The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

Volume 22, Issue 6 November, 2000

Persuasive Preservation Manual
Making the Record

DPA ON THE WEB

DPA Home Page http://dpa.state.ky.us

Criminal Law Links http://dpa.state.ky.us/~rwheeler

DPA Education http://dpa.state.ky.us/train.html

DPA Employment Opportunities:
http://dpa.state.ky.us/career.html

***The Advocate* (since May 1998)**:
http://dpa.state.ky.us/advocate

Defender Annual Caseload Report:
http://dpa.state.ky.us/library/caseload.html

We hope that you find this service useful. If you have any suggestions or comments, please send them to DPA Webmaster, 100 Fair Oaks Lane, Suite 302, Frankfort, 40601 or webmaster@mail.pa.state.ky.us

****

DPA'S PHONE EXTENSIONS

During normal business hours (8:30am - 5:00pm) DPA's Central Office telephones are answered by our receptionist, with callers directed to individuals, their secretaries or their voicemail boxes. Outside normal business hours, an automated phone attendant directs calls made to the primary number, (502) 564-8006. (During periods of exceptionally heavy call volume, calls may "roll-over" to the automated attendant) For calls answered by the automated attendant, to access the employee directory, callers may press "*." Listed below are extension numbers and names for the major sections of DPA. Make note of the extension number(s) you frequently call — this will aid our receptionist's routing of calls and expedite your process through the automated attendant. Should you have questions about this system or experience problems, please call Ann Harris or the Law Operations Division, ext. 136.

Appeals - Renee Godbey	#257
Capital Appeals - Michelle Crickmer	#134
Capital Post Conviction - Joyce Hudspeth	#310
Capital Trials - Joy Brown	#131
Computers - Ann Harris	#130/#285
Contract Payments - Vickie Manley	#118
Deputy Public Advocate Office - Patti Heying	#236
Education - Patti Heying	#236
General Counsel Office - Lisa Blevins	#294
Post-Trial Division - Lisa Fenner	#279
Juvenile Post-Dispositional Branch - Dawn Pettit	#220
Law Operations - Tammy Havens	#136
Library -Will Hilyerd	#120
Payroll - Cheree Goodrich	#114
Personnel - Al Adams	#116
Post Conviction - Jesse Luscher	# 332
Properties - Larry Carey	#218
Protection & Advocacy (502) 564-2967 or	#276
Public Advocate Office - Debbie Garrison	#108
Recruiting - Gill Pilati	#117
Timesheets - Karen Scales	#111
Travel Vouchers - Vickie Manley	#118
Trial Division - Laura Penn	#230

Table of Contents

The Advocate

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

Department of Public Advocacy
Education & Development
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006, ext. 294; Fax: (520) 564-7890
E-mail: lblevins@mail.pa.state.ky.us

Paid for by State Funds. KRS 57.375

From the Editor...

Facts marshaled into a well thought out theory are persuasive. Successful litigators know how to use statutes, rules, caselaw and persuasion to present fact finders with the facts relevant to their theory of their case. This results in clients being effectively represented. It provides judges with all the information for good judicial decision making. Jurors have all the relevant information to render reliable results.

To achieve this, effective litigators use a persuasive motion and objection practice to make sure relevant facts are admitted and irrelevant facts are excluded from consideration, and that the record is preserved for full appellate review on the merits.

Successful litigators never object just to be objecting. They object only to advance their theory to the fact finders so clients have their story accurately told to those
deciding their client's fate.

This manual is an attempt to collect the relevant authority and thinking to persuasively preserve.

DPA is proud to serve Kentucky's criminal justice system through this special issue of *The Advocate*.

Ed Monahan
Deputy Public Advocate
Editor, *The Advocate*

A Process for Successful Preservation of the Trial Record

Painting a Picture with the Facts That Matter

***The Preventive Practice of Law vs. Chicken Noodle soup and hot toddies* - LHM**

I. Begin With the End In Mind

A. As you practice your case, hold in your mind, both your immediate goal of relief and the likely perspective of the appellate courts, should you not gain relief at the trial court level.

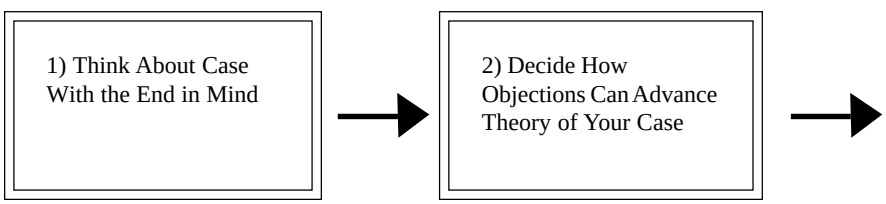
B. In your preparation for and presentation of pretrial motions, keep in mind what you need in the record to support that motion. What assumptions are at play for you, the court and the prosecutor? Do you need to make those assumptions explicit in the record? What is occurring in the hallways of the courthouse, in the news of the day (both tv and print), in the courtroom, that you believe may be influencing the decision-making process? Are there ways you can comment upon the environment to make a part of the record in your client's case, the context in which these important decisions are being made. Remember, the richest records on appeal are those front-loaded with important contextual facts.

C. For example, with suppression hearings, describe the area where the search took place, how many miles is it from the center of town, a wooded area, a deserted location, a neighborhood whose racial or ethnic population is significant. What was the weather? Was it light out or dusk or pitch black? What vehicles were being driven by law enforcement officers. In the infamous "running while black" case, *Illinois v. Wardlow*, 120 S.Ct. 673, 145 L. Ed.2d 570 (2000), the Supreme Court reaffirmed, by its findings, the critical need for defense counsel to place into the record **all facts favorable to the client's position** (a location's characteristics are relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation. *Adams v.* Williams, 407 U.S. 143, 144, 147-148, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Illinois v. Wardlow supra*.) .

Whenever the Commonwealth makes sweeping generalizations about a factual matter, damaging to your case, THINK: **Are there particular facts that undermine the Commonwealth's position and that help my client, that I need to draw into the litigation by making those facts part of the trial and appellate record?**

II. Forward Your Theory of the Case with Your Objections

A. First develop a **solid theory of the case,** focused on the best result possible for your client, and then determine how to advance that theory with your objections.



NOTES

B. **Identify your best facts**. What will the prosecutor do to undermine your presentation of those facts? Stop her/ him ahead of time. Determine and prove why the law does not allow him/her to undercut that important evidence and prepare strategy with motions to preserve objections and to persuade the trial court.

C. **Identify the prosecutor's best facts and convert them into her/his worst facts**. What weapons do you have in the constitution, the rules of evidence, the statutes, the rules of criminal procedure, to render impotent those facts? Open your own arsenal of facts to deflect attention away from or deflate the power of the prosecutor's "best facts." Renowned death penalty lawyer, Millard Farmer encourages us to pursue conflictneering, shifting the focus from the facts of the crime as painted by the prosecutor to a different frame in this movie of (in)justice which tells the client's beneficial story. Remember, many of our stories are about societal injustice. (*See* www.goextranet.net). What is important to this picture of injustice is the prosecutor who destroyed audiotapes, the judge who had *ex parte* communications with jurors, a police officer known to plant evidence.

III. Brainstorm All Possible Objections

A. Brainstorm with those who think differently than you do. Brainstorm the errors likely to be a part of your particular case as well as those objectionable statements or tactics used regularly by your prosecutor, the unfair process imposed on you by the judge, the improprieties of the chief investigating officer or other prosecution witness.

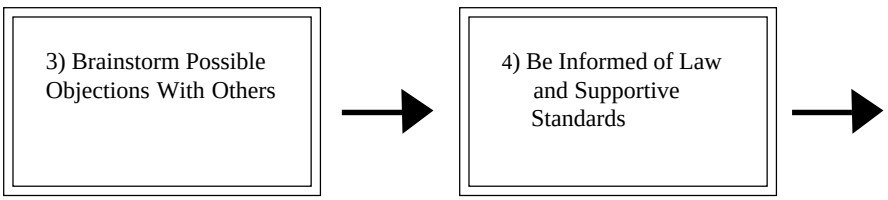
B. Create, file and argue motions *in limine* to prohibit prejudicial comments/tactics. Use the arguing of such motions to put on evidence for the trial and appellate court about the objectionable practice (*i.e.* subpoena the prosecutor, if s/he challenges the accuracy of your motion).

IV. Be Informed by Reviewing

A. Relevant KRS;
B. Controlling Caselaw;
C. Kentucky Rules of Evidence;
D. Relevant scientific, psychological or other forensic information to know what the evidence is and what it means;
E. Kentucky Rules of Criminal Procedure
F. Kentucky Rules of Professional Conduct;
G KBA Ethics Opinions;
H. ABA Standards for Criminal Justice, Defense Function and Prosecution Function; and
I. ABA Mental Health Standards.

V. Prepare All Objections Before Trial

A. **Do not wait until trial to preserve anything unless you have a sound strategy for waiving or delaying**. You cannot be spontaneous about preserving your client's record.



NOTES

B. File motions *in limine* to cover every anticipated error or objection, or decide strategically to wait for trial or to object orally.

C. Have a checklist of evidence you want admitted that prosecutor will try to have excluded and evidence you want out that prosecutor will try to admit. What are your grounds for admitting or excluding evidence? Put checklist for each part of trial in your trial notebook.

voir dire: anticipate right to ask specific questions, list supportive cases to successful meet prosecutor's objections.

opening statement: list grounds to object to prosecutor's opening - what does this prosecutor usually say that is objectionable?

prosecution witness: think ahead of time what evidence the prosecutor will try to introduce through that witness. List objections to that evidence with supportive caselaw and constitutional provisions and applicable rules of evidence to successful argue exclusion. The written list is critical to our ability to object in the heat of trial.

defense witnesses: anticipate prosecutor's objections, again list supportive KREs, case law and constitutional provisions to win admission of the evidence.

directed verdict: list all elements you need to address so that none are forgotten in heat of moment.

instructions: list supportive case-law in trial notebook if not within defense tendered instructions. Object on the record to all objectionable instructions tendered by the Commonwealth or drafted by the Court.

closing argument: list possible grounds for objection to prosecutor's closing, list authority to support arguments you intend to make in defense closing.

D. Note all the objections you need to make for that section. Prepare a page for objections for each section before trial and add to it as unexpected, objectionable events occur during trial

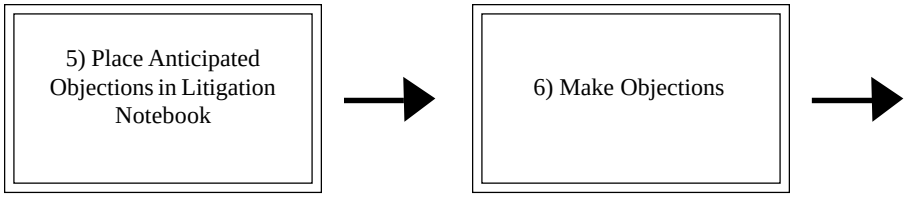
E. Prepare voir dire questions to educate jurors to understand and accept your need to object without prejudice to your client.

F. When objectionable material is admitted despite motions, continue to make objections during trial and use motion for new trial and verdict as last opportunity to object.

G When preparing your motions *in limine* fill them with all of the facts necessary to place the appellate jurists there in the courtroom, county, or at the scene with you.

H. Even if you decide to wait until trial to object because of a tactical reason, have your objection in written form at the proper place in your trial notebook to insure that all bases are covered.

I. Before trial, prepare written jury instructions to tender.



NOTES

VI. How to Present Your Objections Most Persuasively

A. Rulings by the judge are required for preservation of objections! If the judge refuses to rule, make your record, ask repeatedly for a ruling. Demonstrate on the record the impossibility your client faces in securing a ruling from this judge.

B. Be as specific as possible about why this is error, while covering every angle in your objections.

C. State the specific relief you want, beginning with the best relief first *i.e.* mistrial, admonition, suppression of evidence, right to put on evidence to counter the erroneously introduced evidence, death excluded as a penalty.

D. If judge overrules your request move down the line, requesting the next best relief if you believe it will help and not prejudice your client. Remember to put evidence on by avowal. If denied the right to put it on by avowal, make that proffer of proof. If denied the proffer of proof determine if your client is best served by your oral instantaneous statement of the evidence you would have introduced if you had been permitted to do so or by the denial of her/his right to make a record.

E. If judge says she will rule later on your objection, make sure you write that down and remind yourself to obtain ruling.

VII. Posture Yourself Psychologically and Physically to Object

A. If you find it difficult to object during opening statement or closing argument, find a "readiness stance" (*e.g.*, sit on edge of seat with hands ready on arm chair to push yourself up). Maintain this position during prosecutor's entire closing, be ready to dance and then dance. Make your objections! Interrupt the injustice!

