

**INFORMATION PACKET  
POST-CONVICTION  
APPEALS  
IN  
KENTUCKY STATE  
COURTS**

**REVISED OCTOBER 2014**

# **A HELP GUIDE TO APPEAL ORDERS DENYING POST-CONVICTION RELIEF**

## **I. INTRODUCTION**

This help guide is designed for the inmates in the Kentucky Department of Corrections prison system. Its purpose is to assist inmates to appeal orders entered by Kentucky state courts overruling **post-conviction motions**. This guide is not intended to be a substitute for individual legal advice.

All appeals of post-conviction motions (except cases involving challenges to death sentences) are taken to the Kentucky Court of Appeals. The following information relates to an appeal to the Court of Appeals. (There are also cases when a misdemeanor conviction is being attacked at the district court level and the appeal would be taken to the circuit court level.)

If you are using this packet as a general guide for other purposes, then you must carefully check the rules regarding such matters as brief size, etc. This help guide does not address an appeal of a state court order denying a writ of habeas corpus. See KRS 419.130 for guidance in state habeas appeals.

In order to timely process an appeal, you must comply with the applicable rules of procedure. Most of these rules are found in Rule 12 of the Rules of Criminal Procedure (RCr) and Rules 73, 75 and 76 of the Rules of Civil Procedure (CR). Please read all these rules carefully.

As you will notice, many rules place strict limits on such things as time deadlines to file something or page lengths of certain documents. The failure to meet deadlines, in particular, can result in the entire appeal being thrown out and lost forever, regardless of how great your claims are.

The following is an outline of the procedures (with cites to the appropriate rules) which you must follow to insure that your appeal has been processed correctly so that the appellate court can consider your arguments.

Some of the rules require you to file certain documents with the Circuit Court especially in the early stages of your appeal. Other rules will require you to file certain documents with the Court of Appeals.

Remember, regardless of where you will be filing a document, there is almost always filing time lines which must be followed. If you miss a stated time limit, it could hurt or even end your appeal.

## **II. THE TRIAL COURT – WHAT TO FILE AND WHEN TO FILE IT**

### **A. NOTICE OF APPEAL – STARTING YOUR APPEAL**

The **NOTICE OF APPEAL** must be **received** by the Clerk of the Circuit Court within thirty (30) days after the date of the entry of the order overruling your post-conviction motion (RCr 12.04(3)). (Attachment I is a sample Notice of Appeal).

Pursuant to RCr 12.04(5), if an inmate files a notice of appeal in a criminal case, the notice shall be considered filed if its envelope is officially marked as having been deposited in the institution's internal mail system on or before the last day for filing with sufficient First Class postage prepaid (the prison mailbox rule). It is strongly suggested that you file the Notice of Appeal as early as possible to avoid default by missing the filing deadline.

The Notice of Appeal needs to name you as the Appellant and the Commonwealth as the Appellee. Also, you need to state that you are appealing from the final order entered in the case. As you can see from the sample attached Notice of Appeal, not much other information is needed.

There is no need to send a copy of the Notice of Appeal to the Commonwealth. Once the Circuit Clerk's office receives the notice, it is required to mail a copy to the appellate court and to the attorneys for the Commonwealth. RCr 12.04(2).

## **B. *IN FORMA PAUPERIS* MOTION AND ORDER - HOW TO GET A FREE ATTORNEY**

### **1. THE MOTION**

**A MOTION TO PROCEED ON THE APPEAL *IN FORMA PAUPERIS*** (without payment of costs) and requesting the Kentucky Department of Public Advocacy (DPA) be appointed to represent you on the appeal (if you so desire), should be filed along with the Notice of Appeal. (Attachment II is a sample motion with proposed orders). You must attach a completed and sworn Affidavit of Indigency (Attachment II C). The motion and affidavit should be served on the Commonwealth Attorney.

### **2. WHAT IF THE COURT DENIES YOU THE RIGHT TO PROCEED *IN FORMA PAUPERIS*?**

If the circuit court denies your request to proceed *in forma pauperis*, you will "have 10 days to pay any required fees or costs or to appeal the decision." CR 5.05(4). (If you decide not to appeal the order denying your *in forma pauperis* status, you would be required to pay a \$125 filing fee to the Circuit Court Clerk within that 10 day period. CR 73.02(1)(b) and CR 76.42(a)(i).

You can have the order denying you leave to proceed *in forma pauperis* reviewed by the Court of Appeals. You can start this separate appeal by filing in the circuit court a Notice of Appeal pursuant to Gabbard v. Lair, 528 S.W.2d 675 (Ky., 1975), within 30 days of the order denying the *in forma pauperis* motion. (See Attachment III). A copy of this Notice of Appeal must be served on the trial judge who denied your motion to

proceed *in forma pauperis*.

Upon the filing of the Notice of Appeal from the order of the trial court, the clerk of the circuit court shall prepare and certify a copy of all proceedings had and evidence introduced at a hearing upon the motion to prosecute the appeal *in forma pauperis*. The certified record, including a copy of the motion, together with supporting documents and the order, shall be prepared and filed with the clerk of the Court of Appeals by the circuit court clerk. The appellant shall not be required to pay any fees or costs incident to the preparation and filing of this record.

Upon receipt of the certified record by the clerk of the Circuit court, the appeal shall be submitted for final disposition. No briefs need be filed unless requested by the court.

Until such time as the court disposes of the Gabbard appeal on the motion to proceed *in forma pauperis*, the running of the time on the appeal from the criminal conviction shall be stayed.

### **3. WHAT IF THE COURT DOES NOT APPOINT YOU AN ATTORNEY?**

A Gabbard v. Lair appeal is not available to seek a review of an order which allows you to proceed *in forma pauperis* but which denies you appointment of counsel on appeal.

If you have been denied appointment of counsel on appeal by the circuit court, you can file a motion in the Court of Appeals of Kentucky, at any time before the time for filing your brief runs out, to have the Department of Public Advocacy (DPA) appointed to handle your appeal.

Normally, the Court of Appeals will not immediately rule on your motion for appointment of counsel until DPA has had an opportunity to review the pleadings in your case. If DPA reports back to the court that your appeal is not an action that a person with money would be willing to take, then the court will not grant you the appointment of counsel. It will then give you time to file your initial brief (the Brief for Appellant). On the other hand, if DPA reports to the court that there indeed may be some merit to your appeal, then the court will probably appoint DPA to represent you.

### **4. WHAT IF THERE WAS NO HEARING OR IF THE HEARING WAS VIDEO TAPED?**

If an evidentiary hearing was held and was videotaped, you must file a Designation of Record, and you should specify the dates of the proceedings that you want. The Designation of Record must state what portion of the proceedings you want to have included in the Transcript of the Evidence of the evidentiary hearing. (See Attachment V). It is suggested that you designate the entire hearing. (See Attachment IV). It is

also suggested that you specifically designate all portions of your court record necessary for a review of your post-conviction issues – i.e., your trial, guilty plea hearing, sentencing hearing. List the dates of any hearings you designate.

### **7. WHEN DOES THE RECORD HAVE TO BE COMPLETED?**

If the proceedings were taken by a videotape or if there was no hearing to transcribe, then the record on appeal must be completed (certified) by the circuit clerk within thirty (30) days after the filing of the notice of appeal. CR 73.08.

Be aware that in *in forma pauperis* cases, the time for certifying the record on appeal runs from the date that the motion to proceed *in forma pauperis* is granted.

## **III. THE COURT OF APPEALS – WHAT TO FILE AND WHEN TO FILE IT**

### **A. WHAT YOU MUST DO FIRST**

You must file the **BRIEF FOR APPELLANT** within sixty (60) days after the record on appeal is certified CR 76.12(2)(B). The brief must be filed in the Court of Appeals of Kentucky in Frankfort. That Court's address is: Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601.

