granted discretionary review, but not if they are being attacked collaterally. This is true for truth-in-sentencing as well as for PFO purposes. *Melson v. Commonwealth*, 772 S.W.2d 631 (Ky. 1989), *Thompson v. Commonwealth*, 862 S.W.2d 871 (Ky. 1993), *overruled in part by St. Clair*, below, *Kohler v. Commonwealth*, 944 S.W.2d 146 (Ky. App. 1997), *Tabor v. Commonwealth*, 948 S.W.2d 569 (Ky. App. 1997). Evidence showing charges for which the defendant was not convicted – dismissed or amended charges – is inadmissible. *Blane v. Commonwealth*, 364 S.W.3d 140 (Ky. 2012). See also *Chavies v. Commonwealth*, 354 S.W.3d 103 (Ky. 2011).

The word "conviction" is ambiguous, however, and can refer either to an initial conviction after a guilty verdict or guilty plea, or it can refer to the more refined legal conception of a final judgment after all appeals have been exhausted. In some statutes, the word conviction refers to the former event. For example, a person is a "convicted felon" for purposes of the handgun statute (KRS 527.040) the moment the verdict or plea occurs. See *Thomas v. Commonwealth*, 95 S.W.3d 828, 829 (Ky. 2003). Also, based on a meticulous reading of the phrase "prior record of conviction" in KRS 532.025(2)(a)(1), the Kentucky Supreme Court has ruled that prior convictions, for purposes

of the aggravator which must be found before imposition of the death penalty is possible, are also merely “a plea of guilty accepted by the trial court or a jury’s or judge’s verdict of guilty.” *St. Clair v. Commonwealth*, 140 S.W.3d 510, 570 (Ky. 2004), *overruling in part, Thompson. Melson*, supra, was presumably not affected by the decision in *St. Clair*. (But see *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005), in which the Kentucky Supreme Court seems to have applied *St. Clair* in a non-capital, truth-in-sentencing case.)

**Pratice Tip:** Prior Convictions. Defense counsel should move for pretrial discovery of any documents on which the Commonwealth may rely in the penalty phase and make appropriate motions in limine; object to inadmissible evidence and any mention of it in testimony or closing arguments, and move for a new sentencing phase if the client later gets a maximum sentence.

### Out-of-state Convictions

On the other hand, a computer printout from another state showing the defendant’s record of convictions and also a number of dismissed charges was ruled inadmissible. The dismissed charges were not proper evidence, and the record did not meet the requirements of KRS 422.040. That statute requires records of out-of-state convictions to be certified by the clerk with the seal of the court and also certified by the “judge, chief justice, or presiding magistrate.” *Robinson v. Commonwealth*, 926 S.W.2d 853 (Ky. 1996), *Merriweather v. Commonwealth*, 99 S.W.3d 448 (Ky. 2003).

### Juvenile Convictions

A defendant’s juvenile convictions may be introduced during the penalty phase if the crime was one which would have been a felony if committed by an adult. KRS 532.055(2)(a)(6). The portion of that same statute which allows the use of juvenile adjudications for the purpose of impeachment during the guilt/innocence phase, however, has been ruled unconstitutional. *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2002).

The violent offender statute does not apply to youthful offenders, who must be brought back before the court upon reaching the age of 18. KRS 640.030(2), *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008).

### Challenging Prior Convictions

When the prosecution offers evidence of prior convictions based on guilty pleas, the burden shifts to the defendant to show that the pleas were not valid. The Commonwealth is not required to prove both that the prior conviction occurred and that it was constitutionally proper. The defendant’s prior convictions were properly admitted when he failed to meet the burden of demonstrating the invalidity of the pleas. See *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992), *Dunn v. Commonwealth*, 703 S.W.2d 874 (Ky. 1986). This includes even misdemeanor convictions introduced for the purposes of truth-in-sentencing. *McGinnis v. Commonwealth*, 875 S.W.2d 518 (Ky. 1994), *overruled on other grounds*.

The proper time to raise the question of the constitutional validity of a prior conviction is in a pretrial motion, and the trial court did not err in refusing to allow the defendant to put on evidence raising the issue when the defendant waited until the sentencing/PFO phase to do it. *Commonwealth v. Gadd*, 665 S.W.2d 915 (Ky. 1984).

Failure to challenge a prior DUI 1st conviction at the time of the DUI 2nd conviction waived the right to challenge the DUI 1st conviction when it was used to enhance the current charge to DUI 4th. *Commonwealth v. Lamberson*, 304 S.W.3d 72 (Ky. App. 2010).

### Parole Eligibility

Testimony of a parole officer that, given the parole board’s discretion, the period a person spent on parole was apt to be less than the theoretical maximum, comported with the aims of the truth-in-sentencing statute and was not so misleading as to be unfair. *Cox v. Commonwealth*, 399 S.W.3d 431 (Ky. 2013). Testimony concerning parole eligibility and the possible effects of sentence credits must accurately reflect the law. See *Commonwealth v. Higgs*, 59 S.W.3d 886 (Ky. 2001), *Offut v. Commonwealth*, 799 S.W.2d 815 (Ky. 1990), and *Robinson v. Commonwealth*,

## NOTES

181 S.W.3d 30 (Ky. 2005). Although the truth-in-sentencing statute explicitly authorizes the prosecution to establish “minimum parole eligibility,” a defendant may also introduce such evidence. *Boone v. Commonwealth*, 780 S.W.2d 615, 617 (Ky. 1989), *Offut v. Commonwealth*, 799 S.W.2d 815, 818 (Ky. 1990).

**Victims**

Victim impact evidence is largely irrelevant to the issue of guilt or innocence and should be reserved for the penalty phase of the trial. *Bennett v. Commonwealth*, 978 S.W.2d 322 (Ky. 1998). KRS 532.055 defines “victims,” pursuant to KRS 421.500(1). Those statutes allow for multiple victims for the purpose of giving victim impact testimony. Victim impact testimony is appropriate only for the crime being tried. *St. Clair v. Commonwealth*, 451 S.W.3d 597 (Ky. 2014). The right to controvert the contents of a pre-sentence investigation report does not extend to the right to controvert the contents of a victim impact statement. *Phillips v. Commonwealth*, 297 S.W.3d 593 (Ky. App. 2009).

**Mitigation**

The trial court erred during the penalty phase when it excluded the defendant’s mitigating evidence regarding the circumstances which led to his prior conviction for reckless homicide. *Wood v. Commonwealth*, 432 S.W.3d 726 (Ky. App. 2014). Proper mitigation evidence does not include the sentences received by co-defendants for the same crime, *Commonwealth v. Bass*, 777 S.W.2d 233, 236 (Ky. 1989), or plea offers made by the prosecution, *Neal v. Commonwealth*, 95 S.W.3d 843, 847 (Ky. 2003).

**Serious Physical Injury/Violent Offender**

While a court may make a finding of serious physical injury for the purpose of sentencing a defendant as a violent offender when the evidence is sufficient to do so, “it would behoove the Commonwealth to avoid this issue in the future and put the question of finding serious physical injury before the jury.” *Biederman v. Commonwealth*, 434 S.W.3d 40, 46 (Ky. 2014).

**Preservation of Sentencing Error**

Error which occurs at sentencing can be addressed by a motion to alter, amend or vacate a judgment under CR 59.05, which is applicable to criminal cases and must be filed within 10 days after entry of the final judgment. See, e.g., *Crane v. Commonwealth*, 833 S.W.2d 813, 819 (Ky. 1992), in which the Supreme Court suggested that a motion to recuse the trial judge based on comments made prior to sentencing should have been raised in a CR 59.05 motion.

**Bail Pending Appeal**

RCr 12.78 permits the trial court to grant bail pending appeal in any case except one in which the defendant has been sentenced to either life or death. Defense counsel needs to request this at sentencing. An appellate court will not deal with the issue of bail unless “application to the trial court is not practicable,” or unless the trial court denied the request. In most situations, if the request has simply never been made at the trial court level, the court of appeals will send the defendant’s attorney back to the trial court.

KRS 532.070 allows a judge to convert an indeterminate sentence of one year on a Class D felony to a determinate sentence of 12 months in the local jail, if the prison sentence would be unduly harsh. This statute only applies to jury verdicts and is not applicable to guilty pleas. *Bailey v. Commonwealth*, 70 S.W.3d 414 (Ky. 2002).

**Practice Tip:** Parole Eligibility. The Commonwealth might not present all the evidence relevant to parole eligibility to the jury. If it does not, and it applies in your case, make sure the jury also knows about such things as (1) lack of good time credit for violent offenses, (2) lack of good time credit for any offense until minimum parole eligibility, (3) lack of parole eligibility until completing the sex offender treatment program, and (3) the additional 5-year period of postincarceration supervision for sex offenses. Object to parole eligibility which is too high or too low. Object to parole guidelines which do not apply to your case.

**PERSISTENT FELONY OFFENDER, KRS 532.080**

NOTES

**Burden of Proof**

A defendant may be convicted by reasonable inferences which are a logical consequence of the evidence presented. The Commonwealth retains the burden of proving every element beyond a reasonable doubt, but jurors can make inferences based on the evidence. *Martin v. Commonwealth*, 13 S.W.3d 232 (Ky. 2000), *overruling, Hon v. Commonwealth*, 670 S.W.2d 851 (Ky. 1984), which required proof of all elements of PFO by direct evidence. For example, proof of the defendant's age at the time of a prior offense may be inferred from proof of the defendant's date of birth. *Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky.2002). However, jurors must be able to infer from the evidence offered, and not just guess. *Moore v. Commonwealth*, 462 S.W.3d 378 (Ky. 2015).

It is improper to read the indictments to prove PFO status. *Bray v. Commonwealth*, 703 S.W.2d 478 (Ky.1985). It is improper to admit evidence of dismissed or amended charges. *Tanner v. Commonwealth*, 2013 WL 658123, Ky. Feb., 2013, *unpublished*.

**Challenging Prior Convictions**

When the prosecution offers evidence of prior convictions based on guilty pleas, the burden shifts to the defendant to show that the pleas were not valid. The defendant's prior convictions were properly admitted when he failed to do so. See *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992), *Dunn v. Commonwealth*, 703 S.W.2d 874 (Ky. 1986).

The proper time to raise the question of the constitutional validity of a prior conviction is in a pretrial motion, and the trial court did not err in refusing to allow the defendant to put on evidence raising the issue when the defendant waited until the sentencing/PFO phase to do it. *Commonwealth v. Gadd*, 665 S.W.2d 915 (Ky. 1984), *Diehl v. Commonwealth*, 673 S.W.2d 711 (Ky. 1984). However, see *Graham v. Commonwealth*, 952 S.W.2d 206, 209 (Ky. 1997), especially the dissent, for a discussion of how complicated the case law on this subject has become: "the most conscientious of counsel is uncertain of whether to raise a challenge, what type of challenge is appropriate and what court to file in." See also *Hodges v. Commonwealth*, 984 S.W.2d 100 (Ky. 1998), in which failure to challenge a prior conviction upon the occasion of the first use of that conviction for enhancement purposes waives later attempts to challenge the same prior conviction. Uncounseled prior convictions appear to remain an exception to this rule. One should argue that uncounseled prior convictions can be attacked at any time, even collaterally. See also Brian Scott West, "Ignorance of the Law Is an Excuse: Suppressing Prior Guilty Pleas Under *Boykin v. Alabama*", *The Advocate*, vol. 23, no. 3, May 2001, pp. 50-56.

**Sequence of Prior Offenses**

In the case of prior convictions used for purposes of PFO, the prior offenses have to have resulted in convictions prior to the date of the current offense. Convictions which occurred after the current charge, but before the defendant's sentencing on the current charge, cannot be used. *Bray v. Commonwealth*, 703 S.W.2d 478 (Ky. 1985), see also *Dillingham v. Commonwealth*, 684 S.W.2d 307, 309 (Ky. App. 1985). "[T]he philosophy underlying the legislation is that a person who commits a felony after having been convicted of a felony has doubt cast on his ability to be rehabilitated and that a person who commits a felony after having been convicted of a felony the second time may well be incorrigible and deserving of more extended incarceration. It has always been the progressive acts which so designate an individual." *Bray*, at 479-80. If the defendant is still on felony diversion at the time of the subsequent offense, the diverted felony cannot be used to PFO because there was not yet a conviction for that felony at the time of the subsequent offense. *Commonwealth v. Derringer*, 386 S.W.3d 123 (Ky.2012).

**Identity**

A name is direct prima facie evidence of the identity of a person. *Braden v. Commonwealth*, 600 S.W.2d 466 (Ky. App. 1978), *vacated on other grounds*. Once the case has been made, however, the burden shifts to the defendant to show he is not the person who was previously convicted. *Jones v. Commonwealth*, 457 S.W.2d 627, 631 (Ky.1970).

## NOTES

**Merger of Prior Offenses**

KRS 532.080(4) says that “two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.” So, what if the person is probated on his first prior offense, then commits his second prior offense while on that probation, then serves both sentences either concurrently or in an uninterrupted consecutive sentence? Those two prior offenses do not merge. The “concurrent/consecutive sentence break applies only to those who may have committed more than one crime but who have received their sentences for all of the crimes committed before serving any time in prison.” *Adkins v. Commonwealth*, 647 S.W.2d 502, 506 (Ky. App. 1982). Being released on shock probation prior to a subsequent offense will also constitute a “break” in the imprisonment. *Boyd v. Commonwealth*, 439 S.W.3d 126 (Ky. 2014). The same is true in the case of offenses committed while on parole. *Williams v. Commonwealth*, 639 S.W.2d 788, 790 (Ky. App. 1982), *Blades v. Commonwealth*, 339 S.W.3d 450 (Ky. 2011). The court noted that, “the rehabilitative efforts on his first conviction failed, the rehabilitative efforts on his second conviction failed, and he is, under the statute, a persistent felony offender in the first degree upon receiving his third conviction.” See also *Combs v. Commonwealth*, 652 S.W.2d 859 (Ky. 1983).

A later-imposed concurrent sentence is deemed to have commenced at the beginning of the original sentence, so that, even if the second sentence standing alone would have fallen within the 5-year time period for use in PFO proceedings, the sentence instead began and ended with a prior sentence which did not fall within the 5-year period, when the two sentences ran concurrently to each other. *Lienhart v. Commonwealth*, 953 S.W.2d 70 (Ky. 1997).

**Merger of Prior Offenses and Double Jeopardy**

When a defendant has twice been convicted for trafficking in a controlled substance, he can be convicted of both trafficking as a subsequent offender and PFO 2nd, even though the two prior convictions would merge into one conviction under the PFO statute. *Morrow v. Commonwealth*, 77 S.W.3d 558 (Ky. 2002), *overruling Gray v. Commonwealth*, 979 S.W.2d 454 (Ky. 1998). See also *Bolen v. Commonwealth*, 31 S.W.3d 907 (Ky. 2000).

For double-enhancement problems with PFO charges, see “Indictments, Double-Enhancement”

**Separate Indictments**

A defendant may be indicted for PFO in an indictment separate from the current offenses. *Price v. Commonwealth*, 666 S.W.2d 749 (Ky. 1984). Nevertheless, the defendant must at least be arraigned on the charge before he can be tried on it. The defendant has a right to notice of the charges. *Hutson v. Commonwealth*, 171 S.W.3d 743 (Ky. 2005). The defendant’s due process rights were violated when the Commonwealth failed to indict him on PFO prior to trial, the defendant was “ambushed” with the charge during trial, had no opportunity to prepare a defense to the PFO, and no opportunity to enter an informed plea agreement. *Clark v. Commonwealth*, 324 S.W.3d 747 (Ky. App. 2010).

**Drug Paraphernalia as an Underlying Offense**

KRS 532.080(8) clearly states that a felony conviction for possession of drug paraphernalia cannot be used as the basis for finding a defendant to be a persistent felony offender. *Sanders v. Commonwealth*, 301 S.W.3d 497 (Ky. 2010).

**Capital Offenses**

Cannot be PFO’d. *Offut v. Commonwealth*, 799 S.W.2d 815 (Ky. 1990), *Berry v. Commonwealth*, 782 S.W.2d 625 (Ky. 1990), *overruled on other grounds*.

**PFO CHECKLIST**

## NOTES

At Least 21 Years Old at Time of Sentencing - See *Hayes v. Commonwealth*, 660 S.W.2d 5 (Ky. 1983), in which it was not error when defendant was not over 21 at the time of the offense but was over 21 at the time of sentencing. See also *Harris v. Commonwealth*, 338 S.W.3d 222 (Ky. 2011), for the same situation.

Stands Convicted of a Felony for Current Offense - This has been interpreted to require that the defendant be first sentenced on the underlying current offense before he can be convicted as a Persistent Felony Offender. *Commonwealth v. Hayes*, 734 S.W.2d 467 (Ky. 1987), *Davis v. Manis*, 812 S.W.2d 505 (Ky. 1991). Drug offenses with a maximum 3-year sentence may not be subject to PFO enhancement. See, e.g., *Gamble v. Commonwealth*, 2013 WL 375531, Ky. App., Feb. 2013, *unpublished*.

Prior Conviction Was for a Sentence of One Year or More - Out-of-state convictions that were misdemeanors in North Carolina, but which carried sentences of up to 2 years, were felonies for PFO purposes when the defendant received sentences of 18 months and 2 years, even if the sentences were probated. *Ware v. Commonwealth*, 47 S.W.3d 333 (Ky. 2001). An indeterminate sentence of one year modified to a definite sentence of less than one year under KRS 532.070(2) qualifies as a prior conviction for PFO purposes as well. *Hamilton v. Commonwealth*, 754 S.W.2d 870 (Ky. App. 1988). Sentences of 60 days and probation did not qualify as prior convictions in *Johnson v. Commonwealth*, 277 S.W.3d 635 (Ky. App. 2009). Prior felony convictions of Possession of a Controlled Substance, 1st Degree, cannot be used as the predicate prior felonies unless the person was also subsequently convicted of a felony other than Possession, 1st Degree. *Boone v. Commonwealth*, 412 S.W.3d 883 (Ky. App. 2013). Offenses enhanced from a misdemeanor to a felony or from a lower felony to a higher felony because the conviction constituted a second or subsequent offense, cannot be used for PFO enhancement, with certain exceptions. KRS 532.080(8)&(10).

Defendant Was at Least 18 at the Time the Prior Offense Was Committed - "For purposes of the Penal Code, a person is 'over the age of 18' from the first moment of the day on which his 18th birthday falls." *Garret v. Commonwealth*, 675 S.W.2d 1, 1 (Ky.1984).

Requisite Prior Felonies - PFO 1st, 2 Priors or 1 Prior Sex Crime as Defined by KRS 17.500; PFO 2nd, 1 Prior.

Prior Was Served Out within 5 Years of Date of Current Offense - For purposes of PFO 1st, only one of the prior felonies has to meet this or one of the following criteria. *Howard v. Commonwealth*, 608 S.W.2d 62, 64 (Ky. App. 1980). The 5 year period now includes any time spent on postincarceration supervision.

OR

On Probation or Parole for the Prior Offense at Time of Current Offense.

OR

Discharged from Probation or Parole within 5 Years of Date of Current Offense.

OR

In Custody for Prior Offense at Time of Current Offense. See KRS 532.080(4), which says these offenses do not merge into one offense with the prior offense for which the person was imprisoned.

OR

Escaped from Custody for Prior Offense at Time of Current Offense. This refers to offenses committed after an escape. Escape charges themselves fall under the previous criteria of offenses committed while in custody. *Damron v. Commonwealth*, 687 S.W.2d 138 (Ky. 1985).