VIII. Analyze Your Challenges to the Admissibility of Evidence

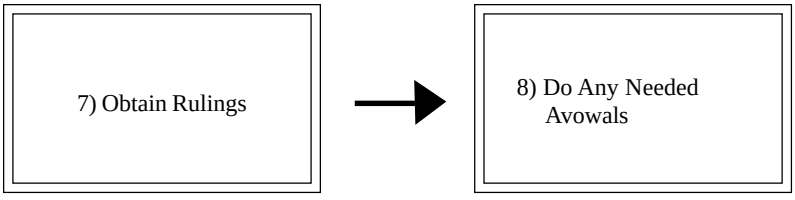
A. If filing motion to suppress evidence on search and seizure grounds, make sure you have gone sufficiently back in time in your challenge to the illegal police action (*i.e.* if there was a stop, an interrogation, a search and
then a seizure of evidence, make sure that you object to the stop as well as all of the steps thereafter).

B. Go over the search or seizure with an appellate lawyer and/or expert in search and seizure law.

C. Outline the actions of the investigating officer in obtaining statements from client or witnesses. Is there anything that officer did to render inadmissible the evidence?

IX. Prevent the Backdoor Admissibility of Inadmissible Evidence

When the prosecutor seems to be trying to introduce damaging and questionable evidence, refer to your checklist of objections to prevent the prosecutor from introducing evidence that the court has ruled inadmissible.



NOTES

X. Make Sure Your Voir Dire Objections are on the Record

A. Place on the record every prosecutor strike of racial or ethnic minorities. Object to prosecutor's justifications for jury strikes of any jurors who expressed views that indicated they could try the case fairly but possess any identifiable characteristics that could cause them to identify with your client or cause them to oppose the Commonwealth (jurors with low incomes, jurors whose family members were prosecuted, jurors who are youthful, or women or have been involved in political activism). Perhaps the case you create and the record you build will make new law equivalent in importance to *Batson!*

B. State on the record the race of jurors, how many are men, women, young, old, low income, involved in criminal justice system or other relevant classifications.

C. Even with video records, the names and numbers of jurors are not in the record when they answer questions unless you ask for them to state their names and numbers.

XI. When Racial or Cultural Prejudice Affects Right to Fair Trial Place it in the Record

A. When relevant and helpful to your client's case, place into the record the race, cultural background, socioeconomic background, age and sex of the arresting and investigating officers, eyewitnesses, social workers and psychologists.

B. Make the **prejudice** as real for the appellate court as it is for you and your client.

XII. Avowal/Offer of Proof

A. When evidence is excluded against your objection, make an offer of proof which sets forth all of the information for the appellate court to understand the materiality of the error.

B. If you are not allowed to put the evidence in the record through witnesses, put it in orally or in writing but whatever you do try to place everything in the record.

C. If you inadvertently left some part of the avowal out of the record, file a motion for new trial and set forth what was excluded, attach evidence by affidavit if possible.

You are the painter, the trial record is your easel, paint creatively, beautifully and with ultimate purpose. ■

REBECCA BALLARD DILORETO
Post Trial Division Director
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail: rdiloret@mail.pa.state.ky.us

NOTES

Making and Meeting Objections: Insuring that the Client's Story is Communicated

NOTES

I. IN GENERAL

1. **Timeliness** - The contemporaneous objection rule requires that an objection be made at the time of the ruling. RCr 9.22; KRE 103(a)(1).

2. **What Is The Objection?** - The objecting party must make known to the court either the action which he/she desires the court to take, or his/her objection to the action of the court. RCr 9.22.

   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*, Ky., 864 S.W.2d 909, 912 (1993).

3. **Grounds for the Objection** - A party is required to state the grounds for an objection only when requested to do so by the court. RCr 9.22; KRE 103(a)(1). *But see Ross v. Commonwealth*, Ky.App., 577 S.W.2d 6 (1977): "A general objection is sufficient if the evidence is not competent for any purpose. However, if the evidence is relevant and prima facie admissible, a specific objection should be made giving the reasons why the trial judge should exclude relevant evidence on the grounds of prejudice."

4. **Relief Requested** - If an objection is made after error occurred, the party making objection must ask for such remedial relief as is desired. *Ferguson v. Commonwealth*, Ky., 512 S.W.2d 501 (1974); *Commonwealth v. Huber*, Ky., 711 S.W.2d 490 (1986); *White v. Commonwealth*, Ky. App., 695 S.W.2d 438 (1985).

   If trial counsel sees an issue and fails to make a timely request for relief, a plain error argument will not be considered on appeal. *Crane v. Commonwealth*, Ky., 833 S.W.2d 813, 819 (1992).

5. **Ruling Required** - If an objection is made, the party making it must insist on a ruling or the objection is waived. *Bell v. Commonwealth*, Ky., 473 S.W.2d 820, 821 (1971); *Harris v. Commonwealth*, Ky., 342 S.W.2d 535, 539 (1960).

6. **Miscellaneous** – Trial counsel should always object to prosecutorial misconduct. Failure to object to alleged prosecutorial misconduct has been deemed a waiver of the alleged error on appeal. *Johnson v. Commonwealth*, Ky., 892 S.W.2d 558, 562 (1994). See also *Burdell v. Commonwealth*, Ky., 990 S.W.2d 628 (1999) where trial counsel failed to preserve for appeal issue of whether expert testimony regarding crack cocaine was admissible in drug case because counsel did not object to any of the testimony at trial; and *Shelton v. Commonwealth*, Ky.App., 992 S.W.2d 849 (1998), the appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory.

II. PRETRIAL MOTIONS

1. Review RCr 8.14, 8.16, 8.18, 8.20, 8.22 and 8.24 for pretrial motion practice.

2. Caution: According to RCr 8.20, motions "raising defenses or objections" must be made prior to a plea being entered. The general practice at arraignment, though, is for defense counsel to request leave of court to reserve the right to make all necessary motions even though a plea is being entered.

3. Regarding motions to dismiss based on lack of jurisdiction or failure of the indictment to charge an offense [RCr 8.18], counsel must make a tactical decision when to raise the issue. For example, if a count of the indictment fails to state a public offense, there may be no good reason to bring it to the court's attention prior to the attachment of jeopardy. See *Stark v. Commonwealth*, Ky., 828 S.W.2d 603 (1991), *overruled on other grounds*, where the issue was raised for the first time on appeal and the Supreme Court ordered that the convictions based on defective counts of the indictment be reversed and the sentences vacated rather than remanded for a new trial. In addition, an indictment is sufficient if it fairly informs the defendant of the nature of the crime with which he is charged and for an alleged defect in an indictment to be considered on appeal, it must be preserved for review; thus, a defect will be deemed waived unless raised by a timely objection. *Stephenson v. Commonwealth*, Ky., 982 S.W.2d 200 (1998). **However**, while ordinarily courts should not attempt to scrutinize the quality or sufficiency of the evidence presented to the grand jury, the trial court may utilize its supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant. *Commonwealth v. Baker*, Ky.App., 11 S.W.3d 585 (2000).

4. Where funds for an expert are needed, an *ex parte* letter to a judge is not a substitute for a properly presented motion and will be deemed unpreserved for appeal. *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377 (1999).

A. Pretrial Discovery

If you announce ready for trial, you waive any noncompliance with discovery rules or orders. *Sargent v. Commonwealth*, Ky., 813 S.W.2d 801 (1991).

B. Venue

1. Improper Venue - Improper venue can be waived by the defendant, so make sure that a timely motion or objection is made. KRS 452.650; *Chancellor v. Commonwealth*, Ky., 438 S.W.2d 783 (1969).

2. Change of Venue - A motion for change of venue must comply with KRS 452.210, 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 timely notice to the Commonwealth. See: *Fugate v. Commonwealth*, Ky., 993 S.W.2d 931 (1999), *Whitler v. Commonwealth*, Ky., 810 S.W.2d 505 (1991) and *Taylor v. Commonwealth*, Ky., 821 S.W.2d 72 (1991). According to *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871 (1993), a motion filed two days before trial is not timely. The motion **must** be renewed **after** voir dire. *Hodge v. Commonwealth*, Ky., 17 S.W.3d 824 (2000).

C. Motions in Limine

1. Motion - A request for a pretrial ruling on the admissibility of evidence may be made under KRE 103(d).

2. Ruling - The court may defer a ruling, but if the issue is resolved by an "order of record," no further objection is necessary. KRE 103(d). The making of the motion will preserve the issue for appellate review. *Powell v. Commonwealth*, Ky.App., 843 S.W.2d 908 (1992).

3. Reconsideration - Reconsideration of a pretrial in limine ruling is authorized if new circumstances at trial require it. KRE 103(d).

4. Generally – KRE 404(b) evidence: See *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181 (1996), where it was held that making (and losing) a motion in limine to exclude the KRE 404(b) evidence does not necessarily suffice to preserve all issues arising from the 404(b) evidence. In *Tucker*, the motion did not specifically object to some of the details of the uncharged crime that were presented at the trial, and there was no contemporaneous objection to these details, and the Court held the issue unpreserved.

NOTES

5. Separate Trial – If necessary, where codefendants are involved, request a separate trial. If denied, be certain to keep pointing out to the court how the proceedings are unfair, even at the penalty phase of trial. See: *Cosby v. Commonwealth*, Ky., 776 S.W.2d 367 (1989) and *Foster v. Commonwealth*, Ky., 827 S.W.2d 670 (1991). Also, if there is a taped statement of a non-testifying codefendant, a motion should be made for separate trials, or for the Commonwealth to redact the statement so as to eliminate not only the defendant's name, but any reference to his or her existence. *Rogers v. Commonwealth*, Ky., 992 S.W.2d 183 (1999).

NOTES

III. Voir Dire

A. Nature of Rights to Fair Jury and Due Process in Jury Selection

We have the duty to protect each defendant's right to be tried by a fair and impartial jury, as well as the right to receive due process in the jury selection proceedings. This article is written to help you secure these rights, ideally, at the trial level; and alternatively at the appellate level. Due to length requirements, this article will not specifically address the Commonwealth's improper use of its peremptory challenges under ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). However, it must be noted that a *Batson* challenge must be made before the swearing of the jury and the discharge of the remainder of the jury panel; otherwise, it will be considered untimely. *Dillard v. Commonwealth*, Ky., 995 S.W.2d 366, 370 (1999).

The right to a fair and impartial jury is guaranteed by the 6th Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. This right encompasses not only the substantive right under the 6th Amendment, but it also encompasses the substantive due process right to fairness under the 14th Amendment to the United States Constitution.

The harm which occurs from a violation of this right is that the accused is tried by a jury which includes at least one juror who is biased, partial, unfair, and/or not neutral.

The right to procedural due process in the course of jury selection is guaranteed by the 14th Amendment to the United States Constitution and Section 2 of the Kentucky Constitution. The harm which occurs from a violation of this right is that there is an interference, or denial, of your client's right to utilize the *procedures* established to ensure that a fair and impartial jury is empaneled. The harm which results from a violation of this right usually comes in the form of a denial of your client's right to freely exercise his peremptory challenges.

B. Two Types of Challenges: Cause and Peremptory

In Kentucky, the method for assuring that your client is tried by a fair and impartial jury includes the provision of *two types of challenges* that can be made of potential jurors:

1. Challenges for Cause: RCr 9.36 (1) provides: "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 number of challenges for cause is limitless.

2. Peremptory Challenges: 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.

RCr 9.40 sets forth the number of challenges allotted to each side in a criminal case. In the case *Springer v. Commonwealth*, Ky., 998 S.W.2d 439, 444 (1999), the Court specifically held the following:

RCr 9.40(1) – 8 (per side)
RCr 9.40(3) – 2 (one per defendant if tried jointly)
RCr 9.40(2) – 1 (one "each side" if alternate jurors seated)
RCr 9.40(2) – 2 (one "each defendant" if alternate jurors seated)
13 Total

If more than 1 defendant is being tried, each defendant shall be entitled to at least 1 additional peremptory challenge to be exercised independently of any other defendant.

However, trial counsel **must** be certain to adequately preserve the challenge to the number of peremptories. *Tamme v. Commonwealth*, Ky., 973 S.W.2d 13 (1998).

RCr 9.36 and RCr 9.40 guarantee the criminal defendant "a substantive right provided by state law - the right of peremptory strikes against qualified jurors. This procedural right is not an `impartial jury' question, but a `due process' question." *Thomas v. Commonwealth*, Ky., 864 S.W.2d 252, 260 (1993).