### **B. WHAT IF YOU CAN NOT GET THE BRIEF FINISHED BY THE DEADLINE?**

If you need an extension of time to file the Brief For Appellant, you must file a **MOTION FOR EXTENSION OF TIME** before your time runs out for filing the brief. (See a sample motion at Attachment VIII).

Like with all motions you file in the Court of Appeals, you must send a copy to the Attorney General. The motion must also contain a **CERTIFICATE OF SERVICE** stating that you indeed mailed a copy of the motion to them. In the Certificate, you must set out the addresses of the Commonwealth Attorney and the Attorney General and the date that you mailed the motion to them.

Remember, it will be up to the Court as to whether an extension will be given. So please put in compelling reasons why you need more time.

In order to avoid unnecessary delays in being notified of an appellate court order or of being served any Commonwealth's brief or motion, please let the Clerk of the Court of Appeals and the Attorney General immediately know of any change in your address.

### **C. HOW LONG CAN A BRIEF FOR APPELLANT BE?**

The brief can be no longer than 25 pages excluding the introduction, the statement of points and authorities, exhibits and appendices. CR76.12(4)(b)(i).

**D. HOW MANY COPIES DO YOU NEED TO FILE AND WHAT SHOULD YOU DO IF YOU CAN NOT SEND THAT MANY?**

The rules require that you file **FIVE (5) COPIES** of the brief. However, if you are indigent, you may file a **MOTION FOR LEAVE TO FILE ONLY ONE BRIEF** when you file the Brief for Appellant. (See at Attachment IX a sample motion for leave to be permitted to file only one brief).

The court will usually grant that motion. If it does not, it will give you a reasonable time to file 5 copies. It will not kick out your appeal if the Clerk of the Court of Appeals received the one copy of the brief on time.

**E. WHAT COLOR MUST THE COVER PAGES BE AND WHAT IF YOU DO NOT HAVE THAT COLOR PAPER?**

The rules require that the cover of the Brief for Appellant be **RED**. If you do not have red paper, you can ask for leave to be permitted to file a brief with a white cover when you file the brief. (Attachment IX deals with this issue also). The same would also apply to the reply brief which normally must have a **YELLOW** cover page.

**F. WHAT NEEDS TO BE IN THE BRIEF FOR APPELLANT?**

The brief has to be organized in the following way and contain the following subparts. CR 76.12(4)(c).

**1. INTRODUCTION**

The Introduction, **which should not exceed two simple sentences**, is the first part and it should communicate what your case is all about. For example, “this is a post-conviction appeal involving the important question of whether Appellant was denied effective assistance of counsel by trial counsel’s failure to investigate and present a meaningful defense”.

**2. STATEMENT OF POINTS AND AUTHORITIES**

The statement of points and authority must clearly set out the order in which the arguments are discussed in the brief and the authorities which you have cited to support those arguments.

**3. THE STATEMENT OF THE CASE**

The next subpart, and the most important part, is the statement of the case. It is well known that many cases are won on the facts - not on the law. Thus, it is important that you clearly detail all the important facts relating to your claims.

If there are some bad facts in the record which will make it more difficult for you to win your case, it is suggested that you be up front about them and place them in the statement of the case. Never give any court the impression that you are trying to hide something.

The rule also requires you to give references from the record supporting each of the statements that you put in this portion of the brief. You may be at a disadvantage here because you may not have access to the records.

Although the clerk will not let you check out the record to do your brief, you may be able to obtain portions or all of the record for your own use. CR 3.02(2) requires the Circuit Court Clerk to provide a copy of all the documents in your case at \$.15 a page. (Being allowed to proceed *in forma pauperis* does not mean that the clerk will waive these costs for copies for your personal use during your appeal).

You also will be able to obtain a copy of all of the video tapes in your case by paying \$15 a tape to the Circuit Clerk. If the record is in the Court of Appeals, you can get copies by contacting the Court of Appeals Clerk's office and paying for the copies at the same rate.

#### **4. ARGUMENT**

The rules require that you initially state in each argument whether the issue that you are raising has been properly preserved for review and, if so, in what manner. Usually you can take care of this by stating, if it is truly the case, that this issue was raised in your post-conviction motion and the court below specifically denied you relief on this issue.

In this section of the brief, you now have your opportunity to set forth all the case law that you have found supporting your claim. While good case law is wonderful, remember that you must apply your facts to the principles found in those cases. Again, facts control your case.

This is also the portion of the brief where you can demonstrate how unfair you have been treated in your case. Argue from your heart as long as you have facts to back you up.

#### **5. CONCLUSION**

The next subsection of the brief is the conclusion. It is simply a way to communicate to the court exactly what relief you are seeking. For example, you can state that "For the foregoing reasons, Appellant respectfully requests that the court reverse the denial of the post-conviction motion and send the case back to the circuit court for the purpose of retrial".

#### **6. APPENDIX**

The next subsection of the brief is the appendix. The first item in the appendix must be an index or list of all documents in the appendix. You must place in the appendix a copy of the order entered by the court below overruling your post-conviction motion and this should be the first item following the index. You can place in there anything else (not things outside the record) which may be helpful to the appellate judges reviewing your case.

## **7. CERTIFICATE OF SERVICE ON THE COVER PAGE**

A copy of **all** briefs must be served on the circuit court judge and the Attorney General. To insure that, each brief must have a **CERTIFICATE OF SERVICE** on the cover page indicating that you have served a copy of each brief on the above-mentioned individuals. (See the cover page on Attachment VII).

### **G. WHEN TO FILE A REPLY BRIEF**

You will have fifteen (15) days after the Appellee's brief (Commonwealth's brief) has been filed in which to file a reply brief. (The Commonwealth's brief is usually filed 30 days (60 if the record contains video tapes) after your brief is filed).

Five copies must be filed with yellow covers; unless you file at the time you send in the reply brief a motion to only file one copy without the appropriate color cover. (*See* Attachment IX). You are limited to five (5) pages.

The rules require that reply briefs be confined to points raised in the initial briefs. The rules also indicate that you should not just rehash arguments that you have already presented in the original brief.

### **H. WHAT ELSE CAN YOU DO IN THE COURT OF APPEALS IF YOU LOSE YOUR APPEAL?**

If the Court of Appeals enters an order affirming or upholding the circuit court's order denying your post-conviction motion, then you can file a **PETITION FOR REHEARING** within twenty (20) days of that opinion (CR 76.32).

You are usually limited to the issues which you have already raised on your appeal. And, by rule, the court will only grant a petition for rehearing when it appears that it has overlooked material facts in the record or a controlling statute or decision or that it has somehow misconceived the issues that you presented.

Petitions for rehearing are rarely granted. And the filing of a petition for rehearing is **NOT** necessary for exhausting your state remedies.

## **IV. THE SUPREME COURT OF KENTUCKY – WHAT TO FILE AND WHEN TO FILE IT**

### **A. A MOTION FOR DISCRETIONARY REVIEW (MDR) IS NOT REQUIRED TO BE FILED TO EXHAUST YOUR STATE REMEDIES**

A motion for discretionary review (MDR) is not required to exhaust your state remedies. However, if you decide to do so the Department for Public Advocacy has prepared a separate packet of information to help you prepare an MDR. Once you are at this stage, please consult that packet for more detailed instructions and assistance.

### **B. HOW MUCH TIME DO YOU HAVE TO FILE AN MDR?**

You must file your motion within thirty (30) days from the date the Court of Appeals has rendered an opinion in your case. CR 76.20. If you have filed a

timely Petition for Rehearing, that 30 days does not start to run until the Court of Appeals has overruled your Petition for Rehearing.

**C. HOW MANY PAGES IN AN MDR?**

A Motion for Discretionary Review cannot exceed fifteen (15) pages in length without asking the court for more pages. It is rare that the court will grant you more pages.

**D. WHAT NEEDS TO BE IN AN MDR?**

**1. PRELIMINARY MATTERS**

In the motion you will be known as the Movant and the Commonwealth will be known as the Respondent. The motion has to contain your name and address and the Attorney General's name and address.