## NOTES

**PFO and Sentencing Caps**

When the defendant was convicted of a Class C Trafficking charge and it was enhanced to 10-20 years with a charge of PFO 2nd, and the jury gave the defendant 20 years on that charge, the KRS 532.110(1)(c) limit on aggregating Class C and D felonies at 20 years operated to prevent running his other charges consecutive to the enhanced Trafficking charge. *Blackburn v. Commonwealth*, 394 S.W.3d 395 (Ky. 2011).

Although both statutes seem to exclude any provisions of KRS 532 which might increase the maximum penalty for those offenses, KRS 218A.1413 (Second Degree Trafficking) can be enhanced by PFO, while KRS 218A.1415 (First Degree Possession) cannot be enhanced by PFO. The difference is that KRS 532.080(8) specifically mentions First Degree Possession. *Gamble v. Commonwealth*, 453 S.W.3d 716 (Ky. 2015), *Eldridge v. Commonwealth*, 479 S.W.3d 614 (Ky. App. 2015).

**Practice Tip:** Remember to renew a motion for directed verdict at the close of the PFO evidence. Although the jury is only determining a question of status, it is still making a finding of fact.

**PRESENTENCE INVESTIGATION REPORTS (PSI)**

PSI's include the defendant's risk and needs assessment and probation's calculation of jail credit. KRS 532.050. In felony cases, Corrections calculates and awards custody credit unless the defendant has sufficient credit to serve out, in which case the court may award that credit at sentencing. KRS 532.120, *Caraway v. Commonwealth*, 459 S.W.3d 849 (Ky. 2015). The Department of Corrections may correct errors as well. See, e.g., *Bowling v. White*, 2015 WL 5654807, Ky., Sept. 2015, *not yet final*.

**Importance Of**

There is not likely to be any document which will have a greater impact on the post-sentencing life of the defendant than the PSI. The contents of the PSI will affect: the classification the client will receive and what restrictions may come with that, what kind of work he will be allowed to do and where he can do it, what kind of statutory credit he will receive and, last but not least, whether he will be paroled. The PSI follows the client throughout the prison system.

For instance, upon in-processing at LaGrange, the inmate will be classified as to custody level (maximum, close, medium, restricted, or minimum). His classification will affect which institutions he can go to, job assignments, cell or dorm assignments, eligibility for furloughs, and eligibility for community-based rehabilitation and re-assimilation programs. The classification is carried out on a scoring system of different categories in which heavy reliance is placed on the contents of the PSI. Information in the PSI can affect the client's scores in such categories as "severity of current offense," "prior assaultive offense history," "escape history," "alcohol/drug abuse," and "prior felony incarceration."

The "crime story" section of the PSI may also affect classification. For example, even if the client pled to Robbery 2nd Degree, which does not involve injury to the victim, the classification officer can read the "crime story" taken from the arresting officer's citation and determine that an injury did occur and, on that basis, invoke KRS 197.140 to determine that the client is ineligible to work outside the walls of the prison.

The parole board is also often more interested in the alleged facts of the case than the charge to which the client ultimately pled. The board will even consider, against the client, the facts surrounding charges that were dismissed, if it appears they were only dismissed as part of a plea deal, and not because they were unfounded.

**Copy to Defendant**

In some jurisdictions, whether the defendant is entitled to a copy of the PSI still seems to be an issue. The old 1987 case which says that a defendant is not entitled to a copy of the PSI, *Bush v. Commonwealth*, 740 S.W.2d 943 (Ky. 1987), was based on the 1987 version of the PSI statute,

KRS 532.050(4), which at the time only allowed the defendant to be informed of the contents of the PSI. The statute was revised in 1990 to require furnishing a copy of the PSI to the defendant's counsel, KRS 532.050(6), and effective April 1, 2009, RCr 11.02 was modified to require that the defendant's attorney receive a copy of the PSI no later than 2 business days prior to final sentencing.

### Waiving

A defendant can waive inspection and controversion of the PSI, *Alcorn v. Commonwealth*, 557 S.W.2d 624 (Ky. 1977), but denying the defendant the right to challenge the contents when he wishes to do so is a denial of due process. *Stewart v. Commonwealth*, 2015 WL 2437555, Ky. App., May 2015, *not yet final*. The PSI will be written regardless of whether the defendant reviews it. So, do not waive review of the PSI unless the client is getting some more important benefit.

**Practice Tip:** PSI's. When faced with misleading or incorrect information in a PSI, make sure to do the following:

Specifically identify what should be corrected or omitted. If the PSI was prepared from the original police reports but a jury found the client guilty of only a lesser offense, object to any reference to allegations concerning the originally charged offense.

1. Specifically inform the court of exactly what the PSI should say instead.
2. Make a motion on the record that only the amended PSI be submitted to the Department of Corrections. Memorialize the amendments in an order for the judge to sign, if necessary.
3. If the court denies your relief, make sure the record clearly reflects what you think the PSI should say.
4. Offer to help write the PSI. Offer to send information to be included on the PSI if it might be helpful to the client.

See, e.g., *Mills v. Commonwealth*, 2005 WL 2317982, Ky., Sept. 2005, *unpublished*, in which the Kentucky Supreme Court found it difficult to ascertain whether the corrected PSI had ever made it to the Department of Corrections.

## VII. INITIATING THE APPEAL

Some of what follows applies only to employees of the DPA:

### Within 5 Days

A motion for new trial under RCr 10.06 must be filed within 5 days after the verdict is returned. (The exception is a motion for new trial based on newly discovered evidence (CR 60.02), which must be filed within a year or "at a later time if the court for good cause so permits.") It can cover any issue arising from the trial. RCr 10.02(1). *Johnson v. Commonwealth*, 17 S.W.3d 109 (Ky. 2000). Nevertheless, raising an issue for the first time in a motion for new trial or motion for judgment notwithstanding the verdict does not preserve an issue for appeal if it was not objected to during the trial. *Byrd v. Commonwealth*, 825 S.W.2d 272 (Ky. 1992), *overruled on other grounds* by *Shadowen v. Commonwealth*, 82 S.W.3d 896 (Ky. 2002).

A motion for judgment notwithstanding the verdict under RCr 10.24 must also be filed within 5 days of the verdict and, since it is essentially a renewed motion for directed verdict, i.e., a complete acquittal, it can only be filed if the defendant moved for a directed verdict at the close of all the evidence.

Remember that in *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky. 1992) and other prior cases, the Court has recognized that cumulative error may be a ground for reversal even if each individual error is not sufficient to require reversal. In *Funk*, the court found that the cumulative effect of prejudice from three trial errors was sufficient to require reversal.

If you miss the deadline, move for an extension and then file the motions.

## NOTES

**At Sentencing**

KRS 31.120(1)(c) reads: “A person who, after conviction, is sentenced while being represented by a public defender shall continue to be presumed a needy person, and the court, at the time of sentencing, shall enter an Order in Forma Pauperis for purposes of appeal without having to show further proof of continued indigency, unless the court finds good cause after a hearing to determine that the defendant should not continue to be considered an indigent person.” A Motion to Proceed in Forma Pauperis may still be necessary if the judge does not automatically sign the Order, but the court cannot refuse to sign the order without a hearing finding a change in the defendant’s indigent status.

DPA must still be (re-)appointed to the appeal even if DPA represented the client at trial. Otherwise, the appellate court and DPA consider the appellant to be represented on appeal by trial counsel, or to be proceeding pro se. And then trial counsel gets a letter from the appellate court ordering him or her to show cause why the appeal has not been perfected and why it should not then be dismissed. Tend the sample motion included in this manual to the court.

**Within 30 Days**

RCr 12.04 requires that the notice of appeal be filed within 30 days of the final judgment or within 30 days of the denial of the motion for new trial. The exception to this is when the court finds that the defendant is no longer indigent. The notice need not list the issues on appeal or the name of any particular attorney who will be representing the defendant.

Within 10 days of filing the notice of appeal, a designation of record must be filed. One must be filed in every case. The designation of record states what portions of the trial-level proceedings are to be included in the appellate record. It must include the specific dates of the proceedings which are to be included in the record. A short description of each event should also be included if there may be any doubt. The clerk will not spontaneously just “copy everything.” Also, remember to include designations of any relevant district or juvenile court proceedings. This is especially important when district court testimony was used to cross-examine a witness or when representing a youthful offender who was transferred to circuit court.

Failure to designate the record properly can lead to dismissal of the appeal or the refusal of the appellate court to review issues pertaining to the missing part of the record. *Commonwealth v. Black*, 329 S.W.2d 192 (Ky. 1959). All absences in the record on appeal are presumed to favor the trial court.

A certificate as to transcript is also required in any non-video appeal, must be attached to the designation of record, and must be signed by both trial counsel and the court reporter. CR 75.01(2).

**Practice Tip:** Exhibits. Not all exhibits are automatically transferred to the appellate court. CR 75.07(3) provides: “Except for (a) documents, (b) maps and charts, and (c) other papers reasonably capable of being enclosed in envelopes, exhibits shall be retained by the clerk and shall not be transmitted to the appellate court unless specifically directed by the appellate court on motion of a party or upon its own motion.” Photograph any large exhibits which will not go to the appellate court and the clerk can send up the photographs with the record. Include copies of any power point presentations and the original copies of any documents that have been enlarged. Finally, check the record sheet with the clerk to make sure it includes all the exhibits and also indicates which were introduced into evidence and what was just marked for identification.

**TERMINATION OF REPRESENTATION**

Upon termination of representation the defendant is entitled to the entirety of the file prepared by his attorney, including attorney work-product. The work product privilege is meant to protect an attorney, but not from his own former client and does not override questions of ownership. *Clark v. Commonwealth*, 194 S.W.3d 324 (Ky. 2006).

**INITIATING THE APPEAL: QUICK REFERENCE**

NOTES

**Required for All Appeals:**

- Notice Of Appeal
  - File with the Court where in which the final judgment took place.
  - State that the client wishes to appeal the final judgment.
- Designation of Record
  - Designate the entire record.
  - Specifically list each court event, and provide the date it occurred.
- Motion to Proceed in Forma Pauperis
  - State the the client was previously appointed DPA representation
  - File pursuant to KRS 453.190 and KRS 31.110

**Special Circumstances:**

- When Denied In Forma Pauperis Status
  - File a Notice of Appeal from Denial of In Forma Pauperis Status
  - File with the Court that denied the Motion to Proceed in Forma Pauperis
  - File pursuant to *Gabbard v. Lair*, 528 S.W.2d 675 (Ky. 1975) and KRS 31.120(1)(c)
- Motion for Additional Time to Certify Record on Appeal
  - File motion with the appellate court
  - File pursuant to CR 73.08
  - Attach an affidavit of the Clerk of the Circuit Court stating that an extension is needed, and why an extension is necessary.
  - Include the requested due date for the record, and the length of the extension requested.

**VII. GUIDE TO KENTUCKY SENTENCING LAW****GENERALLY**

Authorized dispositions for capital offenses (murder) in KRS 532.030(1) are: death, life without parole, life without parole for 25 years, life, a term of imprisonment of not less than 20 years and not more than 50 years. Authorized dispositions for Class A, B, C, and D felonies in KRS 532.060(2) are: Class A felony – life, 20 to 50 years, Class B felony – 10-20 years, Class C felony – 5-10 years, Class D felony 1-5 years. Some Class D drug offenses carry maximum terms of 3 years imprisonment, e.g., KRS 218A.1413 and 218A.1415.

**AGGREGATING SENTENCES**

Multiple misdemeanor convictions cannot be aggregated for more than one year. KRS 532.110(1)(b). The exception is misdemeanors committed while on misdemeanor probation, which can run either concurrent or consecutive. KRS 533.040(3), *Walker v. Commonwealth*, 10 S.W.3d 492 (Ky. App. 1999).

Multiple simultaneous convictions for Class C and D felonies cannot be aggregated for more than 20 years. KRS 532.110(1)(c). This does not apply to convictions for new felonies committed while already on felony probation or parole. In those cases, the total of old and new sentences combined can exceed 20 years because KRS 533.060(2) requires that the new sentences run consecutive to the old ones. The new sentences can run either concurrently or consecutively to each other, *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008), *overruling Devore v. Commonwealth*, 662 S.W.2d 829 (Ky. 1984), but if they are run consecutively then they cannot exceed 20 years, either. *Blackburn v. Commonwealth*, 394 S.W.3d 395 (Ky. 2011), *overruling Devore v. Commonwealth*, 662 S.W.2d 829 (Ky. 1984). This also includes the situation in which a Class C or D felony sentence is enhanced by a PFO 1st. KRS 532.110(1)(c) says that, “the aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed.” In this case, the longest term a Class C or D felony can get on a PFO 1st is 20 years. So, then, the aggregate of all the sentences combined cannot exceed 20 years, either. The statute requiring that sentences for sex crimes involving multiple victims must run consecutively to one another is not exempt from the statutory cap limiting aggregate Class C and D felonies to 20 years. *Commonwealth v. Stambaugh*, 327 S.W.3d 435 (Ky. 2010). The limit of simultaneous aggregated consecutive felonies of any class is 70 years. KRS 532.110(1)(c). The jury should be instructed regarding this sentencing cap in cases in which the defendant could get more than 70 years if the charges are all run consecutively. *Allen v. Commonwealth*, 276 S.W.3d 768 (Ky. 2008).

**Judicial Discretion, Hammer Clauses**

A defendant cannot plead to, nor can a court impose as a result of a plea, a sentence exceeding the statutory maximum. A “hammer clause” imposing more than the maximum sentence if the defendant was revoked, violated the separation of powers doctrine and was an abuse of discretion despite the fact the defendant had agreed to that provision. *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), *overruling Myers v. Commonwealth* 42 S.W.3d 594 (Ky. 2001), and *Johnson v. Commonwealth*, 90 S.W.3d 39 (Ky. 2002). The court cannot commit to a sentencing scheme at the time of the guilty plea which provides increased penalties for violations committed between the plea and sentencing. The record must reflect that sentence was imposed only after the court had considered alternatives to incarceration, the circumstances of the crime, the history, character and condition of the defendant, and the PSI. *Knox v. Commonwealth*, 361 S.W.3d 891 (Ky. 2012). Likewise, the court cannot commit to running the defendant’s sentences concurrently if the defendant succeeds on probation, or consecutively if the defendant is revoked, even if the defendant agrees to it. The court must fix the defendant’s sentence at the time of conviction. *Machniak v. Commonwealth*, 351 S.W.3d 648 (Ky. 2011). When the plea agreement said that the defendant would not be allowed to withdraw his plea at sentencing if he got into any more trouble

between the plea and then, to deny the defendant's motion to withdraw his plea summarily in deference to the plea agreement would have been an abuse of discretion (but that the trial court made the proper inquiries before denying the plea anyway). *Prater v. Commonwealth*, 421 S.W.3d 380 (Ky. 2014). The court's revocation of a pretrial diversion agreement, when the defendant had failed only one drug test, and when the diversion agreement held a zero-tolerance clause, failed to show proper use of judicial discretion and especially failed to demonstrate the discretion required by KRS 439.3406. *Helms v. Commonwealth*, 475 S.W.3d 637 (Ky. App. 2015). While a court must show sensitivity to a victim's concerns, it cannot abdicate its duty to exercise its own discretion at sentencing. Victims do not have authority to dictate the terms of a defendant's sentence. *Griffith v. Commonwealth*, 454 S.W.3d 315 (Ky. App. 2015).

## CONSECUTIVE VS. CONCURRENT

### Generally

When two sentences run concurrently, the Department of Corrections counts them as having started at the same time. A later-imposed concurrent sentence is deemed to have commenced at the beginning of the original sentence. *Lienhart v. Commonwealth*, 953 S.W.2d 70 (Ky. 1997), KRS 197.035(2) and 197.045(3).

A definite (misdemeanor) term of imprisonment must run concurrently with an indefinite (felony) term of imprisonment, and serving-out the indefinite term will satisfy both sentences. KRS 532.110(1)(a). This applies even when the sentences are imposed by different courts. *Powell v. Payton*, 544 S.W.2d 1 (Ky. 1976). A definite term of imprisonment will run concurrent with an indefinite term even when the felony is diverted. When the defendant had pleaded guilty to the felony and the misdemeanor at the same time, the defendant was entitled to credit for the time he served on the misdemeanor when his felony diversion was revoked. *Prather v. Commonwealth*, 301 S.W.3d 20 (Ky. 2009). See also *Ingram v. Commonwealth*, 338 S.W.3d 302 (Ky. App. 2011). If the judgment is silent with regard to other sentences, the sentences run concurrently. KRS 532.110(2). For example, the court did not have jurisdiction to run the defendant's revoked probation time consecutively to time revoked in another county when the judgment was silent as to whether the sentences were to run consecutively to one another. *Goldsmith v. Commonwealth*, 363 S.W.3d 330 (Ky. 2012). The exception to this is when a new felony is committed on felony probation. See *Riley v. Parke*, below.

### Life Sentences

No sentence of a term years, received at the same time as a life sentence, can run consecutively to that life sentence. Life sentences cannot run consecutive to one another. *Bedell v. Commonwealth*, 870 S.W.2d 779 (Ky. 1993), *Holloman v. Commonwealth*, 37 S.W.3d 764 (Ky. 2001). This does not apply when the defendant was already on probation or parole at the time of the offense. See *Stewart v. Commonwealth*, 153 S.W.3d 789 (Ky. 2005), in which the defendant had to serve-out a prior sentence before he could start his life sentence. No sentence of a term of years can run consecutive to a sentence of life without parole for 25 years. *Winstead v. Commonwealth*, 327 S.W.3d 479 (Ky. 2010). As stated in *Bedell*, it does not matter whether the life sentence is capital or non-capital.

### Exceptions

New Offenses Committed on Probation or Parole - Although the general rule is that misdemeanor sentences must run concurrent to felony sentences, and that consecutive misdemeanor sentences cannot exceed one year, sentences for new felonies or misdemeanors committed while on probation can run consecutively to revoked felony or misdemeanor sentences. Generally, when a new offense is committed while a defendant is still on probation:

A sentence for a felony committed while on felony probation must run consecutively to the probated felony sentence. KRS 533.060(2), *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996). Although KRS 533.040(3) seems to require that the probation first be revoked before it can run consecutively, KRS 533.060(2) controls over KRS 533.040(3), so the sentences have to

## NOTES

run consecutively regardless of whether the probation has been revoked.

Furthermore, although KRS 532.110(2) allows sentences to be run concurrently if the judgment does not specify how they are to run, in the case of felonies committed while on felony probation, the Department of Corrections will run those sentences consecutively, whether the judgment is silent on the matter or not. *Riley v. Parke*, 740 S.W.2d 934 (Ky. 1987).

A sentence for a felony committed while on misdemeanor probation can run consecutively to the probated misdemeanor sentence, but does not have to. KRS 533.040(3), *Warren v. Commonwealth*, 981 S.W.2d 134 (Ky. App. 1998). KRS 532.110(1) requires the misdemeanor time to run concurrently with the felony time. On the other hand, KRS 533.040(3) says that a revoked sentence of probation can be run consecutively. Since the statutes conflict, the court can do either.

A sentence for a misdemeanor committed while on felony probation can run consecutively to the probated felony sentence, but does not have to. KRS 533.040(3), *Snow v. Commonwealth*, 927 S.W.2d 841 (Ky. App. 1996). This is the same conflict between the same two statutes as above, with the same result: the court can run the sentences either concurrently or consecutively.