In *Thomas v. Commonwealth*, Ky., 864 S.W.2d 252 (1993), the Kentucky Supreme Court clarified the difference between the right to a fair and impartial jury, as guaranteed by the Sixth Amendment to the U. S. Constitution and Section 11 of the Kentucky Constitution, and the right to procedural due process, as guaranteed by the Fourteenth Amendment to the U. S Constitution and Section 2 of the Kentucky Constitution. The Court made it clear that when a defendant has used all his peremptory challenges, he "has been denied the number of peremptory challenges procedurally allotted to him [procedural due process] when forced to use peremptory challenges on jurors who should have been excused for cause." *Id*. at 259. *But see United States v. Martinez-Salazar,* —U.S.—, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). For there to be a violation of procedural due process, the defendant need not establish that a juror who should have been disqualified actually sat on the jury that decided his case. *Thomas*, at 260.

C. Timing of Challenges

The timing of the exercise of these two types of challenges is also set forth in the criminal rules.

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." *Pelfrey v. Commonwealth*, Ky., 842 S.W.2d 524, 526 (1992).

D. Black Letter Principles Relating to Challenges for Cause

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

2. "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,* Ky., 969 S.W.2d 706, 709 (1998).

3. "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*, Ky., 969 S.W.2d 706, 709 (1998), *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713 (1992),).

4. "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,* Ky., 969 S.W.2d 706, 709 (1998), *Ward v. Commonwealth*, Ky., 695 S.W.2d 404 (1985).

NOTES

5. "There is no requirement that prospective jurors be completely ignorant of the facts. The real test is whether, after having heard all the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict. *Mabe v. Commonwealth*, Ky., 884 S.W.2d 668 (1994)." *Bowling v. Commonwealth*, Ky., 942 S.W.2d 293, 299 (1997).

E. How Court Should Resolve Doubt As To For-Cause Challenges

"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 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*, Ky., 993 S.W.2d 931 (1999), *Sholler v. Commonwealth*, Ky., 969 S.W.2d 706 (1998), *Randolph v. Commonwealth*, Ky., 716 S.W.2d 253 (1986*) overruled on other grounds*.

However, "[a] determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination. *Commonwealth v. Lewis*, Ky., 903 S.W.2d 524, 527 (1995)." *Sholler v. Commonwealth*, Ky., 969 S.W.2d 706, 708 (1998).

F. Examples of Above Principles as Applied to Facts Where For-Cause Challenges Should Have Been Granted

1. Juror who **Fails to Meet Statutory Qualifications** for jury service as set forth in KRS 29A.080.

2. Juror Who Has **Formed Opinion Regarding Guilt.**

Neace v. Commonwealth, 313 Ky. 225, 230 S.W.2d 915 (1950).

Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1992).

Thompson v. Commonwealth, Ky., 862 S.W.2d 871, 875 (1993).

3. Juror Who Has A **Close Relationship With a Party, Attorney or Witness.** *Ward v. Commonwealth*, Ky., 695 S.W.2d 404, 407 (1985).

A. Juror Who Has A Close Relationship With a Party:

a. Venireperson who discussed the case with a relative of the victim. ***Thompson v. Commonwealth***, Ky., 862 S.W.2d 871, 875 (1993).

b. Married to a person who was a second or third cousin of the victim. ***Marsch v. Commonwealth***, Ky., 743 S.W.2d 830 (1987).

c. First cousin to victim. ***Pennington v. Commonwealth***, Ky., 316 S.W.2d 221 (1958).

d. Mother was first cousin to victim's mother. *Leadingham v. Commonwealth*, 180 Ky. 38, 201 S.W. 500 (1918).

e. Wife was second cousin of defendant. *Smith v. Commonwealth*, Ky., 734 S.W.2d 437 (1987).

f. *But see George v. Commonwealth*, Ky., 885 S.W.2d 938 (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.

NOTES

B. Juror Who Has A Close Relationship With a Witness:

a. Juror's being related to and living in the same rural area of the county with the complaining witness' boyfriend and being married to boyfriend's cousin may have justified a challenge for cause. *Anderson v. Commonwealth*, Ky., 864 S.W.2d 909, 911 (1993).

b. 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 were assigned, it was an abuse of discretion to fail to excuse the juror for cause. *Alexander v. Commonwealth*, Ky., 862 S.W.2d 856, 864 (1993), *overruled on other grounds*.

c. Venireman knew both Commonwealth Attorney and chief investigating officer in the crime. *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871, 875 (1993).

d. Juror who was friend of chief investigating officer. *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871, 875 (1993).

e. First cousin to key prosecution witness. *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988).

f. Wife of arresting police officer. *Calvert v. Commonwealth*, Ky.App., 708 S.W.2d 121 (1986).

g. 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*, Ky., 993 S.W.2d 931 (1999).

C. Juror Who Has A Close Relationship With Attorney:

a. Venireman knew both Commonwealth Attorney and chief investigating officer in the crime. *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871, 875 (1993).

b. Venirewoman who had business dealings with the prosecution. *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871, 875 (1993).

c. Juror's wife and prosecutor were first cousins by marriage (however, relationship by blood and affinity are treated the same for purposes of juror disqualification). *Thomas v. Commonwealth*, Ky., 864 S.W.2d 252, 256-7 (1993).

d. 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 venireperson). *Fugate v. Commonwealth*, Ky., 993 S.W.2d 931, 938 (1999).

e. Uncle of Commonwealth Attorney. *Ward v. Commonwealth*, Ky., 695 S.W.2d 404, 407 (1985).

f. Secretary to Commonwealth Attorney. Position gave rise to a loyalty to employer that would imply bias. *Randolph v. Commonwealth*, Ky., 716 S.W.2d 3 (1986), *overruled on other grounds*.

g. Manager of 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*, Ky., 819 S.W.2d 713 (1992).

NOTES

h. County attorney at the time of the defendant's preliminary hearing. *Godsey v. Commonwealth*, Ky.App., 661 S.W.2d 2 (1983).

i. Juror was being represented by the prosecutor on a legal matter at the time of trial. *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713 (1992).

j. Cousin's son-in-law was the prosecutor. *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713 (1992).

k. *But see Sholler v. Commonwealth*, Ky., 969 S.W.2d 706, 709 (1998), where trial court did not abuse its discretion in refusing to dismiss for cause a potential juror who knew the Commonwealth's attorney through mutual friends and their mutual membership in a large card club.

D. Juror Who 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*, Ky.App., 887 S.W.2d 867 (1994).

E. Miscellaneous

a. 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, 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*, Ky., 862 S.W.2d 856, 864 (1993), *overruled on other grounds*.

b. Venirepersons and jurors related to prison employees, who knew many prison employees, whose two best friends and two brothers worked at prison and had discussed case with two brothers. *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871, 875 (1993).

c. Former police officer and present deputy sheriff. *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713 (1992). *But see Sholler v. Commonwealth*, Ky., 969 S.W.2d 706, 708 (1998), where the Court reaffirmed the principle espoused in *Sanders v. Commonwealth*, Ky., 884 S.W.2d 665 (1990), *cert. denied*, 502 U.S. 831, 112 S.Ct. 107, 116 L.Ed.2d 76 (1991), where it held that police officers are not disqualified to serve as jurors in criminal cases.

d. 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 defendants if proof was not sufficient to show guilt. *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713 (1992).

e. Outside patrolman and guard for prison who acknowledged he had spoken with persons in the prison regarding the escape. *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713 (1992).

f. African-American defendant was charged with sexual offenses against his stepdaughter from a biracial marriage, it was reversible error for the trial court to fail to strike for cause a juror who was biased against biracial jurors and would judge the wife's credibility a degree different from the credibility of other witnesses. *Alexander v. Commonwealth*, Ky., 862 S.W.2d 856 (1993), *overruled on other grounds*.

g. The probability of bias was so great that it was an abuse of discretion for the trial court to fail to strike a juror who was employed by the Cabinet for Human Resources, the same organization which a key prosecution was em-

NOTES

ployed, in the same unit that the key witness and detective involved in the case were assigned. *Alexander v. Commonwealth*, Ky., 862 S.W.2d 856 (1993), *overruled on other grounds*.

G Unsuccessful Challenges Which Should Continue To Be Asserted

The following are examples of challenges for cause that have been denied by the trial court and the denial upheld by the Kentucky Supreme Court. Although Kentucky law is not favorable on these grounds it is recommended that you continue to make challenges on these grounds.

1. In a case where the defendant was facing the death penalty but received a life sentence, the defendant moved to excuse for cause two prospective jurors who initially indicated they could not consider the minimum sentence of twenty years (one of these individuals additionally stated he felt that if a person killed another, the life of the killer should also be taken), and a third prospective juror who indicated she would have a hard time considering a lesser sentence for murder when alcohol was involved and that such feelings would impair her ability to follow jury instructions. Through the use of "follow-up" questions, each prospective juror was "rehabilitated," thus allowing the Kentucky Supreme Court to find no error in the trial court's rulings. (The defendant used a peremptory to remove each of the three prospective jurors.) *Mabe v. Commonwealth*, Ky., 884 S.W.2d 668 (1994).

2. Venireperson who lived four houses from victim's family and although not acquainted with victim, knew two of victim's sisters "pretty well" was not such a close situational relationship with the victim as to compel a presumption of bias. *DeRosset v. Commonwealth*, Ky., 867 S.W.2d 195, 197 (1993).

3. Venireperson who drove to scene of crime the night it happened out of curiosity, but stated that such information was not enough to talk about and disclaimed any bias need not be excused for cause. *DeRosset v. Commonwealth*, Ky., 867 S.W.2d 195, 197 (1993).

4. Where defendant was on trial for the shooting death of his ex-girlfriend's current boyfriend, it was not reversible error to fail to excuse for cause potential jurors who worked at same place of employment as victim and ex-girlfriend, who was a prosecution witness. *Copley v. Commonwealth*, Ky., 854 S.W.2d 748, 750 (1993); *Sholler v. Commonwealth*, Ky., 969 S.W.2d 706, 709 (1998).

5. Defendant filed a motion for a mistrial because juror failed to disclose on voir dire that he knew defendant. At hearing on mistrial motion defendant did not present any testimony from the juror in question, nor did he present any evidence showing that the questioned juror was aware of having any prior knowledge of the defendant or his family. The defendant's father testified at the hearing that he had known the juror for 40 years but had not seen him for 20-25 years, that their two families had known each other well, and that he would expect the juror to recognize the defendant's family name. Denying the mistrial motion, the Court of Appeals held that defendant's evidence was nothing more than mere speculation and that questions concerning how and when the juror knew the defendant must be answered to determine if there is juror bias. *Key v. Commonwealth*, Ky.App., 840 S.W.2d 827 (1992); *Sholler v. Commonwealth*, Ky., 969 S.W.2d 706 (1998).

6. In a malpractice action against a doctor, it was not an abuse of discretion for the trial court to fail to excuse for cause three jurors who were former patients of the doctor on trial. *Altman v. Allen*, Ky., 850 S.W.2d 44 (1993); *Sholler v. Commonwealth*, Ky., 969 S.W.2d 706 (1998).

7. Although Court of Appeals stated it was abuse of discretion for trial court to fail to excuse for cause on ground of "implied bias" venire-person who was county attorney at time of alleged offense up to and including time of trial, Court held harmful error was not shown because defendant did not demonstrate that use of peremptory to strike county attorney resulted in failure to strike another unacceptable juror. *Farris v. Commonwealth*, Ky.App., 836 S.W.2d 451 454-5 (1992).

NOTES

8. Juror Was Victim of Similar Offense - Where defendant was on trial for robbery, fact that two prospective jurors had been robbery victims was not sufficient to render prospective jurors unqualified. *Stark v. Commonwealth*, Ky., 828 S.W. 603, 608 (1991). 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*, Ky., 953 S.W.2d 943, 945 (1997).

9. Juror Was Friend of Victim of Similar Offense - Where defendants were on trial for having engaged in sexual acts with young children, trial court's failure to excuse for cause a juror whose best friend's granddaughter had been abused and killed 14 years previously and about which juror had strong feelings was held not an abuse of discretion. However, the Kentucky Supreme Court indicated it would not have been an abuse of discretion if this juror had been excused for cause as unqualified. *Stoker v. Commonwealth*, Ky., 828 S.W.2d 619, 625 (1992).

H. How To Preserve For-Cause Challenges And Protect Your Client's Right To A Trial By A Fair And Impartial Jury As Well As Her Right To Substantive Due Process

1. Conduct a thorough job of questioning the prospective juror to establish the actual or implied partiality. General questions of fairness and impartiality are not sufficient. Specific questions related to the facts of the case and your theory of defense must be asked. Attempt to elicit facts known by the juror or opinions held by the juror that reasonably could be expected to influence her decision. *Miracle v. Commonwealth*, Ky., 646 S.W.2d 720, 723 (1983) (Leibson, J., concurring). "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***, Second Edition, James J. Gobert, Walter E. Jordon (1992 Cumulative Supplement, p. 23).