It must also contain the date that your appeal was finally decided by the Court of Appeals (be it either the date of the opinion or of the order denying petition for rehearing). It must further contain a statement that you are not out on bail and that neither you nor the Commonwealth has a Petition for Rehearing pending in the Court of Appeals.

**2. STATEMENT OF MATERIAL FACTS**

The most important aspect of a MDR is the statement of material facts. You must detail all the facts from the record that you think support your claim for relief. This is your last opportunity to convince the courts in Kentucky that your conviction is just not fair.

**3. QUESTIONS OF LAW INVOLVED**

The next important part is the questions of law involved. In this part, you will be setting out, without arguing, exactly what your issues are.

If you wish to pursue your case into federal court, you must argue that the issue involves an important federal constitutional violation. You should be specific as to what federal constitutional right has been violated. For example, you should argue that you have been deprived of your 6<sup>th</sup> Amendment right to effective assistance of counsel.

**4. SPECIFIC REASONS WHY THE JUDGMENT SHOULD BE REVIEWED**

In this portion of the MDR, you should set out why you have been treated so unfair. Again, the facts of your case will ultimately be the reason that you will be granted relief. Argue them strong and hard.

**E. RECORD ON MOTION**

You must attach to your MDR a copy of the order entered by the Circuit Court overruling your post-conviction motion. You must also attach a copy of the

opinion rendered by the Court of Appeals in your case. If you have filed a Petition for Rehearing, you also must attach a copy of the order denying that petition.

You can also attach anything **from the record** that you want the justices on the Supreme Court of Kentucky to take into consideration when they are ruling on your motion. The appellate record which was in the Court of Appeals will not be before the Supreme Court when it rules.

#### **F. WHAT HAPPENS IF THE MDR IS GRANTED?**

If the Supreme Court of Kentucky grants your MDR, then you will basically be given another chance to brief your case. The order granting the MDR will direct the Clerk of the Supreme Court to call up the record from the Court of Appeals. You will then be given a briefing schedule.

Just follow the information in this help guide and read the rules about what must be in the briefs that you have to file in the Supreme Court. The only significant difference is that you will be allowed more pages in your briefs (50 for the Brief for Appellant and 10 for the Reply brief). Also, you will be required to file more copies of the briefs (10 instead of 5).

#### **G. CAUTIONARY NOTES**

Be warned, the Supreme Court of Kentucky rarely takes discretionary review in post-conviction cases which have been affirmed by the Court of Appeals.

You will have 90 days after an MDR is denied in which to ask the Supreme Court of the United States to grant a Petition for Writ of Certiorari. You do **NOT** have to seek this writ in order to exhaust your state remedies. And since the time used to pursue this remedy may count against you if you want to file a federal Petition for Writ of Habeas Corpus, you better have an incredibly strong claim before you decide to take this route.

Once the Supreme Court of Kentucky denies your MDR, you are ready to go into federal court to seek a Petition for Writ of Habeas Corpus. The DPA has put together a federal habeas packet which should help guide you in pursuing this remedy.

### **V. CONCLUSION**

The appellate process is long and complicated. Hopefully this packet will aid you in your attempt to have the appellate courts in this state pass judgment on the merits your post-conviction claims.

And if you closely follow the advice about exhausting your federal constitutional claims, even if you lose those claims in state court, you may ultimately be able to get relief in federal court.

## **Disclaimer and Notice**

Read this again, and familiarize yourself with the contents and statutes. Realize case law that may pertain to the above can come from the Kentucky courts when such issues are raised by others in court. Some laws change over time. This handout is not a substitute for an attorney nor is it intended to be a substitute for individual legal advice. It is intended as a starting point to prepare one's motion.

COMMONWEALTH OF KENTUCKY  
[REDACTED] CIRCUIT COURT  
CASE NO. [REDACTED]

[REDACTED]

MOVANT

VS.

NOTICE OF APPEAL

COMMONWEALTH OF KENTUCKY

RESPONDENT

\*\*\*\*\*

Notice is hereby given that the Movant, [REDACTED], appeals from the Order  
Overruling his RCr 11.42 motion entered on [REDACTED], 2011. The name of the Appellant is  
[REDACTED] and the name of the Appellee is the Commonwealth of Kentucky.

Respectfully submitted,

\_\_\_\_\_  
Name  
Address

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Notice of Appeal was mailed by U. S. Mail, first class,  
postage prepaid, to: Hon. [REDACTED], Chief Circuit Judge, [REDACTED]  
[REDACTED]; Hon. [REDACTED], Commonwealth Attorney, [REDACTED]  
[REDACTED]; and Mr. [REDACTED], [REDACTED]  
[REDACTED], on this [REDACTED] day of [REDACTED], 2011.

\_\_\_\_\_

ATTACHMENT I

**NOTICE**

Please take notice that the foregoing Motion to Proceed *In Forma Pauperis* was sent U. S. Mail, first class postage prepaid, to Clerk, [REDACTED]

[REDACTED]

\_\_\_\_\_  
NAME

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Motion to Proceed in Forma Pauperis* has been served by mailing same to: Judge \_\_\_\_\_;  
Commonwealth Attorney \_\_\_\_\_, on this [REDACTED],  
2011.

\_\_\_\_\_  
NAME

COMMONWEALTH OF KENTUCKY  
[REDACTED] CIRCUIT COURT  
CASE NO. [REDACTED]

MOVANT

[REDACTED]

VS.

MOTION TO PROCEED *IN FORMA PAUPERIS*

COMMONWEALTH OF KENTUCKY

RESPONDENT

\*\*\*\*\*

Comes the Movant, [REDACTED], *pro se*, and moves this Court pursuant to KRS 453.190 and KRS 31.110, to proceed *in forma pauperis*. Movant is an indigent, presently being incarcerated at the [REDACTED], KY.

WHEREFORE, the Movant moves this Court to allow him to proceed on his appeal *in forma pauperis*.

Respectfully submitted,

\_\_\_\_\_  
Name  
Address

ATTACHMENT II

COMMONWEALTH OF KENTUCKY  
[REDACTED] CIRCUIT COURT  
CASE NO. [REDACTED]

MOVANT

[REDACTED]

VS.

ORDER TO PROCEED IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY

RESPONDENT

\*\*\*\*\*

The Movant, having moved the Court for an order to prosecute the appeal of the denial of his Motion for Relief Pursuant to RCr 11.42 *in forma pauperis*, and it appearing to the Court that the Movant is a pauper within the meaning of KRS 453.190 and KRS 31.110 (2)(b), and the Court being sufficiently advised:

IT IS HEREBY ORDERED AND ADJUDGED that the Movant is hereby granted leave to prosecute his appeal without payment of costs and that the Department of Public Advocacy is appointed to represent the Movant on appeal.

Under my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

JUDGE, [REDACTED] CIRCUIT COURT

DISTRIBUTION:

- Hon. [REDACTED], Commonwealth Attorney
- Inmate Name, Address
- DPA, Post Conviction Branch 200 Fair Oaks Lane, Suite 501, Frankfort, KY 40601

ATTACHMENT II-

AOC-350 Rev. 3-04 Page 1 of 2 Commonwealth of Kentucky Court of Justice www.kycourts.net KRS Chapter 31; KRS 454.410	Doc. Code: AI & OI 06/11/2009 01:38 pm Ver. 1 01  <b>FINANCIAL STATEMENT,          AFFIDAVIT OF INDIGENCE,          REQUEST FOR COUNSEL          AND ORDER</b>	Case No. _____ Court _____ County _____
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NAME: \_\_\_\_\_  
 SSN: \_\_\_\_\_ DOB: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Telephone: (\_\_\_\_) \_\_\_\_\_

**REQUEST FOR THE APPOINTMENT OF LEGAL COUNSEL:**  
 I state to the court that: (1) I am not now represented by legal counsel; (2) I am without sufficient monetary means or assets to afford private legal representation; and (3) I am charged with an offense that may subject me to a term of imprisonment. I am aware the court may require that I pay a partial fee to cover the cost of my legal representation based on the considerations listed in KRS 31.120.<sup>1</sup>

**WAIVER OF REQUEST FOR APPOINTMENT OF LEGAL COUNSEL:**  
 I state to the court that: (1) I am indigent; (2) I am accused of an offense that may subject me to a term of imprisonment; and, (3) I am fully aware of my right to request the appointment of legal counsel. Although aware of these facts, I knowingly, intelligently, and voluntarily waive my right to have the court appoint counsel for my representation.