A sentence for a misdemeanor committed while on misdemeanor probation can run consecutively to the probated misdemeanor sentence, but does not have to. KRS 533.040(3), *Walker v. Commonwealth*, 10 S.W.3d 492 (Ky. App. 1999). Although KRS 532.110(1)(b) prohibits aggregated misdemeanors to exceed 1 year, KRS 533.040(3) allows the sentences to be run consecutively when, and only if, the probated sentence has already been revoked.

KRS 533.040(3) requires that, when a defendant is serving a sentence and has an outstanding probated sentence which has not yet been revoked, that the probated sentence has to run concurrently to the time the defendant is serving unless the probated sentence is revoked, either (1) prior to the defendant's parole or (2) within 90 days that the grounds for revocation come to the attention of the Department of Corrections, whichever comes first. This statute was designed to prohibit prosecutors from waiting till a defendant serves out, and then revoking him on the probation and sending him right back to prison. See the commentary. *Kiser v. Commonwealth*, 829 S.W.2d 432 (Ky. App. 1992). The trial court was prohibited from ordering the defendant's revoked sentence to run consecutively to out-of-state charges when the revocation did not occur within 90 days of the time the grounds for revocation and out-of-state conviction came to the attention of the Department of Corrections. *Ware v. Commonwealth*, 326 S.W.3d 464 (Ky. App. 2010). See also *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995).

Court imposition of a "hammer clause" which specified the sentences would run concurrently when they were probated but would run consecutively if the defendant violated probation, was in violation of the statute requiring that whether sentences run concurrently or consecutively must be fixed at the time of sentencing. *Machniak v. Commonwealth*, 351 S.W.3d 648 (Ky. 2011).

### **SPECIAL SITUATIONS: SENTENCES MUST RUN CONSECUTIVELY**

#### **Sex Crimes**

Sentences for two or more sex crimes involving two or more victims must run consecutively. KRS 532.110(1)(d). Application of this provision to crimes committed prior to the enactment of the statute (July 12, 2006) was held to violate the prohibition against ex post facto laws in *Cecil v. Commonwealth*, 297 S.W.3d 12 (Ky. 2009). Statute requiring that sentences for sex crimes involving multiple victims must run consecutively to one another is not exempt from the statutory cap limiting aggregate Class C and D felonies to 20 years. *Commonwealth v. Stambaugh*, 327 S.W.3d 435 (Ky. 2010).

#### **Ammunition**

When sentenced for the use of armor-piercing or flanged ammunition and sentenced for committing the underlying crime, those sentences must run consecutively. KRS 527.080(3).

**Escape**

Sentences imposed for the crime of escape must run consecutively to any other sentence the defendant must serve, even if the Commonwealth waits more than 90 days to revoke the prior probations. KRS 532.110(3) controls over KRS 533.040(3). *Wilson v. Commonwealth*, 78 S.W.3d 137 (Ky. App. 2001).

**Awaiting Trial**

When a defendant has been held to answer charges in District Court, has been released on bond, and commits a new offense after being indicted by the grand jury, the defendant is “awaiting trial” for the purposes of KRS 533.060(3) even if he has not yet been formally arraigned in Circuit Court and even if he does not know he was indicted. The sentences had to be run consecutively. *Moore v. Commonwealth*, 990 S.W.2d 618 (Ky. 1999), *Brown v. Commonwealth*, 295 S.W.3d 854 (Ky. App. 2009).

When a defendant has pled guilty and commits a new offense while awaiting sentencing, he is “awaiting trial” for the purposes of KRS 533.060(3) even if no trial was scheduled. *Cosby v. Commonwealth*, 147 S.W.3d 56 (Ky. 2004). In *Williams v. Commonwealth*, 354 S.W.3d 158 (Ky. App. 2011), that logic was extended to new offenses which take place while on felony pretrial diversion.

KRS 533.060(3) controls over KRS 532.110(1), so that if a felony is committed while awaiting trial for even just a misdemeanor, the two sentences have to run consecutively. *Handley v. Commonwealth*, 653 S.W.2d 165 (Ky. App. 1983).

A person shock-probated on a felony sentence may still be required to serve a concurrent misdemeanor sentence which was not also shock-probated. *Romans v. Brooks*, 637 S.W.2d 662 (Ky. App. 1982).

**DEFERRED PROSECUTION**

KRS 218A.14151 requires the Commonwealth to agree to deferred prosecution because it constitutes an interruption of the prosecution as it allows dismissal of the charges with prejudice. Allowing a court to unilaterally approve entry into a deferred prosecution program over the objection of the Commonwealth would be a separation of powers violation. A circuit court cannot order deferred prosecution over the objection of the Commonwealth on the basis that the prosecutor failed to state “substantial and compelling” reasons why deferred prosecution would not be appropriate. A comparison of the language of KRS 218A.14151(2) with the definition of “presumptive probation” in KRS 218A.010(37) reveals that the reference to substantial and compelling reasons concerns the appropriateness of presumptive probation once deferred prosecution has been denied. *Jones v. Commonwealth*, 413 S.W.3d 306 (Ky. App. 2012).

KRS 218A.14151 limits deferred prosecution agreements regarding felonies to the discretion of the Commonwealth’s Attorney and circuit court. The Commonwealth Attorney was not bound by the deferred prosecution agreement entered into by the defendant with the county attorney and agreed to by the district court. Deferred prosecution of felony charges which may result in dismissal must take place in circuit court because district court does not have the jurisdiction to dispose of felony charges. *Commonwealth v. Vibbert*, 397 S.W.3d 910 (Ky. App. 2013).

**PRETRIAL DIVERSION**

KRS 533.250 requires the Commonwealth to agree to pretrial diversion because it constitutes an interruption of the prosecution as it allows dismissal of the charges with prejudice. Allowing a court to unilaterally approve entry into a deferred prosecution program over the objection of the Commonwealth would be a separation of powers violation. *Flynt v. Commonwealth*, 105 S.W.3d 415 (Ky. 2003).

When a change in law reduced the underlying offense from a felony to a misdemeanor, the defendant was entitled to be sentenced to the misdemeanor drug paraphernalia charge when her

NOTES

## NOTES

circuit court diversion was revoked. Since the original felony charge had been diverted, final judgment had not been entered in the case and the defendant could still take advantage of the change in law. *Smith v. Commonwealth*, 400 S.W.3d 742 (Ky. 2013).

### PROBATION ELIGIBILITY

If a defendant is statutorily eligible for probation, KRS 533.010(2) requires that the court “shall consider” probation, and that probation “shall be granted” unless imprisonment is necessary for the protection of the public. A blanket refusal to consider probation is reversible sentencing error. *Patterson v. Commonwealth*, 555 S.W.2d 607 (Ky. App. 1977). It is also denial of a mandatory judicial function – the exercise of discretion. *Wyatt v. Ropke*, 407 S.W.2d 410 (Ky. 1966). The record at sentencing must reflect that the court considered the feasibility of probation or conditional discharge. *Brewer v. Commonwealth*, 550 S.W.2d 474 (Ky. 1977). The record must show that the court considered alternative sentences based upon the individual facts of the case and of the defendant. *Knox v. Commonwealth*, 361 S.W.3d 891 (Ky. 2012).

KRS 533.060(2) generally prohibits probation for felonies committed while on felony probation. However, KRS 533.030(6) explicitly says that that prohibition does not apply to Class D felonies. Therefore, even if the sentence for the new offense must run consecutively to the sentence for the old one, the sentence for the new offense can still be probated if it is a Class D felony. *Adams v. Commonwealth*, 46 S.W.3d 572 (Ky. App. 2000).

Note also that KRS 533.030(6) also allows probation for a number of Class D Felonies for which probation is prohibited in KRS 532.045. (But does not cover those charges which cannot be probated under KRS 439.265 or 439.3401.)

A defendant convicted of PFO based on prior convictions of only Class D felonies, is eligible for probation if none of the crimes involved violence or a sex crime. KRS 532.080(7).

### INELIGIBLE FOR PROBATION

#### Violent Offenders

Violent offenders as defined by KRS 439.3401 (see also KRS 532.047 and 533.010(2)), unless it is ordered as allowed by 439.3401(3), which denies probation until 85% of the sentence is carried out or twenty years, whichever is less. KRS 439.3401(2), *Hughes v. Commonwealth*, 87 S.W.3d 350 (Ky. 2002). No shock probation at all. KRS 439.265. Conviction of any Class A felony will qualify an individual to be a violent offender. A finding of death or serious physical injury is not necessary. *Pate v. Department of Corrections*, 466 S.W.3d 480 (Ky. 2015), *Mills v. Department of Corrections*, 438 S.W.3d 328 (Ky. 2014).

#### Sex Offenders

Anyone convicted of Rape 2nd degree, Sodomy 2nd degree, Incest, Unlawful Transaction with a Minor 1st degree (involving sexual activity), Use of a Minor in a Sexual Performance, or attempt to commit these offenses. Note that in 2007 a good number of crimes involving human trafficking were also added to the violent offender statute.

Anyone convicted of Rape 2nd degree, Sodomy 2nd degree, Promoting Prostitution 1st, 2nd, or 3rd degree, Permitting Prostitution, Incest, Use of a Minor in a Sexual Performance, Promoting a Sexual Performance by a Minor, Using Minors to Distribute Material Portraying a Sexual Performance by a Minor, or felony attempt to commit these offenses

#### AND WHO EITHER

uses force, causes bodily injury, befriends the child as a stranger solely for purposes of committing one of these offenses, uses a dangerous instrument or deadly weapon, has a prior conviction for one of these offenses, kidnapped the minor for the purpose of committing one of these offenses, committed one of these offenses on more than one minor at the same time, engaged in substantial sexual conduct with a minor under 14 while committing one of these offenses, or occupied a

position of special trust and engaged in substantial sexual conduct while committing one of these offenses. (KRS 532.045, but see KRS 533.030(6).)

### **PFO's**

Anyone convicted of PFO 2nd, unless all of the convictions are for Class D felonies and none of them involved acts of violence. KRS 532.080(5). Anyone convicted of PFO 1st, unless all of the convictions are for Class D felonies and none of them involved acts of violence or the commission of a sex crime. KRS 532.080(7).

### **Projectile Weapon**

Anyone convicted of a Class A, B, or C felony which involved use of a projectile weapon. KRS 533.060, *Haymon v. Commonwealth*, 657 S.W.2d 239 (Ky. 1983).

### **New Offense while on Parole or Probation**

KRS 533.060(2), but see KRS 533.030(6). See the discussion above.

### **Armed and Wearing Body Armor**

Anyone guilty of any felony offense under KRS 218A, 507, 508, 509, 511, or 513, or guilty of possession of a destructive device, unauthorized use of a motor vehicle, riot 1st degree or 2nd, possession of a firearm by convicted felon, unlawful possession of a weapon on school property, possession of a handgun by a minor, or theft of a motor vehicle under KRS 514.030 AND wearing body armor and armed with a deadly weapon. (KRS 533.065)

## **PROBATION REVOCATION**

### **Notice of Conditions of Probation, Generally**

When a defendant is probated, he is supposed to be given a written statement explicitly listing the terms and conditions of his probation. KRS 533.030(5). (See the standard probation contract at the end of this section.) Simply writing down the conditions of conditional discharge or probation on a district court docket is not sufficient notice. *Wyatt v. Commonwealth*, 387 S.W.3d 350 (Ky. App. 2012). (Compare *Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky. App. 2012), *abrogated*, in which the record reflected that the defendant had been orally informed of the conditions of his probation.) Nevertheless, the law presumes that anyone on probation knows that breaking the law may have an effect on his probation. *Tiitsman v. Commonwealth*, 509 S.W.2d 275 (Ky. App. 1974). Violations of the Uniform Code of Military Justice (UCMJ) can be "offenses" for the purpose of revocation if the violation could result in a fine or imprisonment. *Commonwealth v. Lopez*, 292 S.W.3d 878 (Ky. 2009). The court has no power to inflict banishment from the county as a condition of discharge or probation. *Weigand v. Commonwealth*, 397 S.W.2d 780 (Ky. 1966), see also *Butler v. Commonwealth*, 304 S.W.3d 78 (Ky. App. 2010).

### **Standard of Proof**

The standard of proof is not beyond a reasonable doubt, but rather preponderance of the evidence. *Murphy v. Commonwealth*, 551 S.W.2d 838 (Ky. App. 1977), *Radson v. Commonwealth*, 701 S.W.2d 716 (Ky. App. 1986), *Jarrel v. Commonwealth*, 384 S.W.3d 195 (Ky. App. 2012). For this reason, it is not necessary for a defendant to be convicted on a new charge in order to be revoked on an old one. *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky. App. 1986), *Miller v. Commonwealth*, 329 S.W.3d 358 (Ky. App. 2010). A court does not have to await the outcome of new criminal charges before holding a revocation hearing. *Barker v. Commonwealth*, 379 S.W.3d 116 (Ky. 2012).

The Commonwealth bears the burden. Shifting the burden to the defendant to "show cause" why he should not be revoked violates due process. *Hunt v. Commonwealth*, 326 S.W.3d 437 (Ky. 2010).

Attempts to comply are a defense against revocation. In *Keith v. Commonwealth*, 689 S.W.2d 613 (Ky. App. 1985), the defendant was ordered to admit himself to Eastern State Hospital, but the hospital said he did not need inpatient care and enrolled him in an outpatient program instead. After finding that the defendant "made every reasonable effort to comply with the conditions

NOTES

## NOTES

imposed upon him,” (at 615) the Court of Appeals vacated the revocation and said that “when there is no evidence to support the court’s decision to revoke, the revocation of that probation is totally arbitrary.” (At 625.)

### **Judicial Discretion, Findings Required by Statute**

KRS 439.3601 requires courts to make findings that an individual both “constitutes a significant risk to prior victims of the supervised individual or the community at large” and that he “cannot be appropriately managed within the community” prior to revocation. *Commonwealth v. Andrews*, 448 S.W.3d 773, 776 (Ky. 2014). It also requires consideration of lesser alternatives to revocation. (*Andrews*, at 780.) To that extent, the statute limit’s a court’s authority to revoke probation. *Brann v. Commonwealth*, 469 S.W.3d 429 (Ky. App. 2015).

The record must also reflect that all of these findings were made by the trial court. “On remand, the trial court shall enter express findings as to both elements of KRS 439.3106(1). Per *Andrews*, once the trial court has fully considered and found as to these elements, its analysis should produce a conclusion concerning whether revocation or a lesser sanction is most appropriate, thus serving both the spirit of, and the intent behind, KRS 439.3106.” *McClure v. Commonwealth*, 457 S.W.3d 728, 734 (Ky. App. 2015).

The standard of review for revocations is abuse of discretion. *Lucas v. Commonwealth*, 258 S.W.3d 806 (Ky. App. 2008). The trial court abused its discretion and remand was necessary in *Bran*, *supra*, when the record did not reflect the trial court’s consideration of KRS 439.3601 at the time it revoked the defendant. Remand was necessary in *McClure*, *supra*, when the trial court failed to make findings regarding whether the defendant could be appropriately managed in the community. See also *Blankenship v. Commonwealth*, 2015 WL 9311686, not yet final. Remand was required when the court revoked the defendant’s pretrial diversion without considering whether the defendant was a significant risk and without considering a range of responses to the defendant’s new charges. *Williams v. Commonwealth*, 462 S.W.3d 407 (Ky. App. 2015).

Expressly referring to the factors is not necessary, as long the record reflects that the issues were considered by the court and the facts supported the findings. *McVey v. Commonwealth*, 467 S.W.3d 259 (Ky. App. 2015). Although the courts in *Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky. App. 2012), abrogated, and *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012), abrogated, did not follow the precise language of KRS 439.3106 in revoking the defendants, the findings which were made by the courts covered the necessary findings.

It also an abuse of discretion to arrive at these findings without a sufficient factual basis for them. In some possible instances, a single violation, even if proven by a preponderance of the evidence, may not support findings of significant risk or unmanageability in the community. In *Andrews*, for instance, the court said, “If the trial court had based its decision solely on Andrews’ violation of the condition that he remain drug-free, we would have had to deem that decision an abuse of discretion under the new state of the law.” (*Andrews*, at 780.) “[S]ince the enactment of KRS 439.3106 a failure to comply with a condition of probation is no longer sufficient to automatically justify revocation of probation.” *Downs v. Commonwealth*, 2013 WL 1867982, Ky. App., May, 2013, *unpublished*. It was abuse of discretion for the court to revoke the defendant as a predetermined outcome without the necessary findings when remaining drug free was a condition of diversion, the defendant had only a single positive drug screen and the defendant was diverted under a zero-tolerance provision which set out revocation as the consequence of any violation of the terms of the diversion. *Helms v. Commonwealth*, 475 S.W.3d 637 (Ky. App. 2015).

### **Graduated Sanctions**

The statute does not limit a court’s discretion to revoke prior to the use of lesser alternatives such as graduated sanctions. “Nothing in the statute or in the Supreme Court’s interpretation of it requires the trial court to impose lesser sanctions prior to revoking probation.” (*McClure*, *supra*, at 732.)

The administrative regulation covering the application of graduated sanctions is 501 KAR 6:250.

Get a copy. The regulation lists which offenses are considered minor and major offenses, and then specifies which graduated sanctions are appropriate for each, depending on the risk level of the probationer. See the chart in the back of this Notebook.

When a defendant is sanctioned for a violation and then later revoked for the same violation, the Double Jeopardy Clause does not apply because revocation does not rise to the level of being “put in jeopardy” in the Constitutional sense because a revocation cannot result in another conviction. *Kaletch v. Commonwealth*, 396 S.W.3d 324 (Ky. App. 2013), quoting *Thompson v. Commonwealth*, 147 S.W.3d 22, 54 (Ky. 2004). But remember that if a graduated sanction is imposed in lieu of revocation, KRS 533.040(2) still requires revocation within 90 days of the time Corrections became aware of the new offense or the sentences have to run concurrently. See *Ware v. Commonwealth*, 326 S.W.3d 464 (Ky. App. 2010), *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995), and *Kiser v. Commonwealth*, 829 S.W.2d 432 (Ky. App. 1992).

### Due Process Requirements

Although there is no constitutional right to probation or parole, a defendant still has a constitutional right to due process in revocation proceedings. This is because the defendant has a liberty interest at stake under the 14th Amendment. The minimum due process requirements of a revocation were first applied to parole revocations in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and extended to probation revocations in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). They are: (1) written notice of the alleged violations, (2) disclosure of the evidence against the defendant, (3) opportunity to be heard in person and to present witnesses and documentary evidence, (4) the right to confront and cross-examine adverse witnesses, (5) a “neutral and detached” hearing body or court, and (6) written findings of fact as to the evidence relied on and the reasons for revocation. These requirements were adopted in Kentucky in *Murphy v. Commonwealth*, 551 S.W.2d 838 (Ky. App. 1977).

KRS 535.050(2) provides that a court may not revoke or modify the conditions of a defendant’s probation without a hearing, with the defendant, represented by counsel, following written notice of the grounds of revocation or modification. The prosecution has a right to notice of a scheduled revocation and to attend and participate. *Goff v. Commonwealth*, 472 S.W.3d 181 (Ky. App. 2015).

The defendant’s due process rights were violated in revocation hearing in which the probation officer was not sworn, the defendant’s attorney was not given the opportunity to cross-examine, no testimony was taken, the officer simply stated the defendant’s alleged violations and the court asked the defendant to respond. The court improperly shifted the burden of proof to the defendant by asking him to show cause why he should not be revoked, and appointment of the public defender at the time of the hearing violated the defendant’s due process rights when counsel had just received the file that morning and admitted she had not investigated the allegations against the defendant and had not had time to prepare for the hearing. *Hunt v. Commonwealth*, 326 SW3d 437 (Ky. 2010). See also *Gibson v. Commonwealth*, 2013 WL 6153700, Ky. App., Nov. 2013, unpublished, for a similar case.