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

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

4. You have the option of using your peremptory challenges on any prospective jurors whom you believe should have been excused for cause. Theoretically, you should *not have* to use your peremptory challenges on such persons since the purpose of a peremptory challenge is to eliminate those individuals whose disqualification's do not rise to the level of a for-cause challenge, but whom you have some reason or gut feeling about that makes you believe they will not be able to be fair and impartial. However, to assure your client's right to be tried by a fair and impartial jury, you may have to use your peremptory challenges on these individuals.

If you use your peremptory challenges on the persons whom you challenged for cause, and you still believe there is a juror for whom you have a reason to use a peremptory challenge, and whom you believe will not be fair and impartial, do the following. State to the trial court that you used your peremptory strike to eliminate the specific juror(s) whom you challenged for cause. State that as a result a different juror whom you would have used your peremptory on is still on the jury. You should state you believe this juror is not fair and impartial and that your client's right to be tried by a fair and impartial jury has been denied, even though the juror's bias does not rise to a level of a for-cause challenge.

NOTES

For example, your client is on trial for sex abuse of a minor. You determine through voir dire that prospective Juror A is related to the victim, and prospective Juror B is the grandmother of a victim of child abuse. Move to strike both Juror A and Juror B for cause. Under *Marsch v. Commonwealth*, Ky., 743 S.W.2d 830 (1987), *overruled on other grounds*, the trial court should strike Juror A. The law is not settled on whether Juror B must be stricken for cause. *Stoker v. Commonwealth*, Ky., 828 S.W.2d 619 (1992). However, the trial court denies both your for-cause challenges. You use all your peremptory strikes on other for-cause challenges, including Juror A, and have none left to strike Juror B. Then assert your position that Juror B cannot be fair and impartial and your client's right to a fair and impartial jury has been denied because you had no peremptories left to strike Juror B since you had to use a peremptory on Juror A who should have been stricken for cause. Also ask the trial court for an additional peremptory to use on Juror B. In a recent holding of the U.S Supreme Court, only if Juror B **actually sat** on the jury, would it be error because in such a situation, the defendant is being tried by an unfair and partial jury. *United States v. Martinez-Salazar*, —U.S.—, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000).

5. There are some states that have adopted a rule requiring the defendant to first use his peremptory challenges on those unsuccessful for-cause challenges to ensure the actual jury has no tainted jurors. However, while there is no such rule in Kentucky, and it would appear that *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) does not apply to Kentucky, the United States Supreme Court recently held in *United States v. Martinez-Salazar*, —U.S.—, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) that if a defendant elects to cure a judge's error in not striking a juror for cause by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right.

However, you may still prefer to use your peremptory challenges as they are intended and then place into the record that you have chosen to use all your peremptories on those persons whose characteristics or circumstances do not rise to a for-cause challenge. You should then ask for extra peremptory challenges to remove those persons who should have been stricken for cause.

6. If you choose to use your peremptory challenges to cure a for-cause error, you should still put into the record that you are doing so, and state you would have used each peremptory on a specifically named juror had you not felt constrained to use it on an unsuccessful for-cause challenge.

7. You must demonstrate, by stating in the record, that you used all your peremptory challenges and there are still unfair, biased juror(s) on the panel that **actually served** on the case. In addition, **be sure you make the jury strike sheet part of the record for appeal.**

In *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665, 669 (1991), it was observed that "[i]t is elementary logic and sound law that a defendant's right to be tried by an impartial jury is infringed if and only if an unqualified juror participates in the decision of the case." *See* also *Williams v. Commonwealth*, Ky.App., 829 S.W.2d 942 (1992) where it was noted that to prevail on appeal a defendant must demonstrate he used all his peremptories *and* an incompetent juror was allowed to sit who should have been stricken for cause.

I. How To Preserve A Denial Of Your Client's Right To Procedural Due Process

To establish that your client's right to freely exercise his peremptory challenges has been violated you must do the following:

1. Challenge for cause all persons you believe the law requires to be stricken.

2. Establish on the record that all of your client's peremptory challenges have been exhausted. **Be sure to make the jury strike sheet part of the record for appeal.**

3. State for the record that a biased and unfair juror is a member of the final jury and due to the use of all peremptories, your client's rights to due process are being violated. U*nited States v. Martinez-Salazar*, —U.S.—, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000).

NOTES

4. To make your record for appeal, you should also indicate which persons you would have removed with a peremptory challenge, if you had not been forced to use them on for-cause jurors. While you do not need to articulate *why* you would have exercised a peremptory on the persons, it is more impressive to the appellate court if you have reasons, even if they do not rise to the level of for-cause reasons. Ask to introduce this information by an avowal if you want to avoid revealing your thought processes to the Commonwealth. In *Foster v. Commonwealth*, Ky., 827 S.W.2d 670, 676 (1991), the Kentucky Supreme Court stated that for there to be error, the defendant must use all of her peremptories *and* show that "her use of a peremptory to strike each venireman 'resulted in a subsequent inability to challenge additional unacceptable venireman.'"

NOTES

J. Can Jurors Be Rehabilitated?

There is 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*, Ky., 819 S.W.2d 713, 717-718 (1992). In *Montgomery*, the Court "declared the concept of 'rehabilitation' is a *misnomer* in the context of choosing qualified jurors and direct[d] 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*, Ky., 17 S.W.3d 824 (2000), *Gill v. Commonwealth*, Ky., 7 S.W.3d 365 (1999).

Where potential jurors' attitude 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*, Ky., 862 S.W.2d 856, 865 (1993), *overruled on other grounds*.

Reaffirming *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713, 718 (1992), *overruled on other grounds*, *Thomas v. Commonwealth*, Ky., 864 S.W.2d 252, 258 (1993), holds that once a potential juror expresses disqualifying opinions, the potential juror may not be rehabilitated by leading questions regarding whether s/he can put aside those opinions and be fair and impartial.

The Kentucky Supreme Court has also held that prospective jurors' answers "to leading questions, that they would disregard all previous information, opinions and relationships **should not be taken at face value**." *Marsch v. Commonwealth*, Ky., 743 S.W.2d 830, 834 (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*, Ky., 646 S.W.2d 720, 722 (1983).

Be sure to object to the trial court's or the Commonwealth's use of leading questions in an attempt to rehabilitate an unqualified juror.

"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 v. Commonwealth*, Ky., 864 S.W.2d 252, 255 (1986), *overruled on other grounds*.

"It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty [or alcoholism or homosexuality or law enforcement personnel or other subject relevant to your case] would prevent him or her from doing so." *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 2233, 119 L.Ed.2d 492 (1992).

K. How To Preserve Your Challenge To A Tainted Jury Pool

Often times you are faced with a jury pool containing persons from which a codefendants jury was selected or who were victims of the charged offense. Two recent cases have addressed the procedure for obtaining a different jury pool.

In *Jett v. Commonwealth*, Ky.App., 862 S.W.2d 908, 910-11 (1993), the defendant 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 not to strike the entire panel because the defendant has proven no prejudice. Prejudicial remark by juror does not necessarily require striking the entire panel.

In *Hellard v. Commonwealth*, Ky.App., 829 S.W.2d 427 (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 from which the jurors were selected to hear the defendant's case. The defendant moved for a continuance of her trial until a new jury pool was called. The continuance motion was denied, but the trial court stated its ruling was subject to change if the defendant could show bias or prejudice during voir dire. The Kentucky Court of Appeals did "not feel that Hellard was required to show bias or prejudice under these circumstances." *Id.* at 429.

On appeal, the Commonwealth argued the defendant had waived the issue by failing to renew her continuance motion at the end of voir dire. However, reversing the defendant's convictions, the Kentucky Court of Appeals, relying on RCr 10.26, held the trial court erred in denying the original continuance motion 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."

Pelfrey v. Commonwealth, Ky., 842 S.W.2d 524 (1993), involves a situation similar to *Hellard, supra*, but reaches the opposite result because the issue was not properly preserved for review.

In *Pelfrey* the defendant moved for a continuance until a new jury pool could be empaneled 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." These safeguards were for cause and peremptory challenges. In addition, 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 against the defendant 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." Also, "a continuance motion for a new panel is not the equivalent of individually challenging jurors for cause. Once trial counsel's general [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."

Although Hellard was able to obtain relief on appeal despite failure to properly preserve the issue for review, do not rely on the "manifest injustice" principle of RCr 10.26 to protect your client's rights to a fair and impartial jury. The lesson to be gleaned from *Pelfrey, supra*, is that to properly preserve issue for review you must do two things: 1) Move for a continuance, pursuant to RCr 9.04, until a new jury can be impaneled; 2) Challenge for cause, as biased and prejudiced, each and every juror on the tainted panel. You may also want to move to dismiss the entire jury panel pursuant to RCr 9.34.

L. Voir Dire on the Issue of Punishment

Even in a case where the prosecution is not seeking the death penalty, the defendant is entitled to voir dire the jury panel as to its ability to consider the full range of possible punishments. *Fugate v. Commonwealth*, Ky., 993 S.W.2d 931 (1999), *Shields v. Commonwealth*, Ky., 812 S.W.2d 152 (1991).

NOTES

Where the trial court denied the defendant the right to meaningful voir dire on the issue of punishment **and the defendant received the maximum punishment**, the Kentucky Supreme Court found the error was not harmless beyond a reasonable doubt. *Fugate v. Commonwealth*, Ky., 993 S.W.2d 931 (1999), *Anderson v. Commonwealth*, Ky., 864 S.W.2d 909, 911 (1993).

However, where the defendant moved to voir dire the jury on the penalty range for first degree burglary and second degree assault but *not* for second degree persistent felony offender, the Court held the issue was not properly preserved for review. In addition, since the defendant received the *minimum* sentence for his PFO II conviction, the Court held the trial court's failure to allow voir dire on the penalty range was not error.

Voir Dire Cause Checklist

Here is a checklist with the necessary steps to preserve error due to the trial court's denial of a defense challenge for cause to a prospective juror:

1. The voir dire of the prospective jurors must be recorded and transcribed or videotaped and designated as part of the record on appeal.

2. The defense attorney 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.

3. After a challenge for cause is denied by the trial court, you must decide whether to use a peremptory on the prospective juror.

4. You must use all your peremptory challenges.

5. You should ask the trial court for additional peremptory challenges.

6. Be sure the juror strike sheets are made part of the record on appeal.

7. State clearly for the record that you had to use a peremptory on a specific juror who should have been stricken for cause. Make this statement for each prospective juror you challenged for cause and then removed with a peremptory. Clearly state that you used all your peremptories. Then clearly state the names of the prospective jurors you would have used a peremptory on if you had not had to use your peremptories to remove persons who should have been removed for cause.

8. State clearly for the record the names of those jurors who are actually selected to sit on the jury that are objectionable to you. This statement should be made at the time the trial court identifies the final twelve jurors (plus any alternates) but prior to their being sworn.

IV. 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.

Don't allow the prosecutor to argue his or her case. RCr 9.42(2); *Turner v. Commonwealth*, Ky., 240 S.W.2d 80 (1951).

It is reversible error for a prosecutor to define reasonable doubt in opening statement. *Marsch v. Commonwealth*, Ky., 743 S.W.2d 830, 833 (1987), quoting *Commonwealth v. Callahan*, Ky., 675 S.W.2d 391 (1984).

It is reversible error for a prosecutor to discuss evidence that the court had ruled inadmissible. *Linder v. Commonwealth*, Ky., 714 S.W.2d 154 (1986); KRE 103(c).

If the prosecutor tells about damaging information in opening statement, then fails to introduce evidence to support it, the proper remedy is a motion for mistrial. *Williams v. Commonwealth*, Ky., 602 S.W.2d 148 (1980).

Request a mistrial, if that is what you want.

NOTES

V. COMMONWEALTH'S CASE

NOTES

1. **Make Timely Objections** - KRE 103 (a). [See Above, Section A.1]. Compare *Bell v. Commonwealth*, Ky., 875 S.W.2d 882 (1994) [timely] to *Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1993) [not timely].

2. **Motion to Strike** - If you want the court to strike evidence, you must specifically ask for this relief. KRE 103(a)(1).

3. **Delayed Objections** - A delayed objection may be made if (a) judicial notice is taken before an opportunity to be heard. KRE 201(3); (b) a person disclosed privileged information before the holder of the privilege has time to assert it. KRE 510(2); (c) the judge calls a witness or questions a witness or asks questions tendered by a juror. KRE 614.

4. **Objections Not Necessary** - In two situations, an error is preserved even in the absence of an objection: (a) the judge testifies at trial, or (b) a juror testifies at trial. KRE 605 and 606.