1.	EMPLOYED:	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
	If yes <input type="checkbox"/> Full-time	<input type="checkbox"/> Part-time	<input type="checkbox"/> Temporary/Seasonal	
2.	Total Household Income Per Month:			\$ _____
3.	Available Cash from ALL Sources (Welfare, Food Stamps, SSD, Wo Comp, Unemp. Etc):			\$ _____
4.	Property Ownership:	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Property Value: \$ _____
5.	Number of autos owned in working order: _____			Total Value: \$ _____
6.	Total Value of All Other Assets:			\$ _____
7.	Total Debts:			\$ _____
8.	Number of Dependents:			Monthly Total: \$ _____
9.	Child support obligation?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
10.	Other obligations _____			

The above-named person is a minor (under the age of 18) and I am his/her legal guardian or parent.

Name: \_\_\_\_\_ **PERJURY WARNING**

I understand that making a false statement in the Financial Statement, Affidavit of Indigence, and Request/Waiver of Request for Appointment of Counsel will subject me to the penalties for perjury as contained in KRS Chapter 532. The maximum sentence for perjury is five (5) years imprisonment.

I declare under the penalty of perjury that I have read or have had read to me the information contained on this form and that the statements provided here are true, complete and accurate to the best of my personal knowledge.

\_\_\_\_\_  
 Affiant's Signature Date

Information Collected By: \_\_\_\_\_

<sup>1</sup> KRS 31.120 states the judge may consider the defendant's financial condition, what private attorneys charge for similar services, how complicated the case is, the amount of time an attorney spends on the case, the poverty level income guidelines, the payment of money bail and any other circumstances presented to the Court.

I swear that the facts and information stated in this document are true, complete and accurate to the best of my personal knowledge.

\_\_\_\_\_ Date  
Affiant's Signature

Sworn and signed before me:

\_\_\_\_\_ Date  
Attesting Officer's or Notary's Signature  
\_\_\_\_\_ Title  
My Commission Expires

**ORDER**

Based upon this application/motion, IT IS HEREBY ORDERED:

1. The applicant, or legal guardian/parent
  - Is NOT deemed indigent under KRS Chapter 31.
  - IS found to be indigent under KRS Chapter 31 and may proceed without the payment of courts costs as permitted by KRS 23A.205(2) and KRS 24A.175(3).
2. APPOINTMENT OF COUNSEL
  - Is DENIED
  - Is GRANTED. The Court, having determined Defendant is a needy person as defined in KRS 31.110, HEREBY APPOINTS the Department of Public Advocacy to represent Defendant in the above-identified case. (DPA Office Name) \_\_\_\_\_ is hereby appointed.
3. A PARTIAL FEE
  - Is NOT Assessed
  - IS ASSESSED in the amount of \$ \_\_\_\_\_ and is to be paid in the following manner:

NOTE: If filed by a person in prison or jail, the WARDEN or JAILER must attach a certified copy of the Inmate's/prisoner's account statement for the six (6) months preceeding the filing of this motion. KRS 454.410.

Date: \_\_\_\_\_, 2\_\_\_\_\_, \_\_\_\_\_, Judge  
\_\_\_\_\_  
District/Circuit Court  
(Circle one)

\_\_\_\_\_  
CIRCUIT COURT  
NO. \_\_\_\_-CR-\_\_\_\_

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

NOTICE OF APPEAL

DEFENDANT

\_\_\_\_\_  
\* \* \* \* \*  
Notice is hereby given that the above named Defendant appeals from the order denying him leave to proceed on appeal in forma pauperis. On appeal the Appellant will be \_\_\_\_\_ and the Appellee will be the Commonwealth of Kentucky. This Notice of Appeal is being filed pursuant to Gabbaro v. Lair, Ky., 528 S.W.2d 675 (1975).

\_\_\_\_\_  
DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was served on the trial judge, the Hon. \_\_\_\_\_, \_\_\_\_\_ County Courthouse, \_\_\_\_\_, Kentucky \_\_\_\_\_, and on the Commonwealth's Attorney, the Hon. \_\_\_\_\_, \_\_\_\_\_, Kentucky \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
ATTACHMENT III

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been served by mailing same to the Honorable \_\_\_\_\_, Commonwealth Attorney, \_\_\_\_\_ Circuit Court, \_\_\_\_\_ County Courthouse, \_\_\_\_\_ Kentucky \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_.

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COMMONWEALTH OF KENTUCKY  
[REDACTED] CIRCUIT COURT  
CASE NO. [REDACTED]

MOVANT

[REDACTED]

VS.

DESIGNATION OF RECORD

COMMONWEALTH OF KENTUCKY

RESPONDENT

\*\*\*\*\*

Comes the Movant, [REDACTED], pro se, and for his designation of record, hereby designates the entire record of the proceedings in this matter. Movant designates both the paper and mechanically recorded record, including the arraignment, all pretrial hearings, all evidence presented, voir dire, all opening and closing arguments, all bench conferences, all in chambers hearings, any post-trial hearings and/or hearing on a motion for a new trial, and the final sentencing hearing.

Movant specifically designates the entire record, including:

*Transcript of Record:*

*Videotaped Record:*

Respectfully submitted,

\_\_\_\_\_  
Name  
Address

ATTACHMENT IV

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Designation of Record was mailed by U. S.

Mail, first class postage prepaid, to: [REDACTED]

[REDACTED]; Hon [REDACTED], Commonwealth

Attorney, [REDACTED]; and Mr. [REDACTED]

[REDACTED]

[REDACTED], on this [REDACTED] day of [REDACTED].

[REDACTED]

\_\_\_\_\_  
CIRCUIT COURT  
NO. \_\_\_\_-CR-\_\_\_\_

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

CERTIFICATE AS TO TRANSCRIPT

DEFENDANT

\_\_\_\_\_  
Comes now the defendant, \_\_\_\_\_, pursuant to CR 75.01(2) and hereby certifies the following:

1. The transcript of the evidentiary hearing was requested on \_\_\_\_\_;
2. The estimated number of pages of that hearing are \_\_\_\_\_;
3. The estimated completion date is \_\_\_\_\_;
4. Since the defendant has been allowed to proceed in this action in forma pauperis, satisfactory financial arrangements have been made for the preparation of the transcript.

\_\_\_\_\_  
DEFENDANT

\_\_\_\_\_  
COURT REPORTER

ATTACHMENT V

COURT OF APPEALS OF KENTUCKY  
FILE NO. \_\_\_\_\_

APPELLANT

VS.

MOTION FOR EXTENSION  
OF TIME TO FILE TRANSCRIPT

COMMONWEALTH OF KENTUCKY

APPELLEE

Comes now appellant, \_\_\_\_\_, *pro se*, and moves this Court, pursuant to CR 75.01(3), to extend the time in which to file the transcript of the evidentiary hearing in this matter to and including 110 days from the date of the service of the Designation of the Record in this case and as reasons therefore, states the following:

1. On \_\_\_\_\_, \_\_\_\_\_, the \_\_\_\_\_ Circuit Court entered an order overruling appellant's post-conviction motion. (See attached copy of the order);
2. On \_\_\_\_\_, \_\_\_\_\_, appellant filed the Notice of Appeal. (See attached copy of the Notice of Appeal);
3. On \_\_\_\_\_, \_\_\_\_\_, defendant served the Designation of Record. (See attached copy of the Designation of Record);
4. Attached to this motion please find an affidavit from the court reporter which indicates that an extension of time to and including 110 days of the service of the designation is needed in this case.