In *Townsend v. Commonwealth*, 2013 WL 645944, Ky. App., Feb. 2013, unpublished, the defendant was revoked on the basis of nothing but hearsay and the court said “there are limits to how informal the proceedings can be.” *Townsend’s* fundamental minimum due process rights to confront and cross-examine were violated by the procedure. The trial court’s acceptance of a probation officer’s signed report did not justify the finding of a violation in *Goff v. Commonwealth*, 472 S.W.3d 181 (Ky. App. 2015).

### Attorney at Original Sentencing

Remember, too, that a court cannot revoke a probated sentence if the defendant did not have an attorney when the sentence was imposed and probated. *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002). See also *Stone v. Commonwealth*, 217 S.W.3d 233 (Ky. 2007).

## NOTES

**Not as Extensive as a Criminal Trial**

Nevertheless, the case law also reflects the fact that the due process rights of a defendant at a revocation hearing are not equivalent to those of a defendant in a criminal trial. (See, e.g., *Robinson v. Commonwealth*, 86 S.W.3d 54 (Ky. App. 2002), for the proposition that a revocation hearing is not a second criminal prosecution.) For instance:

- **Appointment of Counsel** – Appointment of counsel at a revocation hearing should be determined on a case-by-case basis and is not an absolute right, especially “if the grounds for revocation are not in dispute, as in the case of a conviction for a new offense.” *Dunson v. Commonwealth*, 57 S.W.3d 847, 849 (Ky. App. 2001), quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Nevertheless, remember that KRS 533.050(2) requires that counsel be appointed. See also *Hunt, supra*.
- **Discovery** – RCr 7.24 does not apply to revocation hearings, and the defendant was not entitled to the tests used, the lab standards, and the amount of marijuana found in the defendant’s system. The defendant’s revocation was proper in as much as the defendant had in fact tested positive for marijuana. *Robinson v. Commonwealth*, 86 S.W.3d 54 (Ky. App. 2002).
- **Confrontation** – The 6th Amendment right to confront is not absolute in informal procedures such as probation revocations. Affidavits, depositions, documents, and other reliable substitutions for live witnesses are allowable when witnesses are unavailable or great hardship would be involved in producing them. *Marshall v. Commonwealth*, 638 S.W.2d 288 (Ky. App. 1982). But see *Townsend, supra*.
- **Evidence** – The rules of evidence do not apply to revocation hearings. KRE 1101(d) (5). Hearsay is admissible. *Marshall v. Commonwealth*, 638 S.W.2d 288 (Ky. App. 1982). But see *Townsend, supra*. Illegally seized evidence is admissible. *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky. App. 1986). Statements made in violation of *Miranda* are admissible. *Childers v. Commonwealth*, 593 S.W.2d 80 (Ky. App. 1980).

**Written Notice of Grounds for Revocation**

In *Radson v. Commonwealth*, 701 S.W.2d 716 (Ky. App. 1986), the defendant was given notice of one ground of revocation, but was actually revoked on the basis of another ground to which he had not been given notice. See also *Baumgardner v. Commonwealth*, 687 S.W.2d 560 (Ky. App. 1985), in which the court ordered a revocation hearing sua sponte after the defendant’s trial and acquittal for receiving stolen property.

Service of notice of intent to revoke should be served on the defendant personally. The requirement of service on the defendant in KRS 533.050(1) can be waived by counsel by not raising the issue prior to the hearing. *Messer v. Commonwealth*, 754 S.W.2d 872 (Ky. App. 1988). See also *Patrick v. Commonwealth*, 2008 WL 746075, Ky. App., March 2008, *unpublished*, and *Patton v. Commonwealth*, 2012 WL 592331, Ky. App., Feb. 2012, *unpublished*.

**Right to Be Heard, Present Evidence, Confront**

In *U.S. v. Dodson*, 25 F.3d 385 (6th Cir. 1994), the defendant was not allowed to testify in his own behalf or present evidence. The court ruled that, even at revocation hearings, “[i]n order to ensure a constitutionally sufficient opportunity to contest the allegations and provide *evidence in mitigation, a defendant must also be afforded as a matter of due process the opportunity to be heard in person and to present witnesses and documentary evidence.*” At 388, *emphasis original*.

A defendant cannot challenge a decision to revoke probation by challenging the validity of the underlying conviction. *Lucas v. Commonwealth*, 380 S.W.3d 554 (Ky. App. 2012).

When testifying in a probation revocation hearing regarding the circumstances surrounding new criminal charges, the probationer’s testimony cannot be used as substantive evidence against him at any later criminal trial on the same conduct, and the court should advise the probationer of this. The testimony can be used to rebut or impeach if subsequent testimony from the defendant is inconsistent with that given in the hearing. *Barker v. Commonwealth*, 379 S.W.3d 116 (Ky. 2012).

**Neutral Court**

Reversal was required in *Baumgardner v. Commonwealth*, 687 S.W.2d 560 (Ky. App. 1985), when the judge who presided over the defendant's trial and acquittal sua sponte ordered a revocation hearing and presided over that as well.

**Findings of Fact**

In *Keith v. Commonwealth*, 689 S.W.2d 613 (Ky. App. 1985), the defendant was ordered to admit himself to Eastern State Hospital, but the hospital said he did not need inpatient care and enrolled him in an outpatient program instead. After finding that the defendant "made every reasonable effort to comply with the conditions imposed upon him," (at 615) the Court of Appeals vacated the revocation and said that "when there is no evidence to support the court's decision to revoke, the revocation of that probation is totally arbitrary." (At 625.) See also *Baumgardner v. Commonwealth*, 687 S.W.2d 560 (Ky. App. 1985), in which there were no findings of fact, and the only evidence presented at the hearing was that the defendant had been acquitted of the charges for which he was being revoked.

Oral findings are sufficient for revocation proceedings if the findings make sufficient reference to the factual basis for revocation and have been preserved sufficiently for review so that a reviewing court can review whether the basis for revocation was proper, *Commonwealth v. Alleman*, 306 S.W.3d 484 (Ky. 2010), *Miller v. Commonwealth*, 329 S.W.3d 358 (Ky. App. 2010). See also *Richardson v. Commonwealth*, 323 S.W.3d 379 (Ky. App. 2010), in which it was held that the defendant's due process rights were not violated by oral findings and an order of revocation which did not specify the factual basis for revocation but the grounds for revocation were in written findings and on the videotaped record of the revocation, preserving the basis of revocation adequately for review.

**Credit for Time Held in Contempt**

The defendant was entitled to jail custody credit for the numerous times he was incarcerated during his failed attempt to successfully complete drug court, in spite of the fact that the court imposed the jail time as sanctions for contempt. The only power the court had to impose jail time was through the fact that the defendant was on probation, and the defendant's so-called acts of contempt were not isolated acts of disrespect but were directly related to the terms of his probation, as modified by his entrance into drug court. When statutory provisions allow for incarceration as a modification of the terms of probation, the court must rely on those rather than on its inherent powers of contempt. Even additional crimes committed while on probation are not a matter of contempt or defiance of the court, but a matter of the violation of law. *Nicely v. Commonwealth*, 326 S.W.3d 441 (Ky. 2010). The defendant is also eligible for time spent in home incarceration either before or after conviction. Violation of the terms of home incarceration interrupts the credit. KRS 532.245, abrogating *Buford v. Commonwealth*, 58 S.W.3d 490 (Ky. App. 2003).

**Timing of Revocation**

Probation revocation must take place during the probation period. The circuit court lost jurisdiction to revoke the defendant's probation or to hold a revocation hearing when the probation period ended. The court's prior order reinstating probation did not extend the initial expiration date. KRS 533.020(1) specifies that revocation take place prior to the end of the probation period. *Conrad v. Evridge*, 315 SW3d 313 (Ky. 2010). See also *Grundy v. Commonwealth*, 400 S.W.3d 752 (Ky. App. 2013), in which the trial court took notice that the probation period had ended by saying the defendant had been probated "five years ago yesterday, as a matter of fact" but then revoked the defendant anyway. This was an abuse of discretion and a miscarriage of justice.

Exceptions to this rule include when the defendant has absconded from supervision, *Commonwealth v. Whitcomb*, 2012 WL 1886564, Ky. App., May 2012, unpublished, and when the running of the time period is tolled by a violation which results in incarceration and the defendant is then put back on probation. KRS 533.040(2) requires that no credit be given toward expiration of the probation period between the date of the violation and the restoration of probation. *Commonwealth v. Dulin*, 427 S.W.3d 170 (Ky. 2014). So, under *Dulin*, the probationary period is tolled but under

NOTES

## NOTES

Nicely the defendant is getting credit toward time served. A warrant issued for the probationer's arrest before expiration of the probationary period extended the jurisdiction of the court to revoke beyond the expiration of the original probationary period in *Robinson v. Commonwealth*, 437 S.W.3d 153 (Ky. App. 2013). Failure to pay restitution does not automatically toll. See *Wright, below*.

It is an abuse of discretion to base a defendant's revocation on an offense committed prior to the beginning of the probationary period. *Northcutt v. Commonwealth*, 2007 WL 3227251, Ky. App., Nov. 2007, *unpublished*.

A court does not have to await the outcome of new criminal charges before holding a revocation hearing. *Barker v. Commonwealth*, 379 S.W.3d 116 (Ky. 2012). Also challenge the use of convictions which are on appeal. They are not admissible in truth-in-sentencing/guilt phase or PFO phase proceedings. *Williams v. Commonwealth*, 178 S.W.3d 491 (Ky. 2005).

KRS 533.040(3), governing probation revocations of people while incarcerated, requires that the probation revocation be completed, and not merely initiated, within the 90 day period if the sentence is to run consecutively. *Commonwealth v. Love*, 334 S.W.3d 92 (Ky. 2011).

On the other hand, the court retained jurisdiction to void the defendant's diversion agreement even after the time of the diversion had terminated, because the Commonwealth had filed a timely motion to void the agreement prior to the expiration of the diversion period. The court retained jurisdiction to void the agreement and even reinstate the original charges. *Ballard v. Commonwealth*, 320 S.W.3d 69 (Ky. 2010). A motion to void a diversion agreement must be made prior to the termination of the diversion period in order for the court to have jurisdiction to void the agreement, *Tucker v. Commonwealth*, 295 S.W.3d 455 (Ky. App. 2009). See also *Maggard v. Commonwealth*, 2012 WL 246389, Ky. App., Jan. 2012, *unpublished*, relying on *Ballard* and *Tucker*.

#### **Extending the Probation Period**

KRS 533.020(4), which allows the probationary period to be extended for "the time necessary to complete restitution" does not automatically prolong the court's jurisdiction without a duly entered court order. *Commonwealth v. Wright*, 2012 WL 1890365, Ky. App., May 2012, *unpublished*.

A misdemeanor conviction for attempt to commit an unlawful transaction with a minor did not qualify the defendant as a sex offender who must be ordered into the three-year sex offender treatment program, and the defendant's two-year misdemeanor probation period could not be extended in order to complete the program. *Miller v. Commonwealth*, 391 S.W.3d 801 (Ky. 2013).

A defendant can agree to an extension of probation beyond statutory limits in order to avoid a more severe sanction. *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997).

#### **Separate Sentencing and Updated PSI**

When a defendant has violated the terms of his diversion, the court has decided to revoke the diversion, and the Commonwealth has decided to proceed to sentencing, the defendant is entitled to a sentencing hearing just as if he had never been diverted, including an updated PSI. *Peeler v. Commonwealth*, 275 S.W.3d 223 (Ky. App. 2008). A court can impose any part or all of the remaining time to serve, but not more than the original sentence. *Hord v. Commonwealth*, 450 S.W.2d 530 (Ky. 1970), *Evans v. Commonwealth*, 2007 WL 1201782, Ky. App., April 2007, *unpublished*.

#### **Child Support, Fines, Restitution**

Relying on the United States Supreme Court holding in *Bearden v. Georgia*, 461 U.S. 660 (1983), the Supreme Court of Kentucky noted that, "when considering revocation for failure to pay fines and restitution, the trial court must consider (1) whether the probationer made sufficient bona fide attempts to make payments but [had] been unable to do so through no fault of his own and, if so, (2) whether alternatives to imprisonment might suffice to serve interests in punishment

and deterrence.” The trial court must specifically identify the evidence it relies upon in making these determinations on the record, as well as the specific reason(s) for revoking probation on the record. *Commonwealth v. Marshall*, 345 S.W.3d 822, 828 (Ky. 2011). The *Bearden* standard was applied to fines in Kentucky in *Mauk v. Commonwealth*, 700 S.W.2d 803 (Ky. App. 1985), applied to restitution in Kentucky in *Clayborn v. Commonwealth*, 701 S.W.2d 413 (Ky. App. 1985), and applied to child support (as a type of restitution) in *Marshall*. See also *Bowlin v. Commonwealth*, 357 S.W.3d 561 (Ky. App. 2012), *Hamm v. Commonwealth*, 367 S.W.3d 605 (Ky. App. 2012), and *Gamble v. Commonwealth*, 293 S.W.3d 406 (Ky. 2009).

The Supreme Court’s holding in *Bearden*, by logical extension, also applies to the failure to find and/or maintain employment. The court must consider whether the defendant made attempts to find employment but could not. *Mbaye v. Commonwealth*, 382 S.W.3d 69 (Ky. App. 2012).

Courts have observed that the receipt of Supplemental Security Income (SSI) benefits does not preclude the enforcement of a child support obligation where there is evidence that the obligor retains or has regained the ability to earn income from which child support could be paid. However, the court is not free to completely disregard the Social Security Administration’s determinations that an SSI recipient is disabled and needs the full amount of his or her award for subsistence. If child support is to be demanded from the SSI benefit, there must be evidence clearly establishing the recipient’s ability to afford the support payment. *Commonwealth v. Ivy*, 353 S.W.3d 324 (Ky. 2011). See also *Com. ex rel. Hale v. Stovall*, 2007 WL 1784081, Ky. App., June 2007, *unpublished*, in which the court set the child support at \$0.00 because the defendant’s only income was SSI.

In a revocation for failure to pay child support, the trial court is required to set a purge amount upon its original finding of contempt and imposition of conditional discharge. In order to preserve for appeal the issue of whether the trial court erred in not setting a purge amount following a finding of contempt, the defendant must request a purge amount at the time he was found in contempt. In order to find the defendant in contempt, the court must determine whether the ex-husband made bona fide attempts to make ordered support payments but was unable to do so through no fault of his own, and whether alternatives to imprisonment might accomplish the objectives of the Commonwealth prior to revocation. *Shaffeld v. Commonwealth*, 368 S.W.3d 129 (Ky. App. 2012).

However, a court order ordering a defendant to pay restitution at an amount to be determined in the future is not a valid order for restitution because it does not fix the amount. KRS 532.033 lists the requirements of a valid order of restitution and requires that the court fix the amount at sentencing. KRS 431.200 controls post-sentencing attempts to collect restitution in cases of damaged property, and requires the filing of a verified petition within 90 days of sentencing. Since that petition was never filed, and the court normally loses jurisdiction over a case 10 days after the entry of final judgment, and since the court waited for 7 years for the defendant to serve out his sentence before setting the amount of restitution, the court had lost jurisdiction over the defendant to order restitution. *Rollins v. Commonwealth*, 294 S.W.3d 463 (Ky. App. 2009). On the other hand, the defendant waived the issue of whether the court retained jurisdiction to order an amount of restitution 10 days after entry of the final judgment in the case, when he agreed to a restitution hearing after sentencing. *Commonwealth v. Steadman*, 411 S.W.3d 717 (Ky. 2013). An order of restitution that failed to fix the amount was also ruled invalid in *Brown v. Commonwealth*, 326 S.W.3d 469 (Ky. App. 2010).

It was an abuse of discretion to revoke the defendant when the trial court recognized that the defendant was making a good faith effort to comply with her restitution payment schedule, but revoked the defendant anyway. *Wills v. Commonwealth*, 396 S.W.3d 319 (Ky. App. 2013).

The child support guidelines are at KRS 403.211 et seq.

### PAROLE ELIGIBILITY

The date set by the Department of Corrections as the date of a state prisoner’s parole eligibility

## NOTES

is a fixed date. It is not brought closer by any kind of good-time, work-time, or educational achievement credit. In fact, although statutory good time is listed in the prisoner's sentence calculation in his resident record card, prisoners do not actually receive credit for good time until they reach their minimum parole eligibility date. *Robinson v. Commonwealth*, 181 S.W.3d 30 (Ky. 2005).

KRS 439.3401(2) says, "Violent offenders may have a greater minimum parole eligibility date than other offenders who receive longer sentences, including a sentence of life imprisonment." This seems plain enough, but it is not the law. For any sentence over 23 years and 6 months, the parole eligibility is 20 years. No sentence can have a longer parole eligibility than a life sentence. *Hughes v. Commonwealth*, 87 S.W.3d 850 (Ky. 2002). This includes parole eligibility at 85%. KRS 439.3401(2).

**By Types of Crimes**

- Capital offenses, Class A felonies of any kind, and Class B felonies involving death or serious physical injury, **85% parole eligibility**, by statute, KRS 439.3401(3), for offenses committed after July 15, 1998. Manslaughter 2nd Degree (a Class C felony) when the victim was a peace officer or firefighter killed in the line of duty and the victim was "clearly identifiable" as a peace officer or firefighter. KRS 439.3401(3)(b). The domestic violence exception to 85% parole eligibility does not apply to people convicted of capital murder. KRS 439.3401(5), KRS 533.060(1), *Gaines v. Commonwealth*, 439 S.W.3d 160 (Ky. 2014).
- Convicted of either Manslaughter 2nd Degree or Reckless Homicide and the victim was a peace officer killed in the line of duty, KRS 439.3401(3)(c), Theft by Unlawful Taking of 10 million dollars or more, KRS 514.030(3), guilty of a Chapter 507 homicide offense or a chapter 507A fetal homicide offense not otherwise constituting a violent offense, and the victim died of an overdose of a Schedule I controlled substance, KRS 439.3401(3)(d), convicted of Importing Heroin, KRS 218A.1410, Trafficking Heroin, Class C felony or higher, or Class D felony with more than one item of paraphernalia, KRS 218A.1412(3)(b)(2) & (c), Aggravated Trafficking, Class B felony, KRS 218A.142, **50% parole eligibility**.
- Class B felonies not involving death or serious physical injury, violent and nonviolent Class C and D felonies, **20% parole eligibility**, by administrative regulation as provided in KRS 439.340(3)(b), 501 KAR 1:030, for offenses committed after December 3, 1980.
- An exception is nonviolent Class D felonies with a total aggregate sentence of not more than five years. They have **15% parole eligibility** or two months of original sentence, whichever is longer, by statute, KRS 439.340(3)(a).

**WARNING!! Violent Offenders.** KRS 439.3401(1), which lists the offenses which can qualify a person as a violent offender, includes offenses which are Class C or D felonies. Subsection (3) limits 85% parole eligibility to capital offenses, Class A felonies, and Class B felonies involving death or serious physical injury. Subsection (4) imposes a minimum serve out of 85% on all violent offenses. Class C or D violent offenses should have parole eligibility of 20%. Nevertheless, the Department of Corrections has applied 85% parole eligibility to ALL felony sexual offenses in the past. DPA Appeals Branch had to do a Declaratory Judgment action. This continues to be a source of concern. So, have the judge make a finding of parole eligibility at the sentencing hearing and get an agreed order.