5. **Mistrial** - If your objection is sustained and you ask for an admonition, which is given, you are deemed to be satisfied with the relief and cannot argue on appeal that a mistrial should have been granted. **If you want a mistrial, ask for one.** *Morton v. Commonwealth*, Ky., 817 S.W.2d 218 (1991); *Derossett v. Commonwealth*, Ky., 867 S.W.2d 195 (1993). The appellate court will presume that an admonition "controls the jury and removes the prejudice." *Clay v. Commonwealth*, Ky.App., 867 S.W.2d 200 (1993). Therefore, if you believe that the admonition was not adequate let the court know and explain why.

6. **Objections to Your Cross-Examination of Prosecution Witnesses** - When the prosecutor objects to your cross-examination questions, remind the court that Kentucky's "wide open" rule of cross-examination has been embodied in the KRE. *Derossett v. Commonwealth*, Ky., 867 S.W.2d 195 (1993); KRE 611.

7. **Expert Witness Testimony** – A timely objection to the qualifications, testimony, procedures, or findings offered by an expert witness must be made by trial counsel for it to be preserved for appellate review. *Commonwealth v. Petrey*, Ky., 945 S.W.2d 417, 419 (1997). Expert opinion evidence is admissible so long as (1) the witness is qualified to render opinion on the subject matter, (2) the subject matter is a proper one for expert testimony, (3) the subject matter satisfies the test for relevancy, subject to the balancing of probativeness against prejudice, and (4) the opinion will assist the trier of fact. *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883 (1997), KRE 401, 702. *Springer* also overruled *Brown v. Commonwealth*, Ky., 812 S.W.2d 502 (1991) and *Alexander v. Commonwealth*, Ky., 862 S.W.2d 856 (1993) in holding that the testimony of a licensed obstetrician/gynecologist that a child victim's vaginal injuries where consistent with her history of sexual abuse was relevant in sexual abuse prosecution and was not inadmissible opinion evidence concerning the ultimate issue. *Stringer* also gives numerous examples of past holdings by the Court regarding expert testimony and the admissibility relating to the ultimate issue in a case.

VI. DEFENSE CASE

1. **Separation of Witnesses**

   a. If one of your witnesses violates the rule, the court cannot automatically preclude the witness' testimony, but must hold a hearing before ruling. *Henson v. Commonwealth*, Ky., 812 S.W.2d 718 (1991).

   b. **Police Officers** - The courts have yet to decide whether the Commonwealth may simply "designate" a police officer as its representative without justifying a need for the officer to remain in the courtroom [KRE 615(2)] or whether the prosecutor must first demonstrate that the officer is "essential" to the presentation" of the Commonwealth's case. [KRE 615(3)]. However, the Court has held that it is entirely

proper for the lead investigator to be seated at the Commonwealth's table during the presentation of the evidence, even if that officer will testify. *Dillingham v. Commonwealth*, Ky., 955 S.W.2d 377 (1999), KRE 615(3).

NOTES

2. **Impeachment With Prior Felony Conviction** – Only felony convictions can be used for impeachment, and identity upon which conviction is based may not be disclosed unless the witness denies the conviction. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845 (1997), KRE 609. Object on the basis that the conviction is too remote in time. A twenty-two year old conviction is too old for impeachment purposes. *Brown v. Commonwealth*, Ky., 812 S.W.2d 502 (1991). See KRE 609(b) [10 year limit].

3. **Character Evidence** - Object to anything that sounds like character evidence, whether it came from prosecution witnesses, cross-examination of defense witnesses or cross-examination of your client. Character evidence is not admissible unless and until the defendant places his or her character in issue. *Holbrook v. Commonwealth*, Ky., 813 S.W.2d 811 (1991); KRE 404; see also *LaMastus v. Commonwealth*, Ky.App., 878 S.W.2d 32 (1994).

   Mere evidence that the victim had been physically abused without any proper evidence linking that abuse to the defendant is substantially more prejudicial than it is probative and the evidence of physical abuse should have been excluded under KRE 403.

   Although prosecutor acted improperly in badgering defendant into stating that police officer was lying, such improper action did not constitute palpable error that could be considered on appeal. *Moss v. Commonwealth*, Ky., 949 S.W.2d 579 (1997).

4. **Evidence of Other Crimes, Wrongs or Acts** - Consider a four-prong attack on this type of evidence:
   (a) prosecutor failed to give proper notice; (KRE 404(c));
   (b) evidence is not relevant to prove something other than criminal disposition;
   (c) evidence is not sufficiently probative to warrant introduction;
   (d) probative value outweighs potential for prejudice. KRE 404(b) and;
   (e) *Clark v. Commonwealth*, Ky., 833 S.W.2d 793, 795 (1991); *Bell v. Commonwealth*, Ky., 875 S.W.2d 882 (1994).

   Where defendant's prior felony conviction is revealed during voir dire, when prospective juror said she recognized the defendant from seeing him at the prison, and there was no proper evidentiary use for this fact in the guilt phase, the jury panel should have been discharged. *Tabor v. Commonwealth*, Ky.App., 948 S.W.2d 569 (1997).

Cases involving KRE 404(b)(1) where the other crime(s) prove(s) identity:

(1) High Degree of Similarity: *Bowling v. Commonwealth*, Ky., 942 S.W.2d 293 (1997), *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181 (1996), *Maddox v. Commonwealth*, Ky., 955 S.W.2d 718 (1997), *Adcock v. Commonwealth*, Ky., 702 S.W.2d 440 (1986), *Warner v. Commonwealth*, Ky., 621 S.W.2d 22 (1981), *Lear v. Commonwealth*, Ky., 884 S.W.2d 657 (1994), Violett v. *Commonwealth*, Ky., *907* S.W.2d 773 (1995) ;

(2) Insufficient Similarity: *Gray v. Commonwealth*, Ky., 843 S.W.2d 895 (1992), *Rearick v. Commonwealth*, Ky., 858 S.W.2d 185 (1993), *Bell v. Commonwealth*, Ky., 875 S.W.2d 882 (1994),

(3) Unique or Distinctive Feature: *Spencer v. Commonwealth*, Ky., 554 S.W.2d 355 (1977);

(4) Common Plan or Scheme: *Roberson v.* Commonwealth, Ky., 913 S.W.2d 310 (1994), Gilbert *v. Commonwealth*, Ky., 838 S.W.2d 376 (1991), *Howard v. Commonwealth*, Ky.App., 787 S.W.2d 264 (1989);

(5) Motive: *Rake v. Commonwealth*, Ky., 450 S.W.2d 527 (1970), *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181 (1996), *Lambert v. Commonwealth*, Ky.App., 835 S.W.2d 299 (1992),

Wilson v. Commonwealth, Ky.App., 761 S.W.2d 182 (1988), *Murphy v. Commonwealth*, Ky., 652 S.W.2d 69 (1983), *Chumbler v. Commonwealth*, Ky., 905 S.W.2d 488 (1995), *Parker v. Commonwealth*, Ky., 952 S.W.2d 209 (1997), *Raeber v. Commonwealth*, Ky., 558 S.W.2d 609 (1977).

(6) Intent: *Bell v. Commonwealth*, Ky., 404 S.W.2d 462 (1966), *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990), *Haight v. Commonwealth*, Ky., 938 S.W.2d 243 (1996), *Wonn v. Commonwealth*, Ky.App., 606 S.W.2d 169 (1980), *Elered v. Commonwealth*, Ky., 906 S.W.2d 694 (1994);

(7) Knowledge: *Lindsay v. Commonwealth*, Ky., 500 S.W.2d 76 (1973);

(8) Opportunity: *U.S. v. Doherty* 675 F.Supp. 714 (D.Mass. 1987);

(9) Preparation: *U.S. v. Nolan*, 910 F.2d 1553 (7th Cir. 1990), *U.S. v. Hill*, 898 F.2d 72 (7th Cir. 1990);

(10) Absence of Mistake or Accident: *Parker v. Commonwealth*, Ky., 952 S.W.2d 209 (1997).

Cases involving KRE 404(b)(2) where the evidence is said **not** to be "inextricably intertwined": *Clark v. Commonwealth*, 833 S.W.2d 793 (1991), *Holland v. Commonwealth*, Ky., 703 S.W.2d 876 (1986).

Cases involving KRE 404(b)(2) where the evidence is said **to be** "inextricably intertwined": *Hawkins v. Commonwealth*, Ky., 481 S.W.2d 259 (1972), *Dunbar v. Commonwealth*, Ky., 809 S.W.2d 852 (1991), *Norton v. Commonwealth*, 890 S.W.2d 632 (1994), *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112 (1990), *Drumm v. Commonwealth*, Ky., 783 S.W.2d 380 (1990).

KRE 403—Weighing Prejudice versus Probative Value:

(1) Definition: *Wonn v. Commonwealth*, Ky.App., 606 S.W.2d 169 (1980);

(2) Balancing Test: *Jarvis v. Commonwealth*, Ky., 960 S.W.2d 466 (1998), Billings *v. Commonwealth*, Ky., 843 S.W.2d 890, 892 (1992), *Bell v. Commonwealth*, Ky., 875 S.W.2d 882 (1994), *Tamme v. Commonwealth*, Ky., 759 S.W.2d 51 (1988);

(3) Remoteness in Time: *Gray v. Commonwealth*, Ky., 843 S.W.2d 895 (1992), *Robey v. Commonwealth*, Ky., 943 S.W.2d 616 (1997);

(4) "Overkill": *Funk v. Commonwealth*, Ky., 842 S.W.2d 476, (1992), *Chumbler v. Commonwealth*, Ky., 905 S.W.2d 488 (1995), *Brown v. Commonwealth*, Ky., 983 S.W.2d 516 (1999).

Cases involving KRE 404(c):

(1) Applies **only** to the Commonwealth;

(2) Notice must be specific, not just in discovery. *Daniel v. Commonwealth*, Ky., 905 S.W.2d 76, 77 (1995)("A police report alone does not provide reasonable pretrial notice pursuant to KRE 404(c).");

(3) Notice must be sufficiently in advance of trial to permit a reasonable time for investigation and preparation. *Gray v. Commonwealth*, Ky., 843 S.W.2d 895 (1992);

(4) Notice requirement **is** met if defense has "actual notice" of Commonwealth's intent to use evidence for 404(b) purposes, as shown by defense motion in limine to exclude the evidence. *Bowling v. Commonwealth*, Ky., 942 S.W.2d 293 (1997).

See the following for other cases where 404(b) evidence was held admissible: *Brown v. Commonwealth*, Ky., 983 S.W.2d 516 (1999), *Bowling v. Commonwealth*, Ky., 942 S.W.2d 293 (1997), *Port v. Commonwealth*, Ky., 906 S.W.2d 327 (1995*), Williams v. Commonwealth*, Ky., 810 S.W.2d 511 (1991), *Moore v. Commonwealth*, Ky., 771 S.W.2d 34 (1989*), Bush v. Commonwealth*, Ky.App., 726 S.W.2d 716 (1987), *Phillips v. Commonwealth*, Ky., 679 S.W.2d 235 (1984).

NOTES

(5) Separate Trial - If you asked for a trial separate from a codefendant, keep pointing out to the court how the proceedings are unfair, even at the penalty phase of trial. See: *Cosby v. Commonwealth*, Ky., 776 S.W.2d 367 (1989) and *Foster v. Commonwealth*, Ky., 827 S.W.2d 670 (1991). Also, if there is a taped statement of a non-testifying codefendant, a motion should be made for separate trials, or for the Commonwealth to redact the statement so as to eliminate not only the defendant's name, but any reference to his or her existence. *Rogers v. Commonwealth*, Ky., 992 S.W.2d 183 (1999).

(6) Prosecutorial Misconduct – Judgment of conviction will be reversed where prosecutor persisted in asking improper and prejudicial questions for purpose of getting evidence before the jury which the law does not permit the jury to hear. *Stewart v. Commonwealth*, 185 Ky. 34, 213 S.W. 185 (1919), *Nix v. Commonwealth*, Ky., 299 S.W.2d 609 (1957), *Vontrees v. Commonwealth*, 291 Ky. 583, 165 S.W.2d 145 (1942), *see e.g., Slaven v. Commonwealth*, Ky., 962 S.W.2d 845 (1997).

(7) Rule of Completeness – Once a defendant introduces a portion of a witness' prior statement to the police in an effort to point out perceived inconsistencies between that statement and an even earlier statements to the police, the rule of completeness allows the Commonwealth to require introduction of the remainder of the statement. KRE 106, *see Slaven v. Commonwealth*, Ky., 962 S.W.2d 845 (1997).

(8) Privileges – *See* KRE 501-KRE 511. *Spousal Privilege* (KRE 504) – Privileged information is not made admissible simply because it is contained in an out-of-court statement which falls within an exception to the hearsay rule; the statement must be admissible under **both** Article V (Privileges) and Article VII (Hearsay) of the Rules of Evidence. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 852 (1997). The Court also specifically stated in *Slaven* that an out-of-court statement of a witness who is precluded from testifying because of invocation of the spousal privilege is admissible if that statement falls within a recognized exception to the hearsay rule and it does not divulge a confidential communication. *See also Thurman v. Commonwealth*, Ky., 975 S.W.2d 888 (1998).