ATTACHMENT VI

WHEREFORE, appellant respectfully requests this Court to extend the time in which the court reporter has to prepare the transcript in this case to 110 days from the service of the Designation of Record.

Respectfully submitted,

\_\_\_\_\_  
APPELLANT

NOTICE

Please take notice that the foregoing Motion has been mailed to the Clerk of the Court of Appeals of Kentucky on this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by mailing same to the Honorable \_\_\_\_\_, Commonwealth Attorney, \_\_\_\_\_ Circuit Court, \_\_\_\_\_ County Courthouse, \_\_\_\_\_, Kentucky \_\_\_\_\_, and to the Hon. Ben Chandler, Attorney General, Capitol Building, Frankfort, Kentucky 40601; on this \_\_\_\_ day of \_\_\_\_\_.

COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS OF KENTUCKY  
FILE NO. 2011-CA-\_\_\_\_\_

NAME OF APPELLANT

APPELLANT

v.

Appeal from (County) Circuit Court  
Judge (Name of Circuit Court Judge)  
Case Number (Circuit Court Case Number)

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT

Submitted by:

\_\_\_\_\_  
*Appellant's Name*  
*Appellant's Address*  
APPELLANT, PRO SE

Certificate required by CR 76.12(b)

The undersigned does hereby certify that a copy of this Brief was served on the following named individuals by U.S. mail, postage prepaid, on \_\_\_\_\_, 2011: Honorable Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky, 40601; and Hon. (Circuit Court Judge), Judge, (County) Circuit Court, (Circuit Court Address). I further certify that the record on appeal has not been withdrawn by me and remains in the Court of Appeals office.

\_\_\_\_\_  
APPELLANT

ATTACHMENT VII

**INTRODUCTION**

(Name of Appellant) appeals from the denial of his RCr 11.42 motion seeking to vacate his twenty year sentence for murder, first degree assault under extreme emotional disturbance, four counts of tampering with physical evidence, possession of a handgun by a convicted felon and being a persistent felony offender, second degree, entered by the Fleming Circuit Court on June 5, 2009. The trial court denied Appellant meaningful access to justice when it denied Appellant's RCr 11.42 motion which raised material issues of fact, which were not refuted by the record, without granting him an opportunity to prove his claims at an evidentiary hearing.

**STATEMENT OF ORAL ARGUMENT**

The Appellant does not seek oral argument in this case unless the Court feels such argument would be helpful.

**STATEMENT CONCERNING CITATIONS**

The transcript of record will be cited as "TR" with the volume number and the page number cited directly following (e.g. TR I, 1). The proceedings contained on the videotapes will be cited in conformance with CR 98(4)(a).

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### STATEMENT OF FACTS

On October 22, 2003, Appellant was indicted by the Fleming County Circuit Court Grand Jury for the criminal offenses of murder, first degree assault, four counts of tampering with physical evidence, possession of a handgun by a convicted felon and persistent felony offender in the second degree. (TR I, 20-22). The charges arose from the alleged murder of Walter Victim sometime between August 3, 2003 and August 9, 2003. (TR I, 20-22).

On November 20, 2003 the Commonwealth filed their Response to Defendant's Motion for Discovery. (TR I, 26-113). Therein was a Uniform Offense Report (hereinafter "Report") prepared by Detective D.T. Owen detailing the investigation of the disappearance of victim (hereinafter "Victim"). (TR I, 34-56). During the investigation, statements were obtained from both the Appellant and his co-defendant, *co-defendant name* (hereinafter "*co-defendant name*"). (TR I, 34-56) The Report stated that on August 26, 2003 at approximately 12:00 hours, Detective Owen, Deputy Roberts and Deputy LeMaster went to the home of Appellant and the co-defendant, Co-defendant, and asked them to go to the sheriff's office to give a statement regarding the disappearance of Victim. (TR I, 38-39).

Sheriff Wagner and Detective Owens interview Co-defendant. (TR I, 40). After a break in the interview, Co-defendant, asked to speak to Sheriff Wagner alone and asked for Appellant to come into the room with them. (TR I, 44). Appellant was brought into the room and Co-defendant started crying. (TR I, 44-45). Co-defendant told Appellant she loved him but could not do this anymore and admitted that she did it. (TR I, 45). Co-defendant stated that Victim came to her house and tried to break in not knowing that

Appellant was home. (TR I, 45). Co-defendant stated that Victim got her down, ripped her clothes off of her, threatened to cut her and rape her. (TR I, 45). Co-defendant said she shot Victim several times and hit him over the head with a concrete block. (TR I, 45). When Sheriff Wagner asked Appellant if this is what happened, Appellant indicated it was. (TR I, 45).

Sheriff Wagner and Detective Owen obtained a statement from Co-defendant. (TR I, 45). Co-defendant stated that Appellant was in the bedroom and she was lying on the couch. (TR I, 45). She heard banging and turned around and saw Victim with some type of iron pipes banging on the windows yelling "come on out here, bitch, I've got something for you." (TR I, 45). Co-defendant yelled at Appellant, grabbed her gun that was under the couch cushion, went to the front door and yelled at Victim to leave them alone and shot into the air. (TR I, 45). Victim then ran down the hill and was on her before she knew it. (TR I, 45). Co-defendant stated she shot him several times outside, but does not know whether she hit him because he just kept coming after her. (TR I, 45-46). Co-defendant stated she did not shoot inside the residence at any time. (TR I, 46). Co-defendant stated that Victim started cutting her with the pipes and she began to bleed. (TR I, 46). Detective Owen noted in his report that Co-defendant showed them several old scars she had from the fight. (TR I, 46). Co-defendant and Victim continued fighting into the house. (TR I, 46). Co-defendant stated that Victim was screaming at her that he was not going to kill her but "just wanted to fuck her and cut her up," he pulled a camera out of his pocket and told her he was going to take picture and show them to Appellant and then he got her down on the kitchen floor and ripped off her shirt. (TR I, 46). Co-defendant then stated that Appellant grabbed Victim by his arm and pulled him off of her



and that she believes Appellant shot him once when he was trying to get Victim off of her. (TR I, 46). Co-defendant stated that she was then looking for something to hit Victim with and started hitting him with anything she could and he fell down. (TR I, 46). She stated that Appellant came to look at her to see if she was okay. (TR I, 46). Co-defendant stated that Victim was down but was sitting up. (TR I, 46). Co-defendant stated she pulled away from Appellant. (TR I, 46). According to Co-defendant, Appellant went to check to see if Victim was alive and he was. (TR I, 46). Co-defendant stated she told Appellant to just leave him alone, she went on put her shoes on and started kicking Victim in the face and stated she just wanted to kick his teeth out. (TR I, 46). She stated that Victim started pulling on her leg and she fell and she grabbed a concrete block and started hitting him in the head with it. (TR I, 46). Co-defendant also stated that she found a hammer and hit him with it. (TR I, 46). Co-defendant stated that she told Appellant to put Victim in back of the truck and they would take him and leave him somewhere. (TR I, 47).

Deputy LeMaster and Deputy Robert had been interviewing Appellant. (TR I, 47). According to what Sheriff Wagner told Appellant and Co-defendant, their statements were fairly consistent. (TR I, 47). However, they differed with respect to where Victim was when Appellant shot him, that is, whether Victim was on the floor or if it occurred while Appellant was trying to pull Victim off of Co-defendant. (TR I, 48).

Detective Owen indicated in his report that, while searching the home of Appellant and Co-defendant, Co-defendant showed him one of the yellow pipes Victim brought with him and that he also photographed the scratch marks on the windows that Co-defendant stated Victim caused when he was banging on them. (TR I, 49).