**CREDIT FOR TIME SERVED**

A defendant must be given credit for time served prior to sentencing when the time was served on the charge which resulted in that sentence. KRS 532.120(3). Time served for a charge of which the defendant is acquitted shall be credited toward any sentence on any other charge which was lodged against the defendant while in custody, by warrant or detainer. KRS 532.120(4).

Time spent on home incarceration is credited to time served when the sentence has been imposed

and the court has ruled that part of the sentence can be served on home incarceration. KRS 532.120(7), 532.210(4), 532.245, 533.030(6). Time spent on home incarceration as a condition of pretrial release is also credited toward time served. Violation of the terms of home incarceration interrupts the credit. KRS 532.245, abrogating *Buford v. Commonwealth*, 58 S.W.3d 490 (Ky. App. 2003).

Credit can now be earned for time spent on parole with the exception of persons who violated their parole, violent offenders, and persons who are registered sexual offenders. KRS 439.344. Upheld in *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky.2009), corrected January 4, 2010. All of the same types of good time credit available to prisoners (see below) are also available to people on parole. KRS 439.345(2), 501 KAR 6:270, policy 27-20-03, Parole Compliance Credit (Amended 3/12/12).

**SERVING TIME**

**Kinds of Time**

Felony sentences are indeterminate, i.e., they are subject to the kinds of statutory credit described below and, as such, may result in shorter time to serve than the term actually imposed. KRS 532.060. A sentence for a misdemeanor, however, is a definite term. KRS 532.090. In other words, if you get sentenced to six months on a misdemeanor, you serve six months (barring shock probation, etc.).

**Placement**

Those persons who receive a sentence of five (5) years or less “shall serve that term in a county jail in a county in which the fiscal court has agreed to house state prisoners.” Class C and D felons who receive sentences over five years may also serve their time in a regional detention facility rather than in a state institution. KRS 532.100(4)(a)&(b). State prisoners who cannot be housed in county jails or regional detention facilities must be transferred to a state institution within 45 days of final sentencing. KRS 532.100(7).

**Modification of Sentence**

When a defendant is sentenced to one year of indeterminate time, the court may convert that sentence to a definite term of one year or less if it believes the felony sentence to be unduly harsh. KRS 532.070(2). This statute only applies to sentences imposed by juries, however, and not to plea bargains. *Bailey v. Commonwealth*, 70 S.W.3d 414 (Ky. 2002).

**Calculation of**

One often hears that a “state year” is 7 months, 21 days, or that it is around 8 months. This is an old wives’ tale. The truth is there is no single answer to what constitutes a state year. It depends entirely on what kind of statutory credit the prisoner receives during each year. There are three kinds of statutory credit (now referred to as “sentencing credit”):

**Statutory Good Time, KRS 197.045(1)(b)(1)**

A prisoner can get 10 days of good time per month. This is probably the source of the rumor that a state year is around eight months. People multiply 10 days per month by 12 months and assume that means that 120 days (4 months) will come off the time, leaving only 8 months to serve out of every state year. It does not work that way. In actuality, the time is being taken off the end of the year as the year progresses, so the prisoner never “serves” 12 months. For instance, after the

<u>1</u>	<u>2</u>	<u>3</u>	4	5	6	7	8	9	10	11	<del>12</del>
In another 3 months, the next-to-last month falls off:											
<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	7	8	9	10	<del>11</del>	<del>12</del>
Leaving, in this case, a “state year” of 9 months:											
<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>	<del>10</del>	<del>11</del>	<del>12</del>

## NOTES

first three months, at 10 days credit per month, the last month of the year falls off:

Good time can be suspended for misconduct. Violent offenders do not get good time. KRS 439.3401(4). Sexual offenders earn sentencing credits of all types but do not get it applied to their sentences until completion of the Sexual Offender Treatment Program. KRS 197.045(4).

**Meritorious Good Time, KRS 197.045(1)(b)(2)**

This is credit for performing duties and work while incarcerated, and is usually handed out liberally. A prisoner can get an extra 7 days of credit per month with this (and 7 more for service during a time of emergency). So, if the prisoner is getting meritorious work time on top of good time, the 9th month of his state year will also fall off of his sentence after a little more than 4 months. This would reduce his “state year,” that year, to only 8 months.

There is also an exceptional emergency service type of meritorious good time not to exceed 7 days per month. KRS 197.045(1)(b)(3).

**Educational Good Time, KRS 197.045(1)(a)(2)&(3)**

This is awarded upon the completion of a G.E.D. or the earning of a high school diploma, upon the earning of a 2- and 4-year degree, and upon completion of a drug treatment program requiring participation for a minimum of six months. This is a 90-day credit. So, if it is added to the credit our hypothetical prisoner already has for this year, his “state year” can be as short as 5-6 months.

**Work Credit, KRS 197.047**

5 “sentence credits” for every full 8 hours worked, 1 day of the actual sentence deducted for every 5 sentence credits earned.

All of these types of sentencing credit can be forfeited once earned, as well as the right to earn sentencing credit in the future, if the prisoner commits offenses, violates the rules, or files a civil action which is later dismissed as being malicious, harassing, or frivolous. KRS 197.045(2)&(5) (a).

See Brenn O. Combs, “Understanding Sentence Calculation and Application,” *The Advocate*, vol. 25, no. 5, September, 2003, pp. 30-36.

**Challenging the Calculation of Credit for Time Served**

An inmate must exhaust all administrative remedies, which includes following the correct administrative procedure, prior to filing a petition for declaration of rights seeking credit against a sentence. See *Thrasher v. Commonwealth*, 386 S.W.3d 132 (Ky. App. 2012), in which the court held that proper procedure required an inmate to commence any challenge to the calculation of his sentence with request to offender information services office at the institution where he was confined, and the inmate submitted only an undated letter received from the Department of Corrections Offender Information Services, which contained no reference to good time credit or to the inmate’s particular case, in violation of KRS 454.415(4).

**Sex Offenders**

If a person convicted of a Class D sex offense receives a sentence of 2 years or more, he must serve that sentence in a state institution. KRS 532.100(4)(a). State prisoners who cannot be housed in county jails or regional detention facilities must be transferred to a state institution within 45 days of final sentencing. KRS 532.100(7).

Be aware that, since KRS 439.340(11) requires completion of the Sexual Offender Treatment Program before a prisoner is eligible for parole, and since the program takes at least 2 years to complete, if your client receives a sentence of two years he will simply have to serve it all out. Good time will also not be credited until completion of the treatment program. KRS 197.045(4).

**POSTINCARCERATION SUPERVISION**

Even if an inmate is not granted parole and serves out his sentence, an additional 5 years of postincarceration supervision is required by KRS 532.043 and KRS 532.060(3)&(4) for the

following offenses: any felony sex crime in KRS 510, Incest, Unlawful Transaction 1st Degree sexual activity, Use of a Minor in a Sexual Performance, and Human Trafficking involving commercial sexual activity. Persons revoked pursuant to these statutes will not be eligible for parole. 501 KAR 1:030. Under KRS 532.060(4) and KRS 532.400, an additional one year of postincarceration supervision will be required for persons convicted of a capital offense, a Class A felony, who have a maximum or close security classification, or are not eligible for parole by statute. In all cases, violations of the terms of supervision may result in the person's reincarceration.

Postincarceration supervision statutes apply retroactively, whether or not they were in effect at the time of sentencing. *Brady v. Commonwealth*, 396 S.W.3d 315 (Ky. App. 2013).

It is the job of the Department of Corrections to set the terms of the postincarceration supervision. A trial court cannot set the conditions of this supervision (formerly known as "conditional discharge"). *Chames v. Commonwealth*, 405 S.W.3d 519 (Ky. App. 2012).

### PAROLE REVOCATION

KRS 31.030(13) allows DPA to appoint attorneys in parole revocations in front of administrative law judges. Parole revocation hearings are conducted pursuant to KRS 439.340(3)(b) and 501 KAR 1:040, and *Morrissey v. Brewer*, 408 U.S. 471 (1972). Like a preliminary hearing on a felony charge in district court, the standard of proof for a parole revocation hearing is probable cause.

Charges against a parolee are initiated by the parole officer serving notice of a preliminary hearing which sets forth the allegations. The parole officer bears the burden of proof to establish the elements of the violation. The parolee has the right to counsel and to testify. The options before an administrative law judge (ALJ) are: (1) dismiss for lack of probable cause. (2) find probable cause and refer the case to the parole board to issue a parole violation warrant for a final hearing within 30 days of the parolee's arrival at the institution, (3) find probable cause but recommend leniency or a viable alternative to incarceration in which case the parole board will vote on issuing a parole violation warrant, (4) grant leniency if all parties agree and continue the case indefinitely if the parolee admits to the violation and agrees to new terms and conditions of parole. This is called a "continuance sine die/violation response." Waiving the preliminary hearing is an acknowledgement of guilt.

#### Practice Tips – from the Department of Corrections

- Parole officers often do not know that they should not talk to the parolee about waiving the hearing or admitting the violation in exchange for leniency after the parolee has been appointed an attorney.
- Confer with the parolee prior to the hearing, if possible, to prepare for the hearing rather than wait for the date of the hearing and ask for a continuance.
- Contact the ALJ directly if a continuance is needed or if any other matter arises which you would automatically address to a judge. Do not go through the parole officer. This includes subpoenas for the production of documents.
- If there is strong mitigation, present it to the ALJ.
- ALJ's have contempt powers.
- The parolee can testify or decide not to without it being held against him. Statements made regarding new pending charges may be used against him in other proceedings.
- Make sure the parolee understands that a waiver or continuance sine die will be an admission of guilt.
- If the hearing is for show cause on supervision fees, there must be a showing that the parolee had the ability to pay and willfully refused to do so.

### SEX OFFENSES

The procedure for a comprehensive sex offender presentence evaluation is laid out in 501 KAR 6:200. KRS 532.045 prohibits probation in the case of sex offenses involving injury, weapons,

## NOTES

befriending a child for the purpose of committing a sex crime, and acts committed by people in a special position of trust, etc. “Sex crime” and “sex offender” are defined in KRS 17.500. The Sexual Offender Treatment Program is covered under KRS 197.400 to 197.440 and uses the definitions set out in KRS 17.500 to determine who must take the program. According to KRS 197.045(4) and KRS 439.340(11), no sex offender can receive good time credit or be eligible for parole before completing the treatment program. The program is described in 501 KAR 6:220. Completion of the treatment program will require taking responsibility for the crime. There is a waiting period to get into the program, and the program can take 3 years to complete. Consider the possibility that, especially in the case of shorter sentences, the defendant will likely have to serve out his sentence. The Sex Offender Registration Program is laid out in KRS 17.500 through 17.580. See the Department of Public Advocacy Collateral Consequences Manual, June, 2013, for a description of registration requirements, at <http://dpa.ky.gov/>. Postincarceration Supervision may also apply to the defendant, including continued counseling requirements. See above. Sex offender postincarceration supervision revocation hearings are covered by 501 KAR 1:070. For an overview of how conviction of different possible sexual offenses affect these factors, see the Department of Corrections chart below, provided by John Hall, Administrative Coordinator, Division of Offender Information and Information Technology.

**PAROLE ELIGIBILITY CHART**

NOTES

**20% Eligibility** (applies to non-violent offenses committed after December 3, 1980)

(Deduct credit for time served prior to sentencing.)

1-23 months.....	4 months	21 years .....	4 years, 2 months
2 years.....	5 months	22 years .....	4 years, 5 months
3 years.....	7 months	23 years .....	4 years, 7 months
3 years, 6 months.....	8 months	24 years .....	10 months
4 years, 6 months.....	11 months	25 years .....	5 years
5 years .....	1 year	26 years .....	5 years, 2 months
5 years, 6 months.....	1 year, 1 month	27 years .....	5 years, 5 months
6 years .....	1 year, 2 months	28 years .....	5 years, 7 months
7 years.....	1 year, 5 months	29 years .....	5 years, 10 months
8 years.....	1 year, 7 months	30 years .....	6 years
9 years .....	1 year, 10 months	31 years .....	6 years, 2 months
10 years .....	2 years	32 years .....	6 years, 5 months
11 years .....	2 years, 2 months	33 years .....	6 years, 7 months
12 years .....	2 years, 5 months	34 years .....	6 years, 10 months
13 years .....	2 years, 7 months	35 years .....	7 years
14 years .....	2 years, 10 months	36 years .....	7 years, 2 months
15 years .....	3 years	37 years .....	7 years, 5 months
16 years .....	3 years, 2 months	38 years .....	7 years, 7 months
17 years .....	3 years, 5 months	39 years .....	7 years, 10 months
18 years .....	3 years, 7 months	more than 39 years	
19 years .....	3 years, 10 months	up to and including life .....	8 years
20 years .....	4 years	PFO 1st ,and A,B, or C felony .....	10 years

PFO 1st based only on nonviolent Class D Felonies does not have to serve 10 years to be eligible for parole, but is calculated at 20% instead. The 10 years only applies if any one of the offenses is a Class C or above. KRS 532.080(7).

**Violent Offender, 85%** (applies to offenses committed after July 15, 1998)

Includes: Capital offense, Class A felonies, Class B felonies involving death or serious physical injury. Violent offenders do not get good time credit! KRS 439.3401(4)

10 years .....	8 years, 6 months	17 years .....	14 years, 5 months
10 years, 6 months.....	9 years	17 years, 6 months.....	15 years
11 years .....	9 years, 4 months	18 years .....	15 years, 4 months
11 years, 6 months.....	9 years, 10 months	18 years, 6 months.....	15 years, 10 months
12 years .....	10 years, 2 months	19 years .....	16 years, 2 months
12 years, 6 months.....	10 years, 9 months	19 years, 6 months.....	16 years, 8 months
13 years .....	11 years	20 years .....	17 years
13 years, 6 months.....	11 years, 7 months	20 years, 6 months.....	17 years, 6 months
14 years .....	11 years, 11 months	21 years .....	17 years, 10 months
14 years, 6 months.....	12 years, 5 months	21 years, 6 months.....	18 years, 4 months
15 years .....	12 years, 9 months	22 years .....	18 years, 8 months
15 years, 6 months.....	13 years	22 years, 6 months.....	19 years, 3 months
16 years .....	13 years, 7 months	23 years .....	19 years, 7 months
16 years, 6 months.....	14 years, 1 month	23 years, 6 months.....	20 years

For any sentence over 23 years, 6 months, parole eligibility is 20 years. Hughes v. Commonwealth, 87 S.W.3d 850 (Ky.2002). There is an exception to 85% eligibility for victims of domestic violence.

**Life sentence** – 20 years

**Ineligible for parole**

Wearing body armor and armed with a deadly weapon AND guilty of any felony offense under KRS 218A, 507, 508, 509, 511, or 513, or guilty of possession of a destructive device, unauthorized use of an automobile, riot 1st degree or 2nd degree, possession of firearm by convicted felon, unlawful possession of weapon on school property, possession of handgun by minor, or theft of a motor vehicle under 514.030. KRS 533.065

A sexual offender who qualifies for sexual offender treatment who has not yet finished the treatment program. KRS 439.340(11)

**PROBATION AND PAROLE VIOLATION MATRIX**

<b>OFFENDER RISK LEVEL</b>					
<b>VIOLATION</b>	<b>Very High</b>	<b>High</b>	<b>Moderate</b>	<b>Low</b>	<b>Admin</b>
<b>1st Minor</b>	2	1	1	1	1
<b>2nd Minor</b>	3	2	2	2	1
<b>3rd (or more) Minor</b>	4	3	3	2	2
<b>1st Major</b>	4	3	3	2	2
<b>2nd Major</b>	4	3	3		
<b>3rd (or more) Major</b>	4	4	4		

<b>Response Range 1</b>	<b>Response Range 2</b>	<b>Response Range 3</b>	<b>Response Range 4</b>
	<b>Any Response or Combination of Responses in Range 1 or:</b>	<b>Any Response or Combination of Responses in Range 1-2 or:</b>	<b>Any Response or Combination of Responses in Range 1-3 or:</b>
Verbal or Written Warning	Cerfew up to 60 days	Cerfew up to 120 days	Cerfew up to 180 days
Increased Reporting	Community Service 20-30 hours	Community Service 30-40 hours	Community Service 40-50 hours
Increased Frequency of Drug Testing	Electronic Monitoring	Halfway House	Jail Time up to 60 days (requires hearing with releasing authority)
Increase Level of Supervision	Increased Treatment up to Residential	Jail Time up to 30 days (requires hearing with releasing authority)	Request Revocation
Loss of Travel or Other Privileges	Discretionary Detention up to 10 days with Supervisor Approval		
Cerfew up to 30 days			
Referral to Social Service Clinician for Sub. Abuse Assessment for Counseling or Treatment			
Referral to Community Service Agency for Counseling or Treatment			
Community Service up to 8 hours			

\*Upon consideration of the totality of the circumstances and with supervisory approval, the officer may direct the offender into appropriate interventions not included in the violation matrix or seek to impose a high lever sanction, up to and including revocation.

Commonwealth of Kentucky- Division of Probation and Parole
Conditions of Supervision

Name: \_\_\_\_\_

Number: \_\_\_\_\_

I understand that a Court and/or Parole Authority has placed me under the supervision of the Kentucky Division of Probation and Parole, and I agree to abide by the following conditions:

I will report as directed at intervals and places as directed by my Probation and Parole Officer.

My level of supervision is:

- High Risk - (Minimum requirement of two face-to-face contacts per month between officer and offender. One contact shall be at a location outside the office. One face-to-face contact at the offender's residence shall occur at least once every three months)
Moderate Risk - (Minimum requirement of one face-to-face contact per month between officer and offender. One face-to-face contact at the offender's residence shall occur at least once every six months)
Low Risk - (Minimum requirement of one face-to-face contact every three months between officer and offender. The offender shall mail in reports during the months when the offender does not report in person.)
Administrative Supervision - (The offender shall mail in reports once every three months with accompanying verification of employment and compliance with financial obligations.)

I agree to abide by the following special conditions as ordered by the Court and/or Parole Authority:

- 1.
2.
3.
4.
I shall make restitution to \_\_\_\_\_ at the rate of \$\_\_\_\_\_ per month for a total of \$\_\_\_\_\_.
I shall pay a supervision fee to \_\_\_\_\_ Circuit Court Clerk at the rate of \$\_\_\_\_\_ per month for a total of \$\_\_\_\_\_.
I shall pay fines and court costs of \$\_\_\_\_\_ by \_\_\_\_\_.
I shall complete \_\_\_\_\_ hours of community service work by \_\_\_\_\_.
I shall complete any treatment program as directed by the Court, Paroling Authority or my officer.
I shall pay child support to \_\_\_\_\_ at the rate of \$\_\_\_\_\_ per month.
I understand I am under a curfew and must be inside my residence from 10:00 p.m. to 6:00 a.m. seven days per week.