(9) Victim Impact Evidence – 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*, Ky., 978 S.W.2d 322 (1998) (however, in *Bennett* it was held to be harmless error).

VII. AVOWALS

RCr 9.52 states:

1. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney the witness may make a specific offer of his or her answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

NOTE: In *Jones v. Commonwealth*, Ky., 623 S.W.2d 226 (1981), it was held to be prejudicially erroneous for a trial court to deny defense counsel an opportunity to offer the testimony of a witness by avowal. See also *Perkins v. Commonwealth*, Ky.App., 834 S.W.2d 182 (1992).

2. Error in trial court sustaining objections to cross-examination of witness could not be a basis for reversal where the appellant failed to request an avowal. *Jones v. Commonwealth*, Ky., 833 S.W.2d 839 (1992).

NOTES

3. KRE 103(b) says that the court "may" direct that an offer of proof be in question and answer form. While this suggests that a narrative may be sufficient, the safest practice would be to make a question and answer avowal unless the court orders otherwise. An avowal by the **witness**, not the attorney, is necessary to preserve error. *Commonwealth v. Ferrell*, Ky., 17 S.W.3d 520 (2000), KRE 103.

NOTES

VIII. MOTION - DIRECTED VERDICT

1. *Kimbrough v. Commonwealth*, Ky., 550 S.W.2d 525 (1977); *Queen v. Commonwealth*, Ky., 551 S.W.2d 239 (1977).

You must make a motion for a directed verdict at the close of the prosecution's case and at the close of the defense's case in order to properly preserve an issue as to the sufficiency of the evidence for appellate review. If either or both parties offer rebuttal evidence, an additional motion for a directed verdict should be made as a safeguard at the close of such proof.

You must object to the given instructions in order to preserve an issue as to sufficiency of evidence for appellate review.

General motions for directed verdicts on all counts of the indictment are insufficient to apprise the trial court of the precise nature of the objection. *Seay v. Commonwealth*, Ky., 609 S.W.2d 128, 130 (1980).

NOTE: If defendant's evidence fills in gap in prosecution's case, then defendant is not entitled to directed verdict. *Heflin v. Commonwealth*, Ky.App., 689 S.W.2d 621 (1985); *Cutrer v. Commonwealth*, Ky.App., 697 S.W.2d 156 (1985).

2. In *Baker v. Commonwealth*, Ky., 973 S.W.2d 54 (1998), the court said that for the issue to be preserved for appellate review, a Motion for Directed Verdict **must** be made at the close of all evidence as well as at the close of the Commonwealth's case. *Baker* specifically overrules *Dyer v. Commonwealth*, Ky., 816 S.W.2d 647 (1991)

3. **Directed Verdict Test** - In *Commonwealth v. Benham*, Ky., 816 S.W.2d 186 (1991), the court explained that *Sawhill v. Commonwealth*, Ky., 660 S.W.2d 3 (1983) is a trial court test for a directed verdict and *Trowel v. Commonwealth*, Ky., 550 S.W.2d 530 (1977) is an appellate test. *See also Clay v. Commonwealth*, Ky. App., 867 S.W.2d 200 (1993). [Also, keep in mind the federal constitutional test: *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)]. *But see Commonwealth v. Jones*, Ky., 880 S.W.2d 544 (1994), declaring that a verdict must be upheld if there is "substantial evidence to support it." The main principles of DV on appellate review was recently upheld in *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377 (1999).

4. Two recent Kentucky cases which were successful on directed verdict issues are *Allen v. Commonwealth*, Ky.App. 997 S.W.2d 483 (1998) (where the Court held that while the testimony of the prostitute was corroborated by other evidence, as required to convict defendant of promoting prostitution, and thus was properly submitted to jury without corroboration instruction, that evidence that a minor participated in sexual conduct with each customer was insufficient to convict defendant of using a minor in a sexual performance; and *Robey v. Commonwealth*, Ky., 943 S.W.2d 616 (1997) where the Court held that the defendant was entitled to directed verdict of acquittal on burglary charge.

IX. INSTRUCTIONS

1. **RCr 9.54(2)** [Amended September 1, 1993] states: "(2) 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."

NOTES

2. **Right to Lesser Included Offense Instructions** - *Ward v. Commonwealth*, Ky., 695 S.W.2d 404, 406 (1985); *Trimble v. Commonwealth*, Ky., 447 S.W.2d 348 (1969); *Martin v. Commonwealth*, Ky., 571 S.W.2d 613 (1978); *Luttrell v. Commonwealth*, Ky., 554 S.W.2d 75 (1977).

   If a jury is instructed on voluntary intoxication as a defense to intentional murder, it must also be instructed on second-degree manslaughter as a lesser-included offense. *Fields v. Commonwealth*, Ky., 12 S.W.3d 275 (2000), *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845 (1997).

   It is **not** palpable error to fail to instruct on a lesser-included offense of that charged in the indictment, and a trial judge is **not** required to *sua sponte* rule accordingly. *Clifford v. Commonwealth*, Ky., 7 S.W.3d 371 (1999).

   NOTE: Also argue lesser included offense instruction required as part of right to present a defense under 6th and 14th Amendments to United States Constitution and Section 11 of Kentucky Constitution.

3. **Entitled to Instructions on D's Theory of Case** – *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845 (1997), *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534, 549-550 (1988), *Kohler v. Commonwealth*, Ky., 492 S.W.2d 198 (1973), *Rudolph v. Commonwealth*, Ky., 504 S.W.2d 340 (1974). *See Taylor v. Commonwealth*, Ky., 995 S.W.2d 355 (1999), *see also Hayes v. Commonwealth*, Ky., 870 S.W.2d 786, 788 (1993), where the court explained that when the defendant admits the facts constituting the offense, but 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."

4. **NOT Entitled to Instructions on Alternative or Inconsistent Theories of Defense** - *Pace v. Commonwealth*, Ky., 561 S.W.2d 664, 667 (1978) was overruled by *Grimes v. McAnulty*, Ky., 957 S.W.2d 223, 227 (1997). A defendant may no longer argue inconsistent theories as they can be termed "mutually exclusive." However, it is not error to give alternate instructions on wanton and intentional murder when the defendant claims self-protection and there is evidence to support the defense. *Allen v. Commonwealth*, Ky., 5 S.W.3d 137 (1999).

5. **Instructions Protecting Right to Unanimous Verdict** – 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 guilty under one theory, while others might find guilt under another; if the evidence would support conviction under two theories, the requirement of jury unanimity is satisfied, but if the evidence would support a conviction under only one of two alternative theories, the requirement of unanimity is violated. *Davis v. Commonwealth*, Ky., 967 S.W.2d 574 (1998). *See also Wells v. Commonwealth*, Ky., 561 S.W.2d 85 (1978); *Boulder v. Commonwealth*, Ky., 610 S.W.2d 615 (1980); *Hayes v. Commonwealth*, Ky., 625 S.W.2d 583 (1981).

   NOTE: Defendant entitled to majority verdict under 6th Amendment - *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).

6. **Preserving Error** - 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 (1991), *see also Baker v. Commonwealth*, Ky., 973 S.W.2d 54 (1998), and *Tamme v. Commonwealth*, Ky., 973 S.W.2d 13 (1998), where defendant failed to request instructions on intoxication, moral justification, or other mitigating circumstances, it was not preserved for appellate review.

   A defendant did not preserve for review his allegation of error challenging the trial court's failure to instruct the jury on alcohol intoxication in a public place where he never requested that instruction. *Blades v. Commonwealth*, Ky., 957 S.W.2d 246 (1997), RCr

9.54(2), *see also Graves v. Commonwealth*, Ky., 17 S.W.3d 858, 864 (2000).

It is **not** palpable error to fail to instruct on a lesser-included offense of that charged in the indictment, and a trial judge is **not** required to *sua sponte* rule accordingly. *Clifford v. Commonwealth*, Ky., 7 S.W.3d 371 (1999).

X. CLOSING ARGUMENT

RCr 9.22 - Defense counsel is required to object to the prosecutor's improper **comments during his closing argument at the time the comments are made.** Failure to object contemporaneously will result in unpreserved error that the Court will not review on appeal. *Gray v. Commonwealth*, Ky., 979 S.W.2d 454 (1998). Defense counsel must make known to the trial court the type of relief she desires, *i.e.*, admonition, and mistrial. Defense counsel need not state the grounds for her objection unless requested to do so by the court. Counsel needs to be aware of all possible grounds for the objection and types of relief because failure to mention a specific ground at trial, if requested to do so, will foreclose ability to argue said ground on appeal. *Johnson v. Commonwealth*, Ky., 864 S.W.2d 266 (1993); *Kennedy v. Commonwealth*, Ky., 544 S.W.2d 219, 221 (1977). Also, failure to request the specific relief desired will foreclose the ability to argue you are entitled to said relief on appeal. *Derossett v. Commonwealth*, Ky., 867 S.W.2d 195 (1993); *West v. Commonwealth*, Ky., 780 S.W.2d 600, 602 (1989).

Where the trial court denies defense counsel a reasonable opportunity to make a record, the appellate court will not hold defense counsel strictly accountable to the rules regarding making contemporaneous objections. *Alexander v. Commonwealth*, Ky., 864 S.W.2d 909, 914-15 (1993).

Two procedures to deal with the prosecutor's closing argument are to (1) move *in limine*, prior to trial, to preclude improper comments in closing argument; and (2) make timely objection at trial during the closing argument. Each procedure requires knowledge and understanding of the types of arguments which have been found to be improper by the Kentucky courts.

Trial counsel must be alert for prejudicial and improper arguments by the prosecutor at both the guilt and truth-in-sentencing phases of the trial. 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 her objection and mistrial motion. 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. You can never unring the bell. *Bruton v. U.S.*, 88 S.Ct. 1620, 1628 (1968); *Bell v. Commonwealth*, Ky., 875 S.W.2d 882 (1994).

Besides becoming familiar with the law regarding closing argument, counsel should become familiar with the practices of the prosecutor trying the case. Many prosecutors make the same (or variations on a theme) improper argument over and over again. By being familiar with the types of arguments and issues of your particular prosecutor, you can move the court *in limine* to preclude the use of the types of improper and prejudicial arguments likely to be used by the prosecutor. Even if your motion *in limine* is denied, you will be better prepared to object at trial.

Examples of unfair arguments using the West Key Number system:

708 - Scope and effect of summing up

709 - For prosecution

The prosecutor is given wide latitude in closing argument, *Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1993), but the prosecutor may not cajole or coerce jury to reach a verdict. *Lycans v. Commonwealth*, Ky., 562 S.W.2d 303 (1978).

717 - Arguing or reading law to jury

Prosecutor misstated law on insanity when he told jury test was whether defendant

NOTES

knew right from wrong. *Mattingly v. Commonwealth*, Ky. App., 878 S.W.2d 797 (1994).

Prosecutor improperly defined reasonable doubt. *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534, 544 (1988); *Commonwealth v. Goforth*, Ky., 692 S.W.2d 803 (1985).

A prosecutor shall not knowingly make a false statement of law to a tribunal. SCR 3.130-3.3(a)(1).

718 - Arguing matters not within issues

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).

719 - Arguing matters not sustained by the 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).

1) in general

Prosecutor may not mention facts prejudicial to defendant that have not been introduced into evidence. *Sommers v. Commonwealth*, Ky., 843 S.W.2d 879 (1992); *Bowling v. Commonwealth*, Ky., 279 S.W.2d 23 (1955).

2) personal knowledge, opinion or belief of counsel

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).

Prosecutor's expression of his opinion is proper when based on the evidence. *Derossett v. Commonwealth*, Ky., 867 S.W.2d 195 (1993).

It was error for prosecutor to make statement about believability of defendant's explanation of how he received certain injuries and to present demonstration of defendant's explanation which was outside the evidence presented. *Wager v. Commonwealth*, Ky., 751 S.W.2d 28 (1988).

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

3) evidence excluded

It was error for 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*, Ky., 860 S.W.2d 275 (1993).

Where trial court ruled 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*, Ky., 634 S.W.2d 426 (1982).

720 - Comments on evidence or witnesses

1) in general

Hall v. Commonwealth, Ky., 862 S.W.2d 321 (1993).

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

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

NOTES

2) misstatements of evidence

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

3) 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).
It was error for prosecutor to make statement about believability of defendant's explanation of how he received certain injuries and to present demonstration of defendant's explanation which was outside the evidence presented. *Wager v. Commonwealth*, Ky., 751 S.W.2d 28 (1988).