On April 28, 2004, Appellant pleaded guilty to the offenses of murder, first degree assault under extreme emotional disturbance, four counts of tampering with physical evidence, possession of a handgun by a convicted felon and being a second-degree persistent felony offender second degree. (TR I, 143-149; VR 3; 4/28/2004; 3:18:20). On May 26, 2004, Appellant was sentenced pursuant to his plea agreement to twenty (20) years imprisonment. (TR II, 150-153).

On March 30, 2006, Appellant filed a *pro se* Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to the Guidelines of RCr 11.42. (TR II; 160-201). Appellant asserted he was denied effective assistance of counsel when his trial counsel failed to properly and fully investigate the circumstances surrounding the criminal charges and failed to inform and properly advise the appellant of the viable defenses protection of another and protection of property. (TR II; 160-201). The court thereafter appointed the Post Conviction Branch of the Department of Public Advocacy to represent the Defendant. (TR II; 202).

On April 17, 2008 appointed counsel filed a Supplement to Appellant's Motion for RCr 11.42 Relief. (TR II, 207-220). Therein it was asserted that Appellant was denied effective assistance of counsel when his trial counsel failed to seek a mental health examination or to request a hearing to determine Appellant's competency to stand trial despite trial counsel's possession of information giving him actual, good faith doubt as to Appellant's competency. (TR II, 207-220).

On April 10, 2009 Appellant *pro se* filed a Memorandum of Law in Support of Defendant's CR 60.02 Motion. (TR II, 227-267). Said memorandum asserts the same

claims originally brought by Appellant's *pro se* Motion filed on March 30, 2006. (TR II, 227-267).

On June 5, 2009 the Fleming Circuit Court entered an Order Overruling the Motions for RCr 11.42 and CR 60.02 Relief without an evidentiary hearing. (TR II, 279-286). The Court held the allegations by the appellant were clearly refuted by the record and therefore a hearing was not necessary. (TR II, 279-286 at 285). It is from this Order that this appeal ensued. (TR II, 295-305).

#### ARGUMENT

**REVERSIBLE ERROR OCCURRED WHEN THE TRIAL JUDGE DENIED APPELLANT AN EVIDENTIARY HEARING EVEN THOUGH HE ALLEGED IN HIS RCR 11.42 MOTION AND SUPPLEMENT SPECIFIC GROUNDS AND FACTS THAT IF TRUE WOULD WARRANT RELIEF AND THE RECORD CANNOT CONCLUSIVELY DISPROVE THE MATERIAL ISSUES OF FACT RAISED IN HIS MOTION.**

#### PRESERVATION

This issue is preserved by Appellant's *pro se* motion, appointed counsel's supplement and the trial judge's Order denying relief without an evidentiary hearing. (TR II; 160-201; TR II, 207-220; TR II, 279-286).

Appellant's grounds for relief, as contained in his motion and appointed counsel's supplement, set out issues which were collateral to the record and which could not be determined by the face of the record. (TR II; 160-201; TR II, 207-220). Thus, at a very minimum, the Appellant is entitled to an evidentiary hearing in the instant case.

#### STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

A court considers two components in determining whether trial counsel's performance was so ineffective as to warrant a new trial. First, the defendant must display

his counsel's deficient performance. Second, the defendant must show that these deficiencies prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985)(*cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986)).

In examining counsel's performance for deficiency, the first prong of the Strickland test, the standard is whether the alleged acts or omissions lied outside the wide range of prevailing professional norms based on an objective standard of reasonableness. Strickland, 466 U.S. at 688-89; Wilson v. Commonwealth, 836 S.W.2d 872, 878 (Ky. 1992)(*cert. denied*, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993))(overruled on other grounds in St. Clair v. Roark, 10 S.W.3d 482 (Ky. 1999)); Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998)(*cert. denied*, 526 U.S. 1056, 119 S.Ct. 1367, 143 L.Ed.2d 537 (1999)).

In measuring prejudice, the second prong, the inquiry is whether a reasonable probability exists that but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland, 466 U.S. at 694; Bowling v. Commonwealth, 981 S.W.2d 545, 551 (Ky. 1998)(*cert. denied*, 527 U.S. 1026, 119 S.Ct. 2375, 144 L.Ed.2d 778 (1999)). A reasonable probability means a probability sufficient to undermine confidence in the outcome considering the totality of the evidence before the jury. Strickland, 466 U.S. at 694-95; see also Moore v. Commonwealth, 983 S.W.2d 479, 484, 488 (Ky. 1998). Furthermore, the Supreme Court in Strickland made it clear that "reasonable probability" does not mean that counsel's deficient conduct more likely than not altered the verdict. In specific, the Court stated "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel

cannot be shown by a preponderance of the evidence to have determined the outcome.”  
Strickland, 466 U.S. at 694.

This same two-part test applies to challenges to guilty pleas based on ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 58 (1985); Osborne v. Commonwealth, 992 S.W.3d 860, 863 (Ky. App. 1998). In a guilty plea case, however, the prejudice test is articulated slightly differently in that the focus is on whether counsel's deficient performance “affected the outcome of the plea process.” Osborne, 992 S.W.3d at 863. Bronk v. Commonwealth, 58 S.W.3d 482 (Ky. 2001) sets forth the standard as follows:

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

**STANDARD USED IN DETERMINING  
WHETHER AN EVIDENTIARY HEARING IS MERITED**

In Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001), the Kentucky Supreme Court reiterated when an evidentiary hearing is required on RCr 11.42 motions. In specific, the Court stated that:

1. The trial judge shall examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion may be summarily dismissed.
2. After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is

required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. . . . The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.

*Fraser*, 59 S.W.3d at 452-453(citations omitted). Thus where an Appellant's allegations would entitle him to relief, he is entitled to an opportunity to prove the truth of the matter asserted at an evidentiary hearing. *Barnes v. Commonwealth*, 454 S.W.2d 352, 354 (Ky. 1970). Only where the record clearly refutes a defendant's allegations may a court dispense with an evidentiary hearing. See *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky.App. 1985). Where a RCr 11.42 hearing is denied, appellate review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

#### ARGUMENT I

**TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SEEK A MENTAL HEALTH EXAMINATION OF APPELLANT AND FOR FAILING TO REQUEST A COMPETENCY HEARING DESPITE COUNSEL'S POSSESSION OF INFORMATION GIVING HIM ACTUAL, GOOD FAITH DOUBT AS TO THE APPELLANT'S COMPETENCY.**

A criminal defendant may not be tried or convicted while legally incompetent, and the Supreme Court of the United States has held that due process requires an evidentiary hearing whenever there is sufficient doubt of competency as to require further inquiry on the question. *Gilbert v. Commonwealth*, 575 S.W.2d 455, 456 (Ky. 1978); *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 385, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966). KRS 504.090 provides that "[n]o defendant who is incompetent to stand trial shall be...convicted or

sentenced so long as the incompetency continues." Smith v. Commonwealth, 224, S.W.3d 757, 760 (Ky. App. 2008) stated as follows:

The prosecution of a criminal defendant who is incompetent to stand trial is a violation of due process of law under the Fourteenth Amendment. Further, the competency to plead guilty and the competency to stand trial are identical. Incompetency to stand trial is defined as where, because of a mental condition, the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his own defense.

KRS 504.100(1) provides that "[i]f upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition." Either reasonable grounds to hold a competency hearing must be called to the attention of the trial court by the defendant or must be so obvious that the trial court cannot fail to be aware of them. Gabbard v. Commonwealth, 887 S.W.2d 547, 552 (Ky. 1994). See also Via v. Commonwealth, 522 S.W.2d 848, 849 (Ky. 1975), Matthews v. Commonwealth, 468 S.W.2d 313, 314 (Ky. 1971); Pate v. Commonwealth, Ky., 769 S.W.2d 46, 48 (1989). Although KRS 504.100(1) places an affirmative duty upon a trial court, competency issues most commonly come before the court when raised by defense counsel. ABA Criminal Justice Mental Health Standard 7-4.2(c) provides:

Defense counsel should move for an evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and the prosecutor those facts known to counsel which raise the good faith doubt of competence.