General Conditions

- 1. I understand that I shall be subject to search and seizure without a warrant if my officer has reasonable suspicion that I may have illegal drugs, alcohol or other contraband on my person or property.
2. I understand that I shall not use or possess any alcoholic beverages (or enter any place where they are sold as the primary commodity, ie. Bars, Nightclubs, Liquor Stores, etc.) or narcotics/controlled substances that are not currently prescribed to me by a licensed physician.
3. I understand that I shall avoid associating with any convicted felon and shall not visit residents of jails or prisons unless permission is obtained from my officer and institutional or jail authority.
4. I understand that I shall submit to alcohol and/or drug testing and shall pay for said testing if directed by my officer.
5. I understand that my Probation and Parole Officer may visit my residence and place of employment at any time. I understand that I will maintain only one residence and shall not change my residence without approval of my officer.
6. I shall work regularly and support my legal dependants. I will immediately report to my officer any change or loss of employment. If unemployed I will make every attempt to obtain bona fide employment.
7. My designated area of supervision is \_\_\_\_\_ and I will not leave this area without my officer's permission. I also understand that I do hereby agree to waive extradition to the State of Kentucky and also agree that I will not contest any effort by any other state to return me to the State of Kentucky. Failure to comply with the above will be deemed to be a violation of the terms and conditions of my release.
8. I shall not violate any law or ordinance of this state, any other state or the United States. If I am arrested, cited, or served with a Criminal Summons/Emergency Protective Order/Domestic Violence Order or if I am questioned by any law enforcement official I will report this within 72 hours to my Probation and Parole Officer. I understand that I cannot serve as an informant or special agent for any law enforcement agency without written permission of the Court.
9. I shall not harass or threaten any employee of the Kentucky Department of Corrections and agree to cooperate fully with any Probation and Parole Officer or any Peace Officer acting at the direction of a Probation and Parole Officer, during the course of my supervision. I shall not falsify any written or oral report to any employee of the Kentucky Department of Corrections.
10. I understand that as a convicted felon that I shall not be permitted to purchase, own or have in my possession or control a firearm, ammunition, dangerous instrument or deadly weapon. I understand that I have lost the right to vote and hold public office. When I become eligible I may apply for Restoration of Civil Rights at any Probation and Parole Office. Restoration of Civil Rights does not give a convicted felon the right to purchase, own or possess a firearm.
11. I understand that I have five (5) days from the date of an incident to file a written grievance with my officer.

I have read, or had read to me the above conditions of my release that I must fully observe while under active supervision. I fully understand and accept the above conditions and realize that any violation shall be reported and failure to abide by these conditions can be grounds for revocation of my release. I have been given a copy of these Conditions of Supervision.

Date: \_\_\_\_\_ OFFENDER: \_\_\_\_\_

Date: \_\_\_\_\_ Probation and Parole Officer: \_\_\_\_\_

# KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

OFFENSE		FELONY CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY***	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
531.360	Adversing Matter Portray Sex Performance By Minor, 1st	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.360/502.020	Complicity: Advertising Matter Portray Sex Performance By Minor, 1st	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.360 [1]	Adversing Matter Portray Sex Performance By Minor, 2nd/GT	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.360 [1]/502.020	Complicity: Advertising Matter Portray Sex Performance By Minor, 2nd/GT	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.340 [1]	Dist Of Matter Portray Sex Performance By Minor, 2nd Or GT	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.340 [1]/502.020	Complicity: Dist Of Matter Portray Sex Performance By Minor, 2nd Or GT	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.340	Dist Of Matter Portraying Sex Performance By Minor, 1st Off	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.340/502.020	Complicity: Dist Of Matter Portraying Sex Performance By Minor, 1st Off	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.030 [1]	Distribution Obscene Matter To Minors-With Prior Conviction	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.030 [1]/502.020	Complicity: Distribution Obscene Matter To Minors-With Prior Conviction	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[1]	Human Trafficking No Serious Physical Injury	C	5-10 Yrs	No	Yes (Committed after 6/26/2007)	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[1]/502.020	Complicity: Human Trafficking No Serious Physical Injury	C	5-10 Yrs	No	Yes (Committed after 6/26/2007)	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[2]	Human Trafficking No Serious Physical Injury Vic < 18	B	10-20 Yrs	No	Yes (Committed after 6/26/2007)	20% (Committed before 6/26/2007)	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[2]/502.020	Complicity: Human Trafficking No Serious Physical Injury Vic < 18	B	10-20 Yrs	No	Yes (Committed after 6/26/2007)	20% (Committed before 6/26/2007)	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[2]/506.010	Criminal Attempt: Human Trafficking No Serious Physical Injury Vic < 18	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[2]/506.030	Criminal Solicitation: Human Trafficking No Serious Physical Injury Vic < 18	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[2]/506.040	Criminal Conspiracy: Human Trafficking No Serious Physical Injury Vic < 18	C	5-10 Yrs	No	No	20%	None	No	No
529.100[2]/506.080	Criminal Facilitation: Human Trafficking No Serious Physical Injury Vic < 18	C	5-10 Yrs	No	No	20%	None	No	No
529.100[3]	Human Trafficking Serious Physical Injury	B	10-20 Yrs	No	Yes (Committed after 6/26/2007)	20% (Committed before 6/26/2007)	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[3]/502.020	Complicity: Human Trafficking Serious Physical Injury	B	10-20 Yrs	No	Yes (Committed after 6/26/2007)	20% (Committed before 6/26/2007)	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[3]/506.010	Criminal Attempt: Human Trafficking Serious Physical Injury	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[3]/506.030	Criminal Solicitation: Human Trafficking Serious Physical Injury	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[3]/506.040	Criminal Conspiracy: Human Trafficking Serious Physical Injury	C	5-10 Yrs	No	No	20%	None	No	No
529.100[3]/506.080	Criminal Facilitation: Human Trafficking Serious Physical Injury	C	5-10 Yrs	No	No	20%	None	No	No
529.100[4]	Human Trafficking Serious Physical Injury Vic < 18	A	20-50 Yrs	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986)	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[4]/502.020	Complicity: Human Trafficking Serious Physical Injury Vic < 18	A	20-50 Yrs	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986)	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[4]/506.010	Criminal Attempt: Human Trafficking Serious Physical Injury Vic < 18	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[4]/506.030	Criminal Solicitation: Human Trafficking Serious Physical Injury Vic < 18	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
529.100[4]/506.040	Criminal Conspiracy: Human Trafficking Serious Physical Injury Vic < 18	B	10-20 Yrs	No	No	20%	None	No	No
529.100[4]/506.080	Criminal Facilitation: Human Trafficking Serious Physical Injury Vic < 18	B	10-20 Yrs	No	No	20%	None	No	No
530.020	Incest	C	5-10 Yrs	Yes	No	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) 3 Yrs (Committed 7/15/1988 - 7/14/2000) 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED OFFENSE STATUTE(S)		OFFENSE	CLASS	RANGE	FELOONY PENALTY	SEX CRIME/ VIOLENT CRIME**	PAROLE ELIGIBILITY***	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
530.020 [3] 502.020		Complicity; Incest	C	5-10 Yrs	Yes	No	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
530.020 [3]		Incest	C	5-10 Yrs	Yes	No	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
530.020 [3] 502.020		Complicity; Incest	C	5-10 Yrs	Yes	No	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
530.020 [1]		Incest - Forcible Compulsion/incap Of Consent, Or U/18 Yoa	B	10-20 Yrs	Yes	No	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
530.020 [1] 502.020		Complicity; Incest - Forcible Compulsion/incap Of Consent, Or U/18 Yoa	B	10-20 Yrs	Yes	No	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
530.020 [1] 508.010		Criminal Attempt; Incest - Forcible Compulsion/incap Of Consent, Or U/18 Yoa	C	5-10 Yrs	Yes	No	20%	None	Yes	Yes (If Committed after 7/12/2006)
530.020 [1] 508.030		Criminal Solicitation; Incest - Forcible Compulsion/incap Of Consent, Or U/18 Yoa	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
530.020 [1] 508.040		Criminal Conspiracy; Incest - Forcible Compulsion/incap Of Consent, Or U/18 Yoa	C	5-10 Yrs	No	No	20%	None	No	No
530.020 [1] 508.080		Criminal Facilitation; Incest - Forcible Compulsion/incap Of Consent, Or U/18 Yoa	C	5-10 Yrs	No	No	20%	None	No	No
530.020 [2]		Incest - Victim U/12 Yoa Or Serious Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% 50% (Committed before 7/15/1986) 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
530.020 [2] 502.020		Complicity; Incest - Victim U/12 Yoa Or Serious Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
530.020 [2] 506.010		Criminal Attempt; Incest - Victim U/12 Yoa Or Serious Physical Injury	B	10-20 Yrs	Yes	No	20%	None	Yes	Yes (If Committed after 7/12/2006)
530.020 [2] 506.030		Criminal Solicitation; Incest - Victim U/12 Yoa Or Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
530.020 [2] 506.040		Criminal Conspiracy; Incest - Victim U/12 Yoa Or Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
530.020 [2] 506.080		Criminal Facilitation; Incest - Victim U/12 Yoa Or Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
510.148 [3]		Indecent Exposure, 1st Degree, 3rd Offense	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.148 [3] 502.020		Complicity; Indecent Exposure, 1st Degree, 3rd Offense	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)



## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED STATUTE(S)	OFFENSE	FELONY CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY****	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
509.040 [15]	KIDNAPPING - HB7	A	20-50 Yrs	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [15]/502.020	Complicity: KIDNAPPING - HB7	A	20-50 Yrs	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [15]/506.010	Criminal Attempt: KIDNAPPING - HB7	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [15]/506.030	Criminal Solicitation: KIDNAPPING - HB7	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [15]/506.040	Criminal Conspiracy: KIDNAPPING - HB7	B	10-20 Yrs	No	No	20%	None	No	No
509.040 [15]/506.080	Criminal Facilitation: KIDNAPPING - HB7	B	10-20 Yrs	No	No	20%	None	No	No
509.040 [7]	KIDNAPPING - HB7	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [7]/502.020	Complicity: KIDNAPPING - HB7	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [7]/506.010	Criminal Attempt: KIDNAPPING - HB7	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [7]/506.030	Criminal Solicitation: KIDNAPPING - HB7	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [7]/506.040	Criminal Conspiracy: KIDNAPPING - HB7	C	5-10 Yrs	No	No	20%	None	No	No
509.040 [7]/506.080	Criminal Facilitation: KIDNAPPING - HB7	C	5-10 Yrs	No	No	20%	None	No	No
509.040 [14]	KIDNAPPING - HB76	A	20-50 Yrs	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [14]/502.020	Complicity: KIDNAPPING - HB76	A	20-50 Yrs	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [14]/506.010	Criminal Attempt: KIDNAPPING - HB76	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [14]/506.030	Criminal Solicitation: KIDNAPPING - HB76	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [14]/506.040	Criminal Conspiracy: KIDNAPPING - HB76	B	10-20 Yrs	No	No	20%	None	No	No
509.040 [14]/506.080	Criminal Facilitation: KIDNAPPING - HB76	B	10-20 Yrs	No	No	20%	None	No	No
509.040 [6]	KIDNAPPING - HB76	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [6]/502.020	Complicity: KIDNAPPING - HB76	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [6]/506.010	Criminal Attempt: KIDNAPPING - HB76	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [6]/506.030	Criminal Solicitation: KIDNAPPING - HB76	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [6]/506.040	Criminal Conspiracy: KIDNAPPING - HB76	C	5-10 Yrs	No	No	20%	None	No	No
509.040 [6]/506.080	Criminal Facilitation: KIDNAPPING - HB76	C	5-10 Yrs	No	No	20%	None	No	No
509.040 [1]	Kidnapping-Adult	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [1]/502.020	Complicity: Kidnapping-Adult	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [1]/506.010	Criminal Attempt: Kidnapping-Adult	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [1]/506.030	Criminal Solicitation: Kidnapping-Adult	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [1]/506.040	Criminal Conspiracy: Kidnapping-Adult	C	5-10 Yrs	No	No	20%	None	No	No
509.040 [1]/506.080	Criminal Facilitation: Kidnapping-Adult	C	5-10 Yrs	No	No	20%	None	No	No
509.040	Kidnapping-Minor	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040/502.020	Complicity: Kidnapping-Minor	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040/506.010	Criminal Attempt: Kidnapping-Minor	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040/506.030	Criminal Solicitation: Kidnapping-Minor	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040/506.040	Criminal Conspiracy: Kidnapping-Minor	C	5-10 Yrs	No	No	20%	None	No	No
509.040/506.080	Criminal Facilitation: Kidnapping-Minor	C	5-10 Yrs	No	No	20%	None	No	No

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED STATUTE(S)	OFFENSE	FELOONY CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY****	SOC/D/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
509.040 [2]	Kidnapping-Victim Death	X	20-50 Yrs*	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [2]/502.020	Complicity: Kidnapping-Victim Death	X	20-50 Yrs*	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [2]/506.010	Criminal Attempt: Kidnapping-Victim Death	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [2]/506.030	Criminal Solicitation: Kidnapping-Victim Death	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [2]/506.040	Criminal Conspiracy: Kidnapping-Victim Death	B	10-20 Yrs	No	No	20%	None	No	No
509.040 [2]/506.080	Criminal Facilitation: Kidnapping-Victim Death	B	10-20 Yrs	No	No	20%	None	No	No
509.040 [3]	Kidnapping-With Serious Physical Injury	A	20-50 Yrs	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [3]/502.020	Complicity: Kidnapping-With Serious Physical Injury	A	20-50 Yrs	No	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [3]/506.010	Criminal Attempt: Kidnapping-With Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [3]/506.030	Criminal Solicitation: Kidnapping-With Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.040 [3]/506.040	Criminal Conspiracy: Kidnapping-With Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
509.040 [3]/506.080	Criminal Facilitation: Kidnapping-With Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
531.335	Poss Of Matter Portray Sex Performance By Minor	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.335/502.020	Complicity: Poss Of Matter Portray Sex Performance By Minor	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
510.155	Proh Use Of Elec Comm Sys To Proc Minor/peace Off Rsex Off	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.155/502.020	Complicity: Proh Use Of Elec Comm Sys To Proc Minor/peace Off Rsex Off	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
531.320(2C)	Promoting A Minor In Sex Performance-Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
531.320(2C)/502.020	Complicity: Promoting A Minor In Sex Performance-Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
531.320(2C)/506.010	Criminal Attempt: Promoting A Minor In Sex Performance-Physical Injury	B	10-20 Yrs	Yes	No	20%	None	Yes	Yes (If Committed after 7/12/2006 and victim was a minor)
531.320(2C)/506.030	Criminal Solicitation: Promoting A Minor In Sex Performance-Physical Injury	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.320(2C)/506.040	Criminal Conspiracy: Promoting A Minor In Sex Performance-Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
531.320(2C)/506.080	Criminal Facilitation: Promoting A Minor In Sex Performance-Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
531.320(2B)	Promoting A Minor U/16 In Sex Performance	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)



## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED OFFENSE STATUTE(S)		CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY****	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
510.040(8)/502.020 Complicity: RAPE 1ST DEGREE - HB455		A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.040(8)/506.010 Criminal Attempt: RAPE 1ST DEGREE - HB455		B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None	Yes	Yes (If Committed after 7/12/2006)
510.040(8)/506.030 Criminal Solicitation: RAPE 1ST DEGREE - HB455		B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
510.040(8)/506.040 Criminal Conspiracy: RAPE 1ST DEGREE - HB455		B	10-20 Yrs	No	No	20%	None	No	No
510.040(8)/506.080 Criminal Facilitation: RAPE 1ST DEGREE - HB455		B	10-20 Yrs	No	No	20%	None	No	No
510.040(9) RAPE 1ST DEGREE - HB76		B	10-20 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.040(9)/502.020 Complicity: RAPE 1ST DEGREE - HB76		B	10-20 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.040(9)/506.010 Criminal Attempt: RAPE 1ST DEGREE - HB76		C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
510.040(9)/506.030 Criminal Solicitation: RAPE 1ST DEGREE - HB76		C	5-10 Yrs	No	No	20%	None	No	No
510.040(9)/506.040 Criminal Conspiracy: RAPE 1ST DEGREE - HB76		C	5-10 Yrs	No	No	20%	None	No	No
510.040(9)/506.080 Criminal Facilitation: RAPE 1ST DEGREE - HB76		C	5-10 Yrs	No	No	20%	None	No	No
510.05 RAPE IN THE 2ND DEGREE		C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.05/502.020 Complicity: RAPE IN THE 2ND DEGREE		C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.06 RAPE IN THE 3RD DEGREE		D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.06/502.020 Complicity: RAPE IN THE 3RD DEGREE		D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.040 [2] Rape, 1st Degree		B	10-20 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

OFFENSE		FELONY CLASS		PENALTY RANGE		SEX CRIME/ VIOLENT CRIME**		PAROLE ELIGIBILITY****		SOCDS/SOPS REQUIRED		REGISTRATION REQUIRED		RESIDENCY RESTRICTIONS	
STATUTE(S)		B		10-20 Yrs	Yes	Yes (Committed after 7/15/1986)		20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998		None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [2]/502.020	Complicity: Rape, 1st Degree	B		10-20 Yrs	Yes	Yes (Committed after 7/15/1986)		20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998		None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [2]/506.010	Criminal Attempt: Rape, 1st Degree	C		5-10 Yrs	Yes	Yes (Committed after 7/12/2006)		20%		None	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [2]/506.030	Criminal Solicitation: Rape, 1st Degree	C		5-10 Yrs	No	No		20%		None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [2]/506.040	Criminal Conspiracy: Rape, 1st Degree	C		5-10 Yrs	No	No		20%		None	No	No	No	No	
510.040 [2]/506.080	Criminal Facilitation: Rape, 1st Degree	C		5-10 Yrs	No	No		20%		None	No	No	No	No	
510.040 [2]/506.080	Criminal Facilitation: Rape, 1st Degree	C		5-10 Yrs	No	No		20%		None	No	No	No	No	
510.040 [2]/506.080	Rape, 1st Degree - Domestic Violence	B		10-20 Yrs	Yes	Yes (Committed after 7/15/1986)		20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998		None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040/502.020	Complicity: Rape, 1st Degree - Domestic Violence	B		10-20 Yrs	Yes	Yes (Committed after 7/15/1986)		20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998		None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040/506.010	Criminal Attempt: Rape, 1st Degree - Domestic Violence	C		5-10 Yrs	Yes	Yes (Committed after 7/12/2006)		20%		None	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040/506.030	Criminal Solicitation: Rape, 1st Degree - Domestic Violence	C		5-10 Yrs	No	No		20%		None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040/506.040	Criminal Conspiracy: Rape, 1st Degree - Domestic Violence	C		5-10 Yrs	No	No		20%		None	No	No	No	No	
510.040/506.080	Criminal Facilitation: Rape, 1st Degree - Domestic Violence	C		5-10 Yrs	No	No		20%		None	No	No	No	No	
510.040 [4]	Rape, 1st Degree - Domestic Violence W/serious Physical Inj	A		20-50 Yrs	Yes	Yes (Committed after 7/15/1986)		20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998		None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [4]/502.020	Complicity: Rape, 1st Degree - Domestic Violence W/serious Physical Inj	A		20-50 Yrs	Yes	Yes (Committed after 7/15/1986)		20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998		None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [4]/506.010	Criminal Attempt: Rape, 1st Degree - Domestic Violence W/serious Physical Inj	B		10-20 Yrs	Yes	Yes (Committed after 7/12/2006)		20% (Committed before 7/12/2006) 85% Committed after 7/12/2006		None	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [4]/506.030	Criminal Solicitation: Rape, 1st Degree - Domestic Violence W/serious Physical Inj	B		10-20 Yrs	No	No		20%		None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [4]/506.040	Criminal Conspiracy: Rape, 1st Degree - Domestic Violence W/serious Physical Inj	B		10-20 Yrs	No	No		20%		None	No	No	No	No	
510.040 [4]/506.080	Criminal Facilitation: Rape, 1st Degree - Domestic Violence W/serious Physical Inj	B		10-20 Yrs	No	No		20%		None	No	No	No	No	
510.040 [1]	Rape, 1st Degree - Incap Of Const/phys Help W/ser Phys Inj	A		20-50 Yrs	Yes	Yes (Committed after 7/15/1986)		20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998		None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [1]/502.020	Complicity: Rape, 1st Degree - Incap Of Const/phys Help W/ser Phys Inj	A		20-50 Yrs	Yes	Yes (Committed after 7/15/1986)		20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998		None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [1]/506.010	Criminal Attempt: Rape, 1st Degree - Incap Of Const/phys Help W/ser Phys Inj	B		10-20 Yrs	Yes	Yes (Committed after 7/12/2006)		20% (Committed before 7/12/2006) 85% Committed after 7/12/2006		None	Yes	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [1]/506.030	Criminal Solicitation: Rape, 1st Degree - Incap Of Const/phys Help W/ser Phys Inj	B		10-20 Yrs	No	No		20%		None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)	
510.040 [1]/506.040	Criminal Conspiracy: Rape, 1st Degree - Incap Of Const/phys Help W/ser Phys Inj	B		10-20 Yrs	No	No		20%		None	No	No	No	No	
510.040 [1]/506.080	Criminal Facilitation: Rape, 1st Degree - Incap Of Const/phys Help W/ser Phys Inj	B		10-20 Yrs	No	No		20%		None	No	No	No	No	
510.040 [1]/506.080	Criminal Facilitation: Rape, 1st Degree - Incap Of Const/phys Help W/ser Phys Inj	B		10-20 Yrs	No	No		20%		None	No	No	No	No	

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

\*\*Sex Crime as defined by KRS 17.500. Pursuant to KRS 197.045 an offender convicted of a sex crime on or after 7/15/1998 must complete the Sex Offender Treatment Program in order to be eligible for parole or receive any form of Good Time Credit.  
 \*\*Violent Crime as defined by KRS 439.3401. All violent offenders are ineligible for statutory good time and must serve 85% of their sentence before they may serve out. (Note: Class D and Class C violent offenses are eligible for parole after 20%, but must serve 85% if not granted parole).  
 \*\*\*Minimum parole eligibility - If an offender is convicted of crimes that require service of different percentages, only the sentence requiring the larger percentage applies. Other factors, such as a PFO conviction may also affect the minimum parole eligibility. Note: For crimes requiring services of 50% the maximum is 12 years and the Maximum for crimes requiring 85% is 20 years (Per Lemon vs. Corrections and Hughes vs. Commonwealth).