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

It was improper for prosecutor to comment that he had known and worked with police officer for a long time, that officer was honest and conscientious, and officer's word was worthy of belief. *Armstrong v. Commonwealth*, Ky., 517 S.W.2d 233 (1974).

4) inferences from and effect of evidence in general

It is improper for prosecutor to infer the potentiality of another crime. *Elswick v. Commonwealth*, Ky.App., 574 S.W.2d 916 (1978).

720.5 - Expression of opinion as to guilt of accused

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).

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

721 - Comments on failure of accused to testify

1) in general

Commonwealth should not comment on defendant's failure to testify. *Powell v. Commonwealth*, Ky.App., 843 S.W.2d 908 (1992).

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

2) reference to testimony as uncontradicted and failure to produce witnesses or testimony - is not held to be an improper comment on the accused's failure to testify or a violation of his right to remain silent under Section 11 of the Kentucky Constitution and the Fifth Amendment of the U.S. Constitution, but you should object anyway because such a comment denies the accused due process of law and a fair trial under the Fourteenth Amendment to the U.S. Constitution.

721.5 - Comments on failure to produce witnesses or evidence

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

722 - Comments on character or conduct of accused or prosecutor

It was error for the prosecutor to make demeaning comments about defendant and defense counsel. *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988).

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

NOTES

722.5 - Comments on commission of other offenses by accused

Where the defendant was on trial for second degree manslaughter arising out of an automobile accident, it was error for the prosecutor to urge the jury to consider the defendant's prior conviction for DUI while deliberating on the manslaughter charge. *Osborne v. Commonwealth*, Ky.App., 867 S.W.2d 484 (1993).

It is improper for prosecutor to infer the potentiality of another crime. *Elswick v. Commonwealth*, Ky.App., 574 S.W.2d 916 (1978).

723 - Appeals to sympathy or prejudice

1) in general

Prosecutor's reference to decedent as "my client" was "less than commendable," although it was not reversible error. *Derossett v. Commonwealth*, Ky., 867 S.W.2d 195 (1993).

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

Prosecutor may not encourage verdict based on passion or prejudice or for reasons not reasonably inferred from the evidence. *Bush v. Commonwealth*, Ky., 839 S.W.2d 550 (1992). *See* also *Clark v. Commonwealth*, Ky., 833 S.W.2d 793 (1992); *Dean v. Commonwealth*, Ky., 777 S.W.2d 900 (1989); *Morris v. Commonwealth*, Ky., 766 S.W.2d 58 (1989); *Ruppee v. Commonwealth*, Ky., 754 S.W.2d 852 (1988); *Estes v. Commonwealth*, Ky., 744 S.W.2d 421 (1988).

Claim concerning prosecutor's closing argument about the pain and suffering endured by the victim's family due to her death was not preserved for review on appeal where there was no objection at trial to the comments. *Bennett v. Commonwealth*, Ky., 978 S.W.2d 322 (1998).

2) Golden Rule argument

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

3) Deterrence argument - appeals for enforcement of laws

It is error for prosecutor to urge 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 the 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).

4) threats and appeals to fears of jury

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

5) appeals to racial prejudices *Dotye v. Commonwealth*, Ky., 289 S.W.2d 206 (1956).

724 - Abusive language

Prosecutor's reference to defendant as "black dog of a night," "monster," "coyote that roamed the road at night hunting woman to use his knife on," and "wolf" was improper. *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988).

725 - Instructions to jury as to its duties

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, 241 Ky. 428 (1932).

NOTES

XI. VERDICT OF JURY

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 new trial. *Caretenders, Inc. v. Commonwealth*, Ky., 821 S.W.2d 83 (1991).

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 guilty under one theory, while others might find guilt under another; if the evidence would support conviction under two theories, the requirement of jury unanimity is satisfied, but if the evidence would support a conviction under only one of two alternative theories, the requirement of unanimity is violated. *Davis v. Commonwealth*, Ky., 967 S.W.2d 574 (1998). *See also Wells v. Commonwealth*, Ky., 561 S.W.2d 85 (1978); *Boulder v. Commonwealth*, Ky., 610 S.W.2d 615 (1980); *Hayes v. Commonwealth*, Ky., 625 S.W.2d 583 (1981).

NOTE: Defendant entitled to majority verdict under 6th Amendment - *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).

XII. SENTENCING

1. **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. *Crane v. Commonwealth*, Ky., 833 S.W.2d 813, 819 (1992). In *Crane*, 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.

2. **Jurisdictional Error** - The *Wellman v. Commonwealth*, Ky., 694 S.W.2d 696 (1985) rule that "sentencing is jurisdictional...[and] cannot be waived by failure to object" does not apply to procedural errors which must be objected to in the trial court. *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713 (1991). [Whether a jury must fix a sentence on the underlying offense before fixing an enhanced sentence for PFO is procedural]. See also *Hughes v. Commonwealth*, Ky., 875 S.W.2d 99 (1994). Appeal of sentencing error can be taken after plea of guilty.

3. **Concurrent/Consecutive Sentences** - An instruction allowing the jury to recommend concurrent or consecutive sentences [KRS 532.055] must give the jury the option of recommending that some sentences be served concurrently and some consecutively, not all or nothing. *Stoker v. Commonwealth*, Ky., 828 S.W.2d 619 (1992).

4. **Truth-In-Sentencing** - Proof of Prior Convictions - Prior convictions, including prior misdemeanor convictions, can be attacked in the same manner as prior convictions used for PFO purposes. *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) and *Dunn v. Commonwealth*, Ky., 703 S.W.2d 874 (1986) apply to misdemeanor convictions. *See McGinnis v. Commonwealth*, Ky., 875 S.W.2d 518 (1994).

XIII. CUMULATIVE ERROR

In *Funk v. Commonwealth*, Ky., 842 S.W.2d 476 (1992) and 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. You may want to make a cumulative error argument at the close of the Commonwealth's case, close of all evidence, in a motion for new trial, or at any other logical point.

NOTES

XIV. POST-TRIAL MOTIONS

See "Initiating The Appeal: The Final Act Of Preservation" by John Palombi on page 40.

Few attorneys are making Motions for a New Trial or JNOV (judgment notwithstanding the verdict); this is not good practice. Every defendant should have this motion filed on his behalf. Although a motion for a new trial premised upon newly discovered evidence may be filed within one year of the judgment, a motion premised *upon any other grounds* must be filed within **five days** of the verdict. RCr 10.06(1). *Johnson v. Commonwealth,* Ky., 17 S.W.3d 109 (2000).

Immediately after the client has been sentenced, trial counsel should obtain an order allowing the client to proceed *in forma pauperis* (IFP) and appointing DPA to represent the client on appeal. Without these orders, the circuit court clerk's office is reluctant to file a timely Certificate of Service or to file the Notice of Appeal in the absence of a filing fee. Also, a Designation of Record **must** be filed, designating specifically every hearing and the trial held in the client's case. Failure to designate all or any of the record can cause dismissal of the appeal or failure of the appellate court to review issues related to the missing record on appeal. *Commonwealth v. Black,* Ky., 329 S.W.2d 192 (1959).

The IFP order should specifically refer to KRS Chapter 31 and appoint DPA to handle the appeal. DPA must be appointed to the appeal even if DPA represented the client below. Otherwise, the appellate court and DPA consider the appellant to be represented on appeal by trial counsel, or proceeding *pro se.*

XV. CONSTITUTIONAL GROUNDS FOR OBJECTION

If you cite particular constitutional provisions, be careful that you don't leave one out. Don't forget the state Constitution. See the article and table of Bruce Hackett on pages 34-35.

RESOURCES:

Kentucky Practice Library, Trial Handbook for Kentucky Lawyers, Second Edition, Thomas L. Osborne, Lawyers Cooperative Publishing Company (1992).

Trial Practice Series, The Law, Art, and Science of Selecting a Jury, Second Edition, James J. Gobert, Walter E. Jordan, McGraw Hill (1990)

This article was originally written by Bruce Hackett, David Niehaus, Frank Heft, Jr. and Jay Lambert. It was later updated by Julie Namkin and Marie Allison. In this edition, it has been updated by Karen Maurer. ■

KAREN S. MAURER
Assistant Public Advocates
Appellate Branch
100 Fair Oaks Lane, Ste. 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006 Fax: (502) 564-7890
E-mail: kmaurer@mail.pa.state.ky.us

NOTES

Consitutional Issues: State and Federal Grounds for Objections and Motions

The case is lost, the client is convicted, and the appeal is underway. The trial judge made some decisions against your client, which you and your client hope are reversible errors. Each argument that you raise in your brief must include, at the very beginning, "a statement with reference to the record showing whether the issue was properly preserved for review and if so, in what manner." CR 76.12 (4)(C)(iv). The reason that you must have raised *all* possible grounds for relief in the trial court is to avoid the all-too-frequent decision of the appellate court which disposes of your argument by ruling that the issue was not properly preserved for review, see RCr 10.26, or that the grounds raised on appeal are different from those raised in the trial court (…"[F]eed[ing] one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, Ky., 544 S.W.2d 219 (1977)).

The reason that you must raise the federal constitutional grounds at the trial court level is so that if you must take the case to federal court, you will be able to demonstrate that the state court had an opportunity to consider and rule upon the federal constitutional grounds. For example, United States Supreme Court Rule 14 says that a petition for a writ of certiorari must contain a statement demonstrating the "specification of 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 [.]"

If you take the case to federal district court, seeking relief through the issuance of a Writ of Habeas Corpus, you must contend with the provisions of the AEDPA - - the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132). See 28 U.S.C. Section 2254. For about a century before the enactment of the AEDPA, the United States Supreme Court and lower federal courts applied the principle of exhaustion, requiring that a habeas petitioner have attempted to gain relief on a federal claim by availing himself of all state remedies before filing a federal habeas corpus petition. The exhaustion principle remains a part of federal habeas litigation under the AEDPA. You must be prepared to show the federal court that you attempted to gain state relief by employing every available procedural path. Not only must you exercise care in raising the federal issue by citing the relevant constitutional provision, you must now exercise care when you cite Supreme Court case law in support of your argument. While there is nothing wrong with relying upon the most recent Supreme Court case or the latest opinion from a lower federal court, you should make sure that you also rely on "clearly established Federal law." [See 28 U.S.C. Section 2254(d)(1)]. For example, if your claim is a discovery violation, cite *Brady v. Maryland*, 373 U.S. 83 (1963); for a confrontation/joint trial issue cite *Bruton v. United States*, 391 U.S. 123 (1968); and for a right-to-counsel case include *Gideon v. Wainwright*, 372 U.S. 335 (1963). Doing so will protect your client from a claim that she is relying on "new rules of law," rather than "clearly established Federal law." Under the AEDPA and *Teague v. Lane*, 489 U.S. 288 (1989), new rules of law cannot be the basis for federal habeas relief.