Trial counsel in this case had a good faith doubt as to the Appellant's competency. The facts supporting this allegation were thoroughly set forth in the supplement to Appellant's RCr 11.42 Motion. (TR II, 207-220). According to handwritten notes taken by Appellant's lead counsel's investigator, during the very first meeting with Appellant on November 26, 2003, the attorney "advised [REDACTED] that we'd have an expert check his mental health history and assess him. (Possibly Dr. Peter Schilling)[.]" (TR II, 213). The notes from that same meeting reflect a decision to have Appellant execute a HIPAA release, which was subsequently used to request records from various jails and institutions including Western State Hospital, L.C. Trover Regional Medical Center/Calumet Counseling Center, Regional Medical Center/Center for Behavioral Health, Volunteers of America/Shelby Men's Center. (TR II, 213-214). Additional handwritten notes from attorney-client meetings with Appellant document the fact that his counsel was aware of all of the following:

- Prior to Appellant's incarceration on this offense, Appellant, who was in his late 30s at the time, drew a check from the Social Security Disability Office.
- In the course of a January 23, 2004 meeting at the Mason County Detention Center Appellant indicated that he was "feeling crazy" and was having "crazy dreams" and Appellant either indicated to his counsel that he was having "trouble differentiating b/n real & not real" or counsel drew that inference from Appellant's statements. In any event, the notes from that meeting reflect that Appellant's counsel "will draft a motion for funding [for] KCPC first of Feb."

- Even prior to that time, however, defense counsel had made a decision to get Appellant "on list for bed @ KCPC." This appears to be as a result of the extensive discussion on that prior occasion regarding Appellant's former hospitalizations, his description of a 1984 automobile accident that left him with a serious head injury and in a coma for more than a year and Appellant's indication that he continued to suffer severe migraine headaches.
- As late as February 24, 2004, the handwritten notes document a telephone call from Appellant in which Appellant made comments about "ending it" and not wanting to do any more time that the investigator interpreted as suicidal ideations but Appellant would neither confirm or deny that.

(TR II, 213-215).

In later January and early February 2004 trial counsel requested a certified copy of all records regarding Appellant from various institutions. (TR II, 215). The records received conclusively verified Appellant's mental health issues. For example, as follows:

- Records obtained from the Volunteers of America's Shelby Men's Center ("SMC") in Louisville, Kentucky reflect that Appellant was placed there after he served out a three (3) year prison sentence at Kentucky State Reformatory's Correctional Psychiatric Treatment Unit, where he was transferred after his attempted suicide while incarcerated in a Hart County Jail Class D program. The referral documentation reflects that Appellant has had suicidal ideations since age nine (9) and estimated sixty (60) suicide attempts "by hanging, gunshot, pills, cuts." At the time of his

referral, Appellant's psychiatric medications were Zyprexa, Depakote, Zoloft and Trazodone. A Presentence Investigation Report provided to SMC notes that prior to his incarceration Appellant was under the care of Dr. Sadeq of the Pennyroyal Mental Health Center was under heavy medication for diagnosed manic depression and schizophrenia. Appellant's discharge summary, which was prepared by his CSW counselor in late September 2001, was less than optimistic. It provided "Mr. [REDACTED] is a 37-year-old Caucasian referred by the Correctional Psychiatric Treatment Unit (CPTU) at Kentucky State Reformatory. Client had served out his sentence and needed transitional housing. Client had a psychiatric history of Major Depression, Recurrent. Client presented to The Shelby Men's Center on June 29, 2001. During his stay, Mr. [REDACTED] was a generally well-behaved, soft-spoken resident who tended to isolate himself and rarely interacted with others, aside from his roommate. Client tends to be a "people-pleaser" who is easily misled by others."

- Records obtained from the Hart County Jail where Appellant served his sentence between August 1999 and September 2000 document that Appellant was on psychiatric medications for the entire length of his stay and that he was ultimately transferred to KSR in part because the family practice physician with whom the Hart County Jail apparently contracted to provide care recommended Appellant's transfer to Kentucky State

Reformatory "due to mental health illness. I am not able to continue this type of treatment."

- Records obtained from a May 27, 1998 to July 6, 1998 admission to the Western State Hospital in Hopkinsville following Appellant's suicide attempt document his Axis I diagnosis of major depressive disorder, recurrent, severe with mood congruent psychotic features and provides additional evidence of prior psychiatric hospitalizations at Western State Hospital (November 1994 and February to March 1998) and the Regional Medical Center in Madisonville.
- Also, despite Appellant's self-reporting that he had been at Kentucky Correctional Psychiatric Center (KCPC) and his statements to counsel and the investigator about being in contact with persons there during his incarceration in Mason County, KCPC itself responded that it was unable to locate a record of treatment for Appellant. This could possibly suggest some disturbing confusion on Appellant's part.

(TR II, 215-217).

This was not a situation where counsel was merely placed on inquiry notice by the information he discovered. In this case, evidence exists to demonstrate that Appellant's trial counsel actually made a decision to seek a competency evaluation for Appellant, communicated that decision to Appellant and had it documented in his investigator's notes. Even absent trial counsel's decision that a competency evaluation was warranted, the objective evidence of Appellant's severe mental illness issues present an unequivocal

basis for seeking such an evaluation. Yet, no competency evaluation was conducted or requested nor a competency hearing held.

Counsel's failure to follow through by obtaining a private evaluation, requesting the court to order a competency evaluation or advising the court of those facts known to counsel which raise good faith doubt competence, counsel rendered ineffective assistance of counsel.

Counsel's failure to request a competency evaluation prejudiced Appellant. Had counsel brought Appellant's competency issues to the attention of the court, it is probable that this case could have been disposed of under KRS 504.110 rather than a twenty year sentence of imprisonment.

When an RCr 11.42 motion is denied without an evidentiary hearing, this Court must determine whether there is a "material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001). The circuit court may not simply disbelieve movant's factual allegations in the absence of evidence in the record to refute same. Id. If a material issue of fact exists, that cannot be resolved upon the fact of the record, the circuit court must grant movant's motion for an evidentiary hearing. Id.

In the case at bar, simply disbelieving the Appellant's factual allegations is exactly what the trial court did. The trial court framed the Appellant's argument simply as "Appellant had a history of substance abuse and therefore trial counsel should have automatically moved the court to determine the Appellant's competency." (TR II, 282). The trial court stated, in its order denying relief, that "[j]ust because a defendant has a history of substance abuse does not entitle him or her to an automatic motion to challenge

the competency of the defendant." (TR II, 283). Absolutely nothing is stated in the Appellant's supplement about a history of substance abuse and the allegations set forth in the supplement filed on behalf of Appellant go far beyond just a history of substance abuse. Among the many indications of incompetency, there were indications of Appellant having crazy dreams, differentiating between real and not real, having been in a coma for more than a year due to a automobile accident which also left him with a serious head injury. (TR II, 214). There were indications of suicidal threats, including reference to referral documentation reflecting Appellant had suicidal ideations since age nine and an estimated sixty suicide attempts. (TR II, 214-215).

The trial court also referred to the twenty year sentence as a lucrative offer and stated "it might have been appropriate to raise competency if the Defendant refused to accept the offer!" (TR II, 283). If the Appellant herein was incompetent to enter a plea of guilty, even if the offer was a great offer, the Appellant was unable to competently decide whether to enter the plea or be tried by a jury of his peers. The supplement filed herein stated specific grounds that if true would warrant relief. As no competency hearing was held the record is silent as to whether the Appellant was competent. Thus, the record cannot conclusively disprove the material issue of fact raised by the Appellant. At minimum, an evidentiary hearing is required to amass the necessary facts to rule on the merits of the Appellant's motion.