RELATED STATUTE(S)	OFFENSE	CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY***	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
510.040 [3]	Rape, 1st Degree - Incapable Of Consent/physically Helpless	B	10-20 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.040 [3]/502.020	Complicity: Rape, 1st Degree - Incapable Of Consent/physically Helpless	B	10-20 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.040 [3]/506.010	Criminal Attempt: Rape, 1st Degree - Incapable Of Consent/physically Helpless	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None	Yes	Yes (If Committed after 7/12/2006)
510.040 [3]/506.030	Criminal Solicitation: Rape, 1st Degree - Incapable Of Consent/physically Helpless	C	5-10 Yrs	No	No	20%	None	No	Yes (If Committed after 7/12/2006 and victim was a minor)
510.040 [3]/506.040	Criminal Conspiracy: Rape, 1st Degree - Incapable Of Consent/physically Helpless	C	5-10 Yrs	No	No	20%	None	No	No
510.040 [3]/506.080	Criminal Facilitation: Rape, 1st Degree - Incapable Of Consent/physically Helpless	C	5-10 Yrs	No	No	20%	None	No	No
510.040 [6]	Rape, 1st Degree - Victim LT 12 YOA	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.040 [6]/502.020	Complicity: Rape, 1st Degree - Victim LT 12 YOA	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.040 [6]/506.010	Criminal Attempt: Rape, 1st Degree - Victim LT 12 YOA	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None	Yes	Yes (If Committed after 7/12/2006)
510.040 [6]/506.030	Criminal Solicitation: Rape, 1st Degree - Victim LT 12 YOA	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
510.040 [6]/506.040	Criminal Conspiracy: Rape, 1st Degree - Victim LT 12 YOA	B	10-20 Yrs	No	No	20%	None	No	No
510.040 [6]/506.080	Criminal Facilitation: Rape, 1st Degree - Victim LT 12 YOA	B	10-20 Yrs	No	No	20%	None	No	No
510.040 [5]	Rape, 1st Degree w/Serious Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.040 [5]/502.020	Complicity: Rape, 1st Degree w/Serious Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.040 [5]/506.010	Criminal Attempt: Rape, 1st Degree w/Serious Physical Injury	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None	Yes	Yes (If Committed after 7/12/2006)
510.040 [5]/506.030	Criminal Solicitation: Rape, 1st Degree w/Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
510.040 [5]/506.040	Criminal Conspiracy: Rape, 1st Degree w/Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
510.040 [5]/506.080	Criminal Facilitation: Rape, 1st Degree w/Serious Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
510.050 [1]	Rape, 2nd Degree (mentally Incapacitated By Intox Sub)	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED STATUTE(S)		OFFENSE	FEELONY CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY****	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
510.050 [1]/502.020		Complicity: Rape, 2nd Degree (mentally Incapacitated By Intox Sub)	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.060		Rape, 3rd Degree	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.060/502.020		Complicity: Rape, 3rd Degree	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.050		Rape-2nd Degree-No Force	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.050/502.020		Complicity: Rape-2nd Degree-No Force	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.110		Sexual Abuse, 1st Deg, Victim U/12 Years Of Age	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.110/502.020		Complicity: Sexual Abuse, 1st Deg, Victim U/12 Years Of Age	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.110 [1]		Sexual Abuse, 1st Degree	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.110 [1]/502.020		Complicity: Sexual Abuse, 1st Degree	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [7]		SODOMY 1ST DEGREE - HB465	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986) 50% (Committed before 7/15/1986 - 7/15/1998) 85% Committed after 7/15/1998	20%	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED STATUTE(S)	OFFENSE	FELONY PENALTY CLASS RANGE		PAROLE ELIGIBILITY****		SOC/SDPS REQUIRED		REGISTRATION REQUIRED		RESIDENCY RESTRICTIONS	
		A	B	Yes (Committed after 7/15/1986)	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [7]/502.020	Complicity: SODOMY 1ST DEGREE - HB455	A		Yes	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [7]/506.010	Criminal Attempt: SODOMY 1ST DEGREE - HB455	B	10-20 Yrs	Yes	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [7]/506.030	Criminal Solicitation: SODOMY 1ST DEGREE - HB455	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [7]/506.040	Criminal Conspiracy: SODOMY 1ST DEGREE - HB455	B	10-20 Yrs	No	No	20%	None	No	No	No	No
510.070 [7]/506.080	Criminal Facilitation: SODOMY 1ST DEGREE - HB455	B	10-20 Yrs	No	No	20%	None	No	No	No	No
510.070 [8]	SODOMY 1ST DEGREE - HB455	B	10-20 Yrs	Yes	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [9]/502.020	Complicity: SODOMY 1ST DEGREE - HB455	B	10-20 Yrs	Yes	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [9]/506.010	Criminal Attempt: SODOMY 1ST DEGREE - HB455	C	5-10 Yrs	Yes	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [9]/506.030	Criminal Solicitation: SODOMY 1ST DEGREE - HB455	C	5-10 Yrs	No	No	20%	None	No	No	No	No
510.070 [9]/506.040	Criminal Conspiracy: SODOMY 1ST DEGREE - HB455	C	5-10 Yrs	No	No	20%	None	No	No	No	No
510.070 [9]/506.080	Criminal Facilitation: SODOMY 1ST DEGREE - HB455	C	5-10 Yrs	No	No	20%	None	No	No	No	No
510.070 [10]	SODOMY 1ST DEGREE - HB76	B	10-20 Yrs	Yes	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [10]/502.020	Complicity: SODOMY 1ST DEGREE - HB76	B	10-20 Yrs	Yes	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [10]/506.010	Criminal Attempt: SODOMY 1ST DEGREE - HB76	C	5-10 Yrs	Yes	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [10]/506.030	Criminal Solicitation: SODOMY 1ST DEGREE - HB76	C	5-10 Yrs	No	No	20%	None	No	No	No	No
510.070 [10]/506.040	Criminal Conspiracy: SODOMY 1ST DEGREE - HB76	C	5-10 Yrs	No	No	20%	None	No	No	No	No
510.070 [10]/506.080	Criminal Facilitation: SODOMY 1ST DEGREE - HB76	C	5-10 Yrs	No	No	20%	None	No	No	No	No
510.070 [8]	SODOMY 1ST DEGREE - HB76	A	20-50 Yrs	Yes	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [8]/502.020	Complicity: SODOMY 1ST DEGREE - HB76	A	20-50 Yrs	Yes	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [8]/506.010	Criminal Attempt: SODOMY 1ST DEGREE - HB76	B	10-20 Yrs	Yes	No	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1998	None	Yes	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [8]/506.030	Criminal Solicitation: SODOMY 1ST DEGREE - HB76	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)	Yes (If Committed after 7/12/2006)
510.070 [8]/506.040	Criminal Conspiracy: SODOMY 1ST DEGREE - HB76	B	10-20 Yrs	No	No	20%	None	No	No	No	No
510.070 [8]/506.080	Criminal Facilitation: SODOMY 1ST DEGREE - HB76	B	10-20 Yrs	No	No	20%	None	No	No	No	No

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED STATUTE(S)	OFFENSE	FEELONY CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY***	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
510.08	SODOMY IN THE 2ND DEGREE	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.08/502.020	Complicity: SODOMY IN THE 2ND DEGREE	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.09	SODOMY IN THE 3RD DEGREE	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.09/502.020	Complicity: SODOMY IN THE 3RD DEGREE	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [1]	Sodomy, 1st Deg - Incap Const/phys Help W/serious Phys Inj	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [1]/502.020	Complicity: Sodomy, 1st Deg - Incap Const/phys Help W/serious Phys Inj	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [1]/506.010	Criminal Attempt: Sodomy, 1st Deg - Incap Const/phys Help W/serious Phys Inj	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None	Yes	Yes (If Committed after 7/12/2006)
510.070 [1]/506.030	Criminal Solicitation: Sodomy, 1st Deg - Incap Const/phys Help W/serious Phys Inj	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
510.070 [1]/506.040	Criminal Conspiracy: Sodomy, 1st Deg - Incap Const/phys Help W/serious Phys Inj	B	10-20 Yrs	No	No	20%	None	No	No
510.070 [1]/506.080	Criminal Facilitation: Sodomy, 1st Deg - Incap Const/phys Help W/serious Phys Inj	B	10-20 Yrs	No	No	20%	None	No	No
510.070 [2]	Sodomy, 1st Deg - Incapable Of Consent/physically Helpless	B	10-20 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [2]/502.020	Complicity: Sodomy, 1st Deg - Incapable Of Consent/physically Helpless	B	10-20 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [2]/506.010	Criminal Attempt: Sodomy, 1st Deg - Incapable Of Consent/physically Helpless	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None	Yes	Yes (If Committed after 7/12/2006)
510.070 [2]/506.030	Criminal Solicitation: Sodomy, 1st Deg - Incapable Of Consent/physically Helpless	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
510.070 [2]/506.040	Criminal Conspiracy: Sodomy, 1st Deg - Incapable Of Consent/physically Helpless	C	5-10 Yrs	No	No	20%	None	No	No
510.070 [2]/506.080	Criminal Facilitation: Sodomy, 1st Deg - Incapable Of Consent/physically Helpless	C	5-10 Yrs	No	No	20%	None	No	No

**KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE**

RELATED STATUTES	OFFENSE	CLASS	PENALTY RANGE	SEX CRIME	PAROLE ELIGIBILITY**	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
510.070 [B]	Sodomy, 1st Degree	B	10-20 Yrs	Yes	20% (Committed before 7/15/1998) 50% Committed 7/15/1998 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (Committed 7/15/2000 - 7/12/2006) 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [B] 502.020	Complicity; Sodomy, 1st Degree	B	10-20 Yrs	Yes	20% (Committed before 7/15/1998) 50% Committed 7/15/1998 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (Committed 7/15/2000 - 7/12/2006) 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [B] 506.010	Criminal Attempt; Sodomy, 1st Degree	C	5-10 Yrs	Yes	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)
510.070 [B] 506.030	Criminal Solicitation; Sodomy, 1st Degree	C	5-10 Yrs	No	20%	None	Yes (If Victim was a minor)	Yes (If Committed after 7/12/2006)
510.070 [B] 506.040	Criminal Conspiracy; Sodomy, 1st Degree	C	5-10 Yrs	No	20%	None	No	No
510.070 [B] 506.080	Criminal Facilitation; Sodomy, 1st Degree	C	5-10 Yrs	No	20%	None	No	No
510.070 [B]	Sodomy, 1st Degree- Domestic Viol - W/serious Physical Inj	A	20-50 Yrs	Yes	20% (Committed before 7/15/1998) 50% Committed 7/15/1998 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (Committed 7/15/2000 - 7/12/2006) 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [B] 502.020	Complicity; Sodomy, 1st Degree- Domestic Viol - W/serious Physical Inj	A	20-50 Yrs	Yes	20% (Committed before 7/15/1998) 50% Committed 7/15/1998 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (Committed 7/15/2000 - 7/12/2006) 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [B] 506.010	Criminal Attempt; Sodomy, 1st Degree- Domestic Viol - W/serious Physical Inj	B	10-20 Yrs	Yes	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)
510.070 [B] 506.030	Criminal Solicitation; Sodomy, 1st Degree- Domestic Viol - W/serious Physical Inj	B	10-20 Yrs	No	20%	None	Yes (If Victim was a minor)	Yes (If Committed after 7/12/2006)
510.070 [B] 506.040	Criminal Conspiracy; Sodomy, 1st Degree- Domestic Viol - W/serious Physical Inj	B	10-20 Yrs	No	20%	None	No	No
510.070 [B] 506.080	Criminal Facilitation; Sodomy, 1st Degree- Domestic Viol - W/serious Physical Inj	B	10-20 Yrs	No	20%	None	No	No
510.070 [B]	Sodomy, 1st Degree- Domestic Violence	B	10-20 Yrs	Yes	20% (Committed before 7/15/1998) 50% Committed 7/15/1998 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (Committed 7/15/2000 - 7/12/2006) 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [B] 502.020	Complicity; Sodomy, 1st Degree- Domestic Violence	B	10-20 Yrs	Yes	20% (Committed before 7/15/1998) 50% Committed 7/15/1998 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (Committed 7/15/2000 - 7/12/2006) 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 [B] 506.010	Criminal Attempt; Sodomy, 1st Degree- Domestic Violence	C	5-10 Yrs	Yes	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006)
510.070 [B] 506.030	Criminal Solicitation; Sodomy, 1st Degree- Domestic Violence	C	5-10 Yrs	No	20%	None	Yes (If Victim was a minor)	Yes (If Committed after 7/12/2006)
510.070 [B] 506.040	Criminal Conspiracy; Sodomy, 1st Degree- Domestic Violence	C	5-10 Yrs	No	20%	None	No	No
510.070 [B] 506.080	Criminal Facilitation; Sodomy, 1st Degree- Domestic Violence	C	5-10 Yrs	No	20%	None	No	No
510.070	Sodomy, 1st Degree- Victim L T 12 YOA	A	20-50 Yrs	Yes	20% (Committed before 7/15/1998) 50% Committed 7/15/1998 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (Committed 7/15/2000 - 7/12/2006) 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
510.070 502.020	Complicity; Sodomy, 1st Degree- Victim L T 12 YOA	A	20-50 Yrs	Yes	20% (Committed before 7/15/1998) 50% Committed 7/15/1998 - 7/15/1998 85% Committed after 7/15/1998	None (Committed Before 7/15/1998) 3 Yrs (Committed 7/15/1998 - 7/14/2000) Note: Court Must Order 7/15/1998 - 7/14/2000 3 Yrs (Committed 7/15/2000 - 7/12/2006) 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED STATUTE(S)	OFFENSE	CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY****	SOCDS/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
510.070/506.010	Criminal Attempt: Sodomy, 1st Degree - Victim LT 12 YOA	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None	Yes	Yes (If Committed after 7/12/2006)
510.070/506.030	Criminal Solicitation: Sodomy, 1st Degree - Victim LT 12 YOA	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
510.070/506.040	Criminal Conspiracy: Sodomy, 1st Degree - Victim LT 12 YOA	B	10-20 Yrs	No	No	20%	None	No	No
510.070/506.080	Criminal Facilitation: Sodomy, 1st Degree - Victim LT 12 YOA	B	10-20 Yrs	No	No	20%	None	No	No
510.070 [5]	Sodomy, 1st Degree Wisenious Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1988	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.070 [5]/502.020	Complicity: Sodomy, 1st Degree Wisenious Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1988	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.070 [5]/506.010	Criminal Attempt: Sodomy, 1st Degree Wisenious Physical Injury	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None	Yes	Yes (If Committed after 7/12/2006)
510.070 [5]/506.030	Criminal Solicitation: Sodomy, 1st Degree Wisenious Physical Injury	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
510.070 [5]/506.040	Criminal Conspiracy: Sodomy, 1st Degree Wisenious Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
510.070 [5]/506.080	Criminal Facilitation: Sodomy, 1st Degree Wisenious Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
510.080 [1]	Sodomy, 2nd Degree (mentally Incapacitated By Intox Sub)	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.080 [1]/502.020	Complicity: Sodomy, 2nd Degree (mentally Incapacitated By Intox Sub)	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.080	Sodomy, 3rd Degree	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.080/502.020	Complicity: Sodomy, 3rd Degree	D	1-5 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.080	Sodomy-2nd Degree	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)
510.080/502.020	Complicity: Sodomy-2nd Degree	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006	Yes	Yes (If Committed after 7/12/2006)