#### ARGUMENT II

#### **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM AND PROPERLY ADVISE THE APPELLANT OF VIABLE DEFENSES.**

"In order to be valid, a guilty plea in a criminal case must represent a meaningful choice between the probable outcome at trial and the more certain outcome offered by the

plea agreement." Vaughn v. Commonwealth, 258 S.W.3d 435, 439 (Ky. App. 2008). The issue for the court is whether counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance and whether that deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial. Bronk v. Commonwealth, 58 S.W.3d 482, 486-487 (Ky. 2001). Where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the prejudice inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The Appellant herein was charged with murder, among other charges related thereto, as a result of the death of Walter Victim. (TR I, 20-22). According to the statements made by the Appellant and his co-defendant, Appellant was coming to the aid of the co-defendant with whom he lived in their home. (TR I, 34-56). There were no other witnesses to the incident. The discovery provided the Appellant contained in the court file does not appear to be inconsistent with this version of events. (TR I, 26-113).

The version of KRS 503.070(2), protection of another, in effect at the time of the Appellant's indictment and conviction was as follows:

The use of deadly physical force by a defendant upon another person is justifiable when:

- (a) The defendant believes that such force is necessary to protect a third person against imminent death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat; and

(b) Under the circumstances as they actually exist, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.

The version of KRS 503.050(2), use of physical force in self-protection, in effect at the time of Appellant's indictment and conviction was as follows: "The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat."

The version of KRS 503.080(2)(b), regarding protection of property, in effect at the time of Appellant's indictment and conviction stated that the use of deadly physical force by a defendant upon another person is justifiable under subsection (1) thereof only when the defendant believes that the person against whom such force is used is committing or attempting to commit a burglary of such dwelling. A person is guilty of burglary when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling. KRS 511.030.

Again, according to the statements made by the Appellant and his co-defendant, Appellant was coming to the aid of the co-defendant with whom he lived in their home. (TR I, 34-56). There were no other witnesses to the incident. The discovery provided the Appellant contained in the court file does not appear to be inconsistent with this version of events. (TR I, 26-113). If there was evidence to the contrary, it is not a part of the record. Accordingly, the trial court erred when it conclusively denied that this defense would be unjustified because it does not comply with the provisions of KRS 503.070.

The trial court in its order denying the Appellant relief stated it had reviewed the discovery filed in this case. After reciting some of the statements made by Co-defendant

regarding the death of Walter Victim as set forth in Detective Owen's report the Court stated as follows with respect to the possibility of KRS 503.070(2), protection of another, as a defense for Appellant:

"The Defendant was entitled to come to the aid of Co-defendant; however, the Defendant was entitled only to use that amount of force reasonable necessary to protect Co-defendant from the rape and assault that Co-defendant was entitled to use. Victim had already been shot in the neck and was in a dazed state. Co-defendant was not privileged to use deadly force against Victim after he had been shot and was in a dazed state as long as he was no longer a threat of imminent death or serious physical injury to her. Therefore, [REDACTED] was not privileged to use deadly force against Victim."

There was no evidence of record that Appellant applied any further deadly force against Victim after shooting him in the neck. Co-defendant, in her statement to the authorities, stated she inflicted the remainder of the alleged assaults upon Walter Victim. (TR I, 34-56).

It is very probable this defense would have succeeded at trial with respect to the Appellant. Although failure to call the authorities and concealing the body may not be supportive of this defense such acts would not be dispositive of it as the Appellant's co-defendant explained in her statement that they were afraid to call authorities because they were both convicted felons. (TR 54).

Bronk v. Commonwealth, 58 S.W.3d 482, 486-487 (Ky. 2001) stated forth the standard for prejudice in a guilty plea case is whether there is a reasonable probability that the defendant would not have pleaded guilty but would have insisted on going to trial. The Defendant stated in his Motion that had counsel advised him of the possible

defenses and fully explained them to him he would have insisted on exercising his constitutional right to a jury trial rather than waiving it.

Lastly, whether counsel explored the possibilities of the above viable defenses with Appellant is a question which cannot be determined from the face of the record and which warranted the granting of an evidentiary hearing which was denied by the trial court.

#### CONCLUSION

For these reasons, Appellant respectfully requests that this Court reverse the court below and remand his case to the Fleming County Circuit Court for an evidentiary hearing, that he receive the assistance of appointed counsel and for all other just and proper relief as determined by this Court.

Respectfully submitted,

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**APPENDIX**

<b><u>Tab</u></b>	<b><u>Item Description</u></b>	<b><u>Location in Record</u></b>
Tab 1	Order Denying RCr 11.42 Relief Entered June 5, 2009 Fleming Circuit Court	TR 99-CR-00023, I, 57 TR 99-CR-00024, III, 221

COURT OF APPEALS OF KENTUCKY  
FILE NO. \_\_\_\_\_

APPELLANT

VS.

MOTION FOR EXTENSION OF TIME  
TO PERFECT APPEAL AND TO FILE BRIEF FOR APPELLANT

COMMONWEALTH OF KENTUCKY

APPELLEE

Comes now appellant, by counsel, and moves this Court to grant him an extension of time of 30 days in which to file the brief for appellant and which to perfect this appeal.

The reasons for this request are as follows:

1. On \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, the \_\_\_\_\_ Circuit Court entered an order overruling appellant's post-conviction motion to vacate his judgment. (See attached copy of the order);
2. On \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, appellant filed his Notice of Appeal. (See attached copy of the Notice of Appeal);
3. On \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, the Clerk of the \_\_\_\_\_ Circuit Court certified the record as being complete;
4. Appellant is proceeding *pro se* in this action. And despite his due diligence, he has been unable to complete all the research necessary to present an adequate brief to this Court;

ATTACHMENT VIII

5. The requested extension should provide him an opportunity in which to complete the research and in which to competently present all the issues in this case.

WHEREFORE, appellant respectfully requests this Court to grant an extension of time of 30 days in which to file the brief for appellant in this case and which to perfect this appeal.

Respectfully submitted,

\_\_\_\_\_  
APPELLANT

NOTICE

Please take notice that the foregoing Motion has been mailed to the Clerk of the Court of Appeals of Kentucky on this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by mailing same to the Honorable \_\_\_\_\_, Commonwealth Attorney, \_\_\_\_\_ Circuit Court, \_\_\_\_\_ County Courthouse, \_\_\_\_\_ Kentucky \_\_\_\_\_, and to the Hon. Ben Chandler, Attorney General, Capitol Building, Frankfort, Kentucky 40601; on this \_\_\_\_ day of \_\_\_\_\_.

COURT OF APPEALS OF KENTUCKY  
FILE NO. \_\_\_\_\_

APPELLANT

VS.

MOTION FOR LEAVE TO FILE ONE COPY  
OF THE BRIEF WITH A WHITE COVER PAGE

COMMONWEALTH OF KENTUCKY

APPELLEE

Comes now appellant, *pro se*, and moves this Court for leave to file just one copy of the brief attached to this motion and to be allowed to file the brief with a white cover page. The reason for the requested actions are as follows:

1. Although the rules require appellant to file five copies of this brief, he does not have the money to make that number of copies;
2. The rules also require appellant to file this brief with a \_\_\_\_\_ colored cover page. Appellant does not have access to this colored paper.

WHEREFORE, appellant respectfully requests this Court to allow him leave to file only one brief with a white cover page. Appellant further requests this Court to direct the Clerk of this Court to make the requisite number of copies and to place same in his file.

Respectfully submitted,

\_\_\_\_\_  
APPELLANT

ATTACHMENT IX

NOTICE

Please take notice that the foregoing Motion has been mailed to the Clerk of the Court of Appeals of Kentucky on this \_\_\_\_ day of \_\_\_\_\_.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by mailing same to the Honorable \_\_\_\_\_, Commonwealth Attorney, \_\_\_\_\_ Circuit Court, \_\_\_\_\_ County Courthouse, \_\_\_\_\_ Kentucky \_\_\_\_\_, and to the Hon. Ben Chandler, Attorney General, Capitol Building, Frankfort, Kentucky 40601; on this \_\_\_\_ day of \_\_\_\_\_.