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED STATUTE(S)	OFFENSE	FELONY CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY***	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
530.064(1)(a) [1]	Unlawful Trans W/Minor, 1st, Illegal Sex Act., Phys Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
530.064(1)(a) [1]/502.C	Complicity: Unlawful Trans W/Minor, 1st, Illegal Sex Act., Phys Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/15/1988 85% Committed after 7/15/1988	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
530.064(1)(a) [1]/506.C	Criminal Attempt: Unlawful Trans W/Minor, 1st, Illegal Sex Act., Phys Injury	B	10-20 Yrs	Yes	No	20%	None	Yes	Yes (If Committed after 7/12/2006)
530.064(1)(a) [1]/506.C	Criminal Solicitation: Unlawful Trans W/Minor, 1st, Illegal Sex Act., Phys Injury	B	10-20 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
530.064(1)(a) [1]/506.C	Criminal Conspiracy: Unlawful Trans W/Minor, 1st, Illegal Sex Act., Phys Injury	B	10-20 Yrs	No	No	20%	None	No	No
530.064(1)(a) [1]/506.C	Criminal Facilitation: Unlawful Trans W/Minor, 1st, Illegal Sex Act., Phys Injury	B	10-20 Yrs	No	No	20%	None	No	No
509.020	Unlawful Imprisonment-1st Degree	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
509.020/502.020	Complicity: Unlawful Imprisonment-1st Degree	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
530.064(1)(a) [2]	Unlawful Trans W/Minor 1st, Illegal Sex Act, U/16 Yoa	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
530.064(1)(a) [2]/502.C	Complicity: Unlawful Trans W/Minor 1st, Illegal Sex Act, U/16 Yoa	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
530.064(1)(a) [2]/506.C	Criminal Attempt: Unlawful Trans W/Minor 1st, Illegal Sex Act, U/16 Yoa	C	5-10 Yrs	Yes	No	20%	None	Yes	Yes (If Committed after 7/12/2006)
530.064(1)(a) [2]/506.C	Criminal Solicitation: Unlawful Trans W/Minor 1st, Illegal Sex Act, U/16 Yoa	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
530.064(1)(a) [2]/506.C	Criminal Conspiracy: Unlawful Trans W/Minor 1st, Illegal Sex Act, U/16 Yoa	C	5-10 Yrs	No	No	20%	None	No	No
530.064(1)(a) [2]/506.C	Criminal Facilitation: Unlawful Trans W/Minor 1st, Illegal Sex Act, U/16 Yoa	C	5-10 Yrs	No	No	20%	None	No	No
530.064(1)(a)	Unlawful Trans W/Minor, 1st - Illegal Sex Act, U/18 Yoa	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
530.064(1)(a)/502.020	Complicity: Unlawful Trans W/Minor, 1st - Illegal Sex Act, U/18 Yoa	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1988) 3 Yrs (Committed 7/15/1988 - 7/14/2000) Note: Court Must Order 7/15/1988 - 7/14/2000 3 Yrs (committed 7/15/2000 - 7/12/2006) 5 Yrs Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
531.370 [1]	Use Minor To Distrib Matter Protray Sex Perf Minor-2nd Or GT	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.370 [1]/502.020	Complicity: Use Minor To Distrib Matter Protray Sex Perf Minor-2nd Or GT	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.370	Use Minor To Distrib Matter Protray Sex Perf Minor-1st Off	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.370/502.020	Complicity: Use Minor To Distrib Matter Protray Sex Perf Minor-1st Off	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.040 [1]	Use Minor To Distribute Obscene Material-With Prior Convict	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.040 [1]/502.020	Complicity: Use Minor To Distribute Obscene Material-With Prior Convict	D	1-5 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)

## KY DOC SEX OFFENDER SENTENCING REFERENCE GUIDE

RELATED STATUTE(S)		OFFENSE	FELONY CLASS	PENALTY RANGE	SEX CRIME	VIOLENT CRIME**	PAROLE ELIGIBILITY****	SOCD/SOPS REQUIRED	REGISTRATION REQUIRED	RESIDENCY RESTRICTIONS
531.310(2C)	506.010	Use Of A Minor In A Sex Performance-Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1986	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1986 - 7/14/2000 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
531.310(2C)	506.020	Complicity: Use Of A Minor In A Sex Performance-Physical Injury	A	20-50 Yrs	Yes	Yes (Committed after 7/15/1986)	20% (Committed before 7/15/1986) 50% Committed 7/15/1986 - 7/14/2000 85% Committed after 7/15/1986	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1986 - 7/14/2000 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
531.310(2C)	506.010	Criminal Attempt: Use Of A Minor In A Sex Performance-Physical Injury	B	10-20 Yrs	Yes	No	20%	None	Yes	Yes (If Committed after 7/12/2006)
531.310(2C)	506.030	Criminal Solicitation: Use Of A Minor In A Sex Performance-Physical Injury	B	10-20 Yrs	No	No	20%	None	No	Yes (If Committed after 7/12/2006 and victim was a minor)
531.310(2C)	506.040	Criminal Conspiracy: Use Of A Minor In A Sex Performance-Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
531.310(2C)	506.080	Criminal Facilitation: Use Of A Minor In A Sex Performance-Physical Injury	B	10-20 Yrs	No	No	20%	None	No	No
531.310(2B)		Use Of A Minor U/16 In A Sex Performance	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1986 - 7/14/2000 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
531.310(2B)	502.020	Complicity: Use Of A Minor U/16 In A Sex Performance	B	10-20 Yrs	Yes	Yes (Committed after 7/12/2006)	20% (Committed before 7/12/2006) 85% Committed after 7/12/2006	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1986 - 7/14/2000 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
531.310(2B)	506.010	Criminal Attempt: Use Of A Minor U/16 In A Sex Performance	C	5-10 Yrs	Yes	No	20%	None	Yes	Yes (If Committed after 7/12/2006)
531.310(2B)	506.030	Criminal Solicitation: Use Of A Minor U/16 In A Sex Performance	C	5-10 Yrs	No	No	20%	None	Yes (If Victim was a Minor)	Yes (If Committed after 7/12/2006 and victim was a minor)
531.310(2B)	506.040	Criminal Conspiracy: Use Of A Minor U/16 In A Sex Performance	C	5-10 Yrs	No	No	20%	None	No	No
531.310(2B)	506.080	Criminal Facilitation: Use Of A Minor U/16 In A Sex Performance	C	5-10 Yrs	No	No	20%	None	No	No
531.310(2A)		Use Of A Minor U/18 In A Sexual Performance	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1986 - 7/14/2000 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)
531.310(2A)	502.020	Complicity: Use Of A Minor U/18 In A Sexual Performance	C	5-10 Yrs	Yes	Yes (Committed after 7/12/2006)	20%	None (Committed Before 7/15/1986) 3 Yrs (Committed 7/15/1986 - 7/14/2000) Note: Court Must Order 7/15/1986 - 7/14/2000 5 Yrs (Committed after 7/12/2006)	Yes	Yes (If Committed after 7/12/2006)

## LAYING EVIDENTIARY FOUNDATIONS

**When Necessary** – “Whenever Evidence law makes proof of a fact or event a condition to the admission of an item of evidence, that fact or event is part of the foundation for the evidence’s admission.” Criminal Evidentiary Foundations, Imwinkelried & Blinka, Lexis, 1997, p. 2.

**Pretrial Hearings and Motions in Limine** – Some questions involving the admissibility of evidence require a judicial finding of fact before the evidence is admissible. KRE 104(a). These types of foundations involve preliminary questions of law. Some of these questions must be argued outside the presence or hearing of the jury. KRE 104(c), RCr 9.78. The court is not bound by the rules of evidence, except that it may not hear privileged information.

**Laying a Foundation in Front of a Jury** – In other instances, what is necessary for an item of evidence to be relevant is the establishment of another fact. KRE 104(b). This is often called “conditional relevancy.” In those cases, the jury hears both the foundation fact and the primary fact and can use one to weigh the credibility of the other. Typical examples of these kinds of foundations include authenticating documents or objects, etc., under KRE Article IX, establishing that a lay witness has personal knowledge of what she is about to testify to, and reviewing an expert’s credentials relevant to his expert testimony. Foundational facts must be proven with “evidence sufficient to support a finding of the fulfillment of the condition,” KRE 104(b). The standard is preponderance of the evidence. See, e.g., *Bourjaily v. U.S.*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). What follows are some guides to laying foundations in those cases.

### EXHIBITS, GENERAL PROCESS:

1. Mark the exhibit.
2. Show it to the prosecutor.
3. Ask the court to approach the witness.
4. Show the witness the exhibit.
5. Lay the proper foundation for the exhibit (including authentication if necessary).
6. Move that the exhibit be admitted into evidence.
7. If applicable, request permission to publish the exhibit to the jury and publish it to the jury.

- She recognizes the exhibit as these records.
- How does she recognize it as the records?
- If the records contain any unusual symbols, have the witness explain them.

### Copies

- Witness is familiar with the original.
- The original was copied.
- The original was lost or destroyed.
- A thorough search has failed to locate the original.
- She believes that the exhibit is a “true and accurate” copy of the original.

### AUTHENTICATION, KRE 901:

#### Business records

- The witness can identify the documents.
- They were prepared in the course of regularly conducted business activity.
- The documents were stored and witness has personal knowledge of the business’ filing system.
- She properly removed a record from this filing system.
- She recognizes the exhibit as the record she removed from this system.
- How does she recognize it as that record?

#### Computer records

- The witness has personal knowledge of the business’ filing system.
- The business uses a computer.
- The computer is reliable.
- The business has a procedure for inputting records into this computer.
- This procedure has specific safeguards to ensure reliability and accuracy.
- The computer is properly maintained.
- She used the computer to obtain certain records.
- She followed proper procedures to obtain these records.
- The computer was functioning properly at the time she obtained these records.

#### Documents, witness observed formation

- When did she observe the formation?
- Who was there?
- How was the document formed?
- Does she recognize the exhibit as this same document?
- How does she recognize it?

#### Documents, witness familiar with author’s handwriting

- Does she recognize the handwriting on the writing?
- How is she familiar with the author’s handwriting style?
- What is her familiarity based upon?

#### Letters, sent by witness

- Witness authored/prepared a letter to another person.
- She signed the original letter.
- She knows the letter was properly mailed.
- She recognizes the exhibit as that letter.
- How does she recognize it?

#### Letters, received by witness in reply to earlier letter

- Witness authored/prepared the first letter.
- She addressed it to the author of this letter and properly mailed it.
- She received a letter in reply.
- The letter arrived through the mail system.
- The reply letter was either responsive to her first letter or references her first letter in its own text.

- The reply letter had the name of whomever wrote it.
- She recognizes the exhibit as the reply letter.
- How does she recognize the exhibit as the reply letter?

### **Photographs**

- The witness is familiar with the scene depicted in the photograph at the relevant time and date.
- She believes that the exhibit “fairly and accurately” depicts the scene at the relevant time and date.

### **Taped conversations**

- Have you had the opportunity to hear the voice of Mr. X before?
- How many times have you heard his voice?
- How familiar are you with Mr. X’s voice?
- Have you heard the recording marked as exhibit “a” for identification?
- Do you recognize the voice?
- To whom does the voice belong?

### **Telephone: witness knows the declarant**

- When did the phone call take place?
- Where was the witness when the call occurred?
- How does the witness recognize the declarant’s voice?
- Who was the declarant?
- Who else was on the line?
- Who said what to whom?

### **Telephone: witness finds out later who the caller was**

- When did the phone call take place?
- Where was the witness when the call occurred?
- The witness did not recognize the declarant’s voice at the time.
- She later talked to the declarant again.
- Where did she talk to the declarant again?
- When did she talk to the declarant again?
- What were the surrounding circumstances? Why did she talk to the declarant again?
- She now recognizes the declarant’s voice from the previous phone call.
- Who was the declarant?
- Who else was on the line then?
- Who said what to whom?

### **Telephone: witness dialed a listed business number**

- When did the phone call take place?
- Where was the witness when the call occurred?
- How did the witness obtain the business number (telephone directory, internet, information, flyer)?
- She dialed the business number.
- Voice on the other end informed her that she had reached the business.
- Who else was on the line then?
- Who said what to whom?

### **Caller identification**

- Establish the reliability of caller identification. The judge may take judicial notice or you may have to call a telephone company representative as an expert

witness (see “Scientific Evidence” litany).

- The witness obtained and installed (or had installed) a caller id box to her telephone before the specific call.
- The witness installed (or had installed) the caller id box properly. This may be proven by either expert testimony or circumstantial evidence (it worked for a period of time and the day of the specific call).
- The specific call occurred.
- When the specific call occurred, the caller id box displayed a particular telephone number. The witness may be able to testify from personal knowledge if she recalls the number or you may need to establish a foundation for the caller id box’s logging capacity.
- The witness knows who that number belongs to (from personal knowledge, a telephone directory, or a backwards telephone entry already entered into evidence).
- The witness publishes the identity of the person to whom that phone number belongs.

### **Physical Evidence, unique**

- The exhibit can be identified through the senses and possesses some unique identifying features.
- The witness recognizes the exhibit.
- She knows what the exhibit looked like on the relevant date.
- She recognizes the unique identifying features that distinguish it from other similar objects.
- The exhibit is in the same condition now as when she saw it before.

### **Physical evidence, not unique-Chain of custody required**

- Either one witness or a series of witnesses needs to show through standard procedures or personal knowledge that the exhibit has been in the “continuous, secure, and exclusive” possession of one or several specified people.
- The exhibit was specially labeled and remained in a sealed, tamper-resistant container the entire time.

## **DEMONSTRATIVE EVIDENCE**

### **Models/diagrams, Verifying**

- Follow the photograph litany. If the model or diagram is not to scale, the witness should say so and you should not object to a limiting instruction.

### **Marking**

- First, you need to determine whether the judge prefers that a diagram be completely marked before being introduced into evidence or will allow witnesses to label an exhibit already in evidence. Second, you should give very specific standardized marking instructions, make sure the record reflects that the witness followed your instructions, and have a legend on the diagram to explain the markings.

### **Witness drawings**

- The witness is familiar with the relevant scene on the

- The drawing would help the witness explain her testimony.
- The drawing is a reasonably accurate depiction of the scene on that day (and is not prejudicial in any way).

### **Witness demonstrations**

- The witness observed a relevant physical action.
- The demonstration would help the witness explain her testimony (and is more probative than prejudicial).
- The witness demonstrates the physical action.

### **Charts that summarize evidence**

- The witness (usually an expert) used exhibits and testimony already in evidence to prepare the chart.
- Every fact on the chart is taken from specific witness testimony or exhibit already in evidence.
- She explains any mathematical computations or other extrapolations of the evidence used to obtain a result on the chart.

## **WITNESSES:**

### **Lay Witness**

Must have personal knowledge, KRE 602, 701

### **Expert Testimony, KRE 703**

1. Qualify the witness. The witness' qualifications include:
  - Advanced educational degree(s) in the area
  - Other specialized training in the area
  - License(s) to practice in the area
  - Experience actually practicing in the area for "a substantial amount of time"
  - Teaching in the area
  - Publishing in the area
  - Membership in a professional organization(s) in the area
  - Previous qualification and testimony as an expert in court
2. The expert explains the general theory behind her testimony (unless the theory or principle is stipulated to or judicially noticed).
3. The factual basis of the expert opinion:
  - Personal knowledge,
  - Third-party hearsay (if admissible in your jurisdiction),
  - Hypothetical questions:
  - Tell the expert the facts to assume (usually there must already be evidence on the record supporting these assumed facts).
  - Tell her to assume that a witness(es) testified accurately.
4. The statement of the expert opinion.
5. The explanation of the expert opinion.

## **REFRESHING RECOLLECTION:**

### **Present recollection revived**

- The witness forgets facts that she recalled earlier on the stand.
- She states that she knew the facts before but cannot remember them now.

remember.

- She is given the report or other item for review (it is not admitted into evidence).
- She states that she remembers.
- She continues to testify without referring further to the report or item.

### **Past recollection recorded**

- The witness doesn't recall the relevant event.
- She had firsthand knowledge of the event earlier.
- She made a record earlier of the event at or about the time the event occurred.
- Give the witness the exhibit, her record (it does not have to be admitted into evidence).
- She recognizes the exhibit as her record.
- This record was complete and accurate when she made it.
- It is in the same condition now as when she made it.
- She reads or refers to the necessary parts of the record in order to recall what she witnessed earlier.

## **IMPEACHMENT:**

### **Prior inconsistent statement, KRE 613**

- Get the witness to commit to her testimony in direct examination.
- The witness made a prior statement (oral or written) at a specific place.
- The witness made the statement at a specific time.
- What were the surrounding circumstances?
- Establish that the prior statement was made under reliable circumstances.
- Read/say the prior inconsistent statement and get her to admit making it. Give her the chance to explain.
- If she fights you at all, you will have to prove the first chance you have that she actually made the statement.

### **Untruthfulness, reputation for, KRE 608**

- The impeaching witness ("impeacher") is a member of the same community (residential or social) of the witness.
- The impeacher has been a member for a substantial period of time.
- The impeacher states that the witness has a reputation for untruthfulness in that community.
- The impeacher knows the witness' reputation for untruthfulness.

### **Untruthfulness, opinion regarding**

- The impeacher knows the witness personally.
- How she knows the witness. Number of years acquainted? How regularly does she see him?
- The impeacher has a personal opinion of the witness' truthfulness.
- In the impeacher's opinion, the witness is untruthful.

\* Derived from, in part, Edward J. Imwinkelried & Daniel D. Blinka, *Criminal Evidentiary Foundations*, (1997 & Supp. 1999) ("Criminal Foundations").

# NOTES

# NOTES

## OBJECTIONS CHEAT SHEET

### TO JURY SELECTION

- A. Batson issues.
- B. Defining Reasonable Doubt.
- C. Facts. Arguing facts.
- D. Law. Arguing law.
- E. Prejudice.

### TO OPENING STATEMENT

- A. Arguing the facts, law.
- B. Mentions inadmissible evidence
- C. Personal belief.
- D. Prejudice.
- E. Mentions evidence or facts that are unprovable.

### TO QUESTIONS

- A. Ambiguous/confusing.
- B. Argumentative, harassing.
- C. Asked and answered.
- D. Assumes a fact not in evidence.
- E. Best evidence.
- F. Beyond the scope of direct/cross.
- G. Bolstering credibility before it has been attacked.
- H. Seeking impeachment on matter collateral to trial.
- I. Compound question.
- J. Conclusion.
- K. Cumulative
- L. Foundation.
- M. Hearsay.
- N. Improper characterization.
- O. Improper hypothetical question.
- P. Improper identification.
- Q. Improper impeachment.
- R. Witness is not competent to answer that question.
- S. Irrelevant.
- T. Leading. Asking leading questions on direct.
- U. Misstates evidence/misquotes a witness.
- V. Narrative. Calls for a narrative answer.
- W. Calls for an opinion witness is not qualified to give.
- X. Prejudice.
- Y. Privilege.
- Z. Speculative. Calls for speculation.
- AA. Testifying. The prosecutor is testifying.

### TO ANSWERS

- A. Ambiguous/confusing
- B. Assumes a fact not in evidence.
- C. Authentication.
- D. Best evidence.
- E. Beyond the scope.
- F. Conclusion.
- G. Hearsay.
- H. Improper characterization.
- I. Irrelevant.
- J. Narrative.
- K. No question pending.
- L. Opinion. Witness not qualified to give opinion.
- M. Prejudice.
- N. Privilege.
- O. Unresponsive.

### TO EXHIBITS

- A. Authentication
  - 1. Best evidence.
  - 2. Chain of custody.
  - 3. Condition altered.
  - 4. Inaccurate depiction or copy.
- B. Completeness. Out of context and misleading.
- C. Foundation.
- D. Hearsay/Double hearsay.
- E. Contains Inadmissible evidence.
- F. Prejudice.
- G. Relevance.

### TO CLOSING ARGUMENT

- A. Appeal to local prejudice.
- B. Arguing legal presumptions/burden shifting.
- C. Arguing effect of a verdict.
- D. Defining Reasonable Doubt.
- E. Diminishing juror responsibility.
- F. Failure of accused to testify.
- G. Golden rule.
- H. Improper demonstration.
- I. Matters not in evidence.
- J. Misstating evidence.
- K. Misstating the law.
- L. Personal attack on your client or yourself.
- M. Personal opinion of credibility.
- N. Prejudice.
- O. "Send a message."



## Department of Public Advocacy

5 Mill Creek Park • Frankfort, Kentucky 40601 • Ph: 502-564-8006, Fax: 502-695-6767

### The Advocate

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Edward C. Monahan: 1984-2004  
Erwin W. Lewis: 1978-1983

Melanie Foote Hollingsworth, Graphics, Design, Layout

#### **The Department of Public Advocacy** **dpa.ky.gov**

5 Mill Creek Park  
Frankfort, Kentucky 40601  
Tel: 502-564-8006  
Fax: 502-695-6767  
Email: [melanie.foote@ky.gov](mailto:melanie.foote@ky.gov)