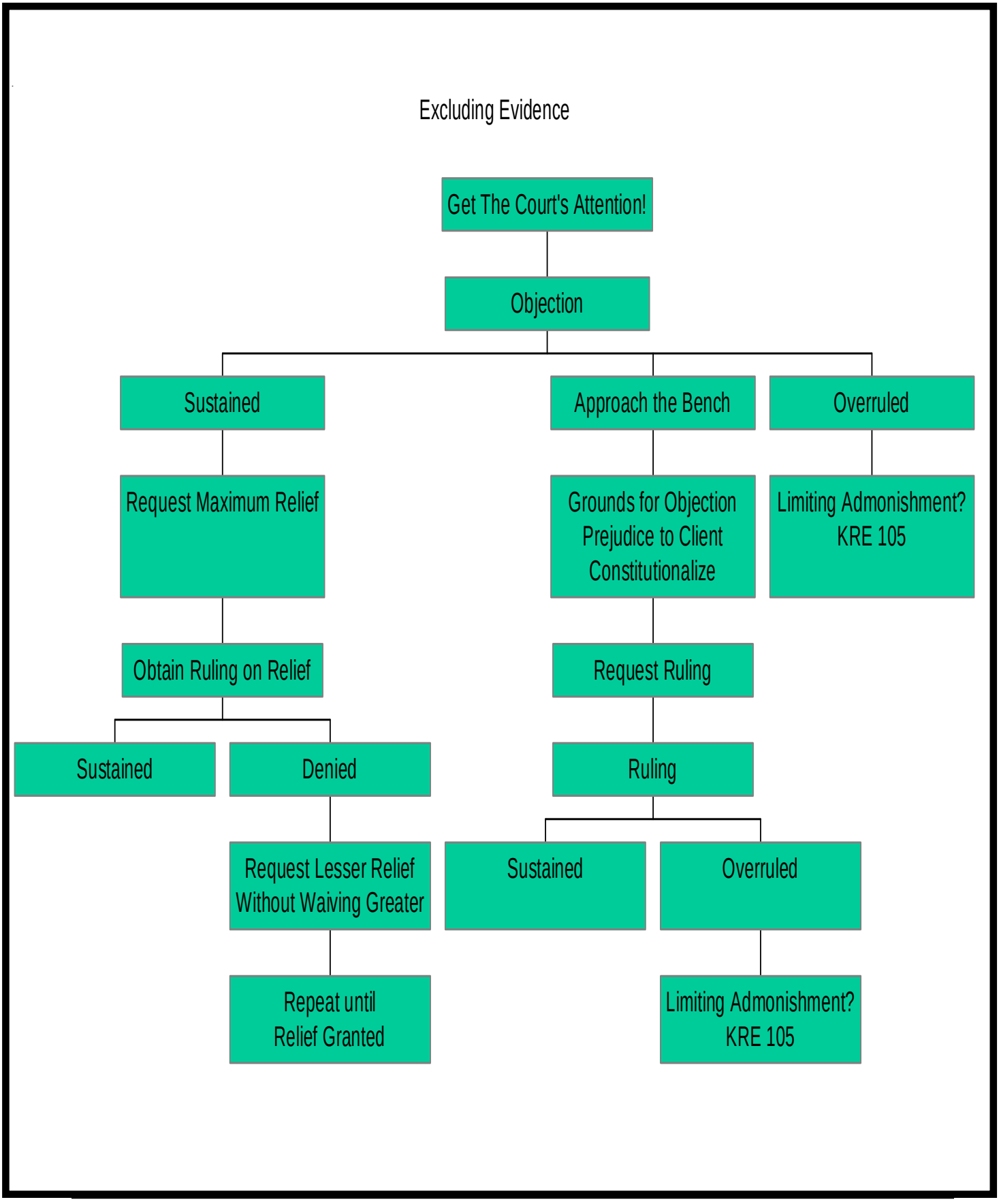
Another consideration in your decision to cite both state and federal constitutional grounds in your objection or motion in the trial court and in your brief on appeal is to insulate your winning state constitutional argument from federal review. If you can convince the appellate court that your client should prevail based upon the application of state constitutional law, the Commonwealth will not have any success in seeking to overturn the state court decision in the United States Supreme Court. See, for example, *Ohio v. Robinette*, 519 U.S. 33 (1996).

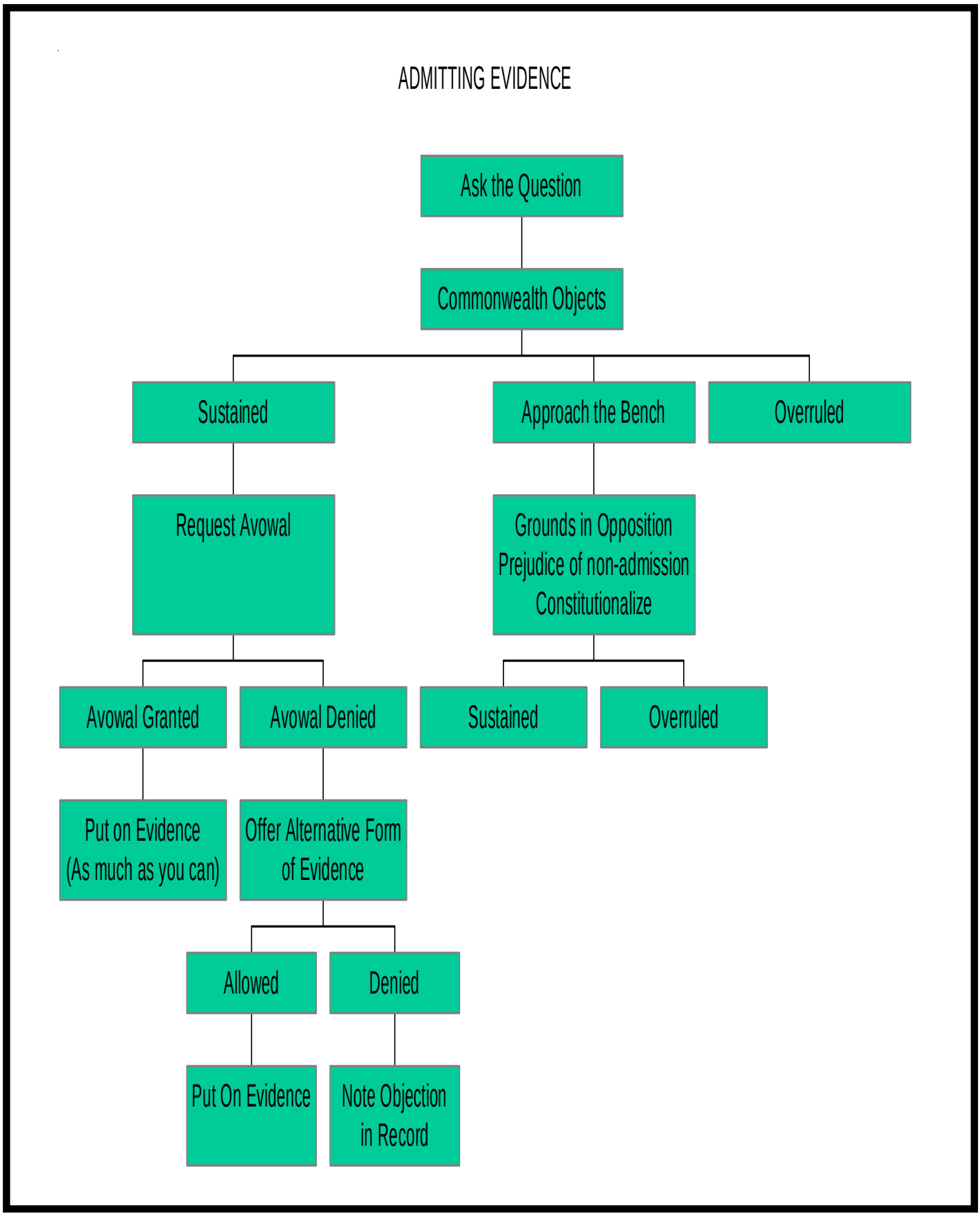
These are but a few of the considerations that should factor into your decision to raise state and federal constitutional issues. Obviously, there are booby traps, minefields and trapdoors everywhere, and one wrong step can knock your client out of federal court. Raising all possible grounds for relief at the first opportunity can go a long way to preserve your client's ability to ultimately get relief.

Following this article is a table of state cases, which sets out the constitutional guarantees for you to use as a starting point for your research. ■

Bruce Hackett
Deputy Appellate Defender
719 West Jefferson Street
Louisville, KY 40202
Tel: (502) 574-3800 FAX: (502) 574-4052
E-Mail: defender@thepoint.net

Rights Protected	Federal Constitutional Amendment	KY Constitutional Section	KY Cases Recognizing State Constitutional Right
Search & Seizure	4th	1, 10	*Commonwealth v. Robey*, Ky., 337 S.W. 2d 3 (1960) *Holbrook v. Knopf*, Ky., 847 S.W. 2d 52 (1993) *Lafollette v. Commonwealth*, Ky., 915 S.W. 2d747(1996)
Self-Incrimination	5th	11	*Jones v. Commonwealth*, 303 Ky., 666, 198 S.W. 2d 969 (1947) *Mace v. Morris*, Ky., 851 S.W. 2d 457 (1993)
Grand Jury Indictment	5th	12	*King v. City of Pineville*, Ky., 299 S.W. 1082 (1927) *Commonwealth v. Baker*, Ky., 11 S.W. 3d 585 (2000)
Double Jeopardy	5th	13	*Commonwealth v. Burge*, Ky., 947 S.W. 2d 805 (1996)
Due Process (Invoked in federal cases by the 5th and in the state cases by the 14th)	5th, 14th	2, 3, 10, 11, 14 ("Due course of law")	*Commonwealth v. Raines*, Ky., 847 S.W. 2d 724 (1993) *Kentucky Milk Marketing v. Kroger Co.*, Ky., 691 S.W. 2d 893 (1985) *Commonwealth v. Spauldin*, Ky., 991 S.W. 2d 651 (1999)
Equal Protection	5th, 14th	1, 2, 3, 59 (procedural fairness)	*Yost v. Smith*, Ky., 862 S.W. 2d 852 (1993) *Commonwealth, Revenue Cabinet v. Smith*, Ky., 875 S.W. 2d 873 (1994) *Commonwealth v. Brown*, Ky. App., 911 S.W. 2d 279 (1995)
Speedy Trial	6th	11	*Hayes v. Ropke*, Ky., 416 S.W. 2d 349 (1967)
Public Trial	6th	11	*Lexington Herald-Leader Co. v. Meigs*, Ky., 660 S.W. 2d 658 (1983)
Jury Trial	6th	7, 11	*Donta v. Commonwealth*, Ky. App., 858 S.W. 2d 719 (1993) *Whitler v. Commonwealth*, Ky., 810 S.W. 2d 505 (1991)
Informed of Nature of Accusation	6th	11	*Carter v. Commonwealth*, Ky., 404 S.W. 2d 461 (1966)
Confrontation & Cross-Examination	6th	11	*Dillard v. Commonwealth*, Ky., 995 S.W. 2d 366 (1999) *Rogers v. Commonwealth*, Ky., 992 S.W. 2d 183 (1999)
Compulsory Process	6th	11	*Justice v. Commonwealth*, Ky., 987 S.W. 2d 306 (1998)
Effective Counsel (& Right to Counsel)	6th	11	*Ivey v. Commonwealth*, Ky. App., 655 S.W. 2d 506 (1969) *Denny v. Commonwealth*, Ky., 670 S.W. 2d 847 (1984)
Bail	8th	2, 16, 17	*Fryrear v. Parker*, Ky., 920 S.W. 2d 519 (1996) *Marcum v. Broughton*, Ky., 442 S.W. 2d 307 (1969)
Cruel & Unusual Punishment	8th	2, 17	*Sizemore v. Commonwealth*, Ky., 485 S.W. 2d 498 (1972) *Cornelison v. Commonwealth*, Ky., 2 S.W. 235 (1886)
Present a Defense	6th, 14th	11	*Barnett v. Commonwealth*, Ky., 838 S.W. 2d 361 (1992) *Bowling v. Commonwealth*, Ky., 873 S.W. 2d 175 (1993)
Prohibition Against Ex Post Facto Laws	Art. 1, Sec. 10	19	*Morse v. Alley*, Ky. App., 638 S.W. 2d 284 (1982)
Freedom of Speech	1st	8	*Musselman v. Commonwealth*, Ky., 705 S.W. 2d 476 (1986)
Privacy	5th, 14th	1, 2, 3	*Commonwealth v. Wasson*, Ky., 842 S.W. 2d 487 (1992)
Right of Appeal	None	115	*Revenue Cabinet v. Barbour*, Ky. App., 836 S.W. 2d 418 (1992) *Stahl v. Commonwealth*, Ky., 613 S.W. 2d 617 (1981)
Unanimous Verdict	None	7	*Hayes v. Commonwealth*, Ky., 625 S.W. 2d 583 (1981)


Excluding Evidence
Get The Court's Attention!
Objection
Sustained
Approach the Bench
Overruled
Request Maximum Relief
Grounds for Objection
Prejudice to Client
Constitutionalize
Limiting Admonishment?
KRE 105
Obtain Ruling on Relief
Request Ruling
Sustained
Denied
Ruling
Request Lesser Relief
Without Waiving Greater
Sustained
Overruled
Repeat until
Relief Granted
Limiting Admonishment?
KRE 105


ADMITTING EVIDENCE
Ask the Question
Commonwealth Objects
Sustained
Approach the Bench
Overruled
Request Avowal
Grounds in Opposition
Prejudice of non-admission
Constitutionalize
Avowal Granted
Avowal Denied
Sustained
Overruled
Put on Evidence
(As much as you can)
Offer Alternative Form
of Evidence
Allowed
Denied
Put On Evidence
Note Objection
in Record

Components of an Objection

Perhaps the most frequently used weapon of a trial lawyer is the mundane and ostensibly simplistic procedural device of the oral objection. As a procedure the verbal objection freezes the trial or hearing in a state of suspended animation, propels the objector to center stage to be heard, provides a vehicle by which the objector can persuade the trial judge that the objection should be sustained and appropriate curative relief granted, and insures that a reviewing court will understand exactly what the overruling of the objection and/or the requested relief did to prejudice the accused's right to a fair trial. To appreciate the functions of the trial objection, one must dissect the objection and analyze its anatomy.

Reduced to a basic structure, the eleven components of an objection are:

1. **HAIL**
   The word, phrase or sentence used to interrupt the proceedings and to secure an opportunity to speak on the record. Examples of effective hails include: May I approach the bench? May I be heard? May the defense be heard? Objection! The defense objects!

2. **OBJECTION**
   A phrase or sentence that immediately notifies the court and your adversary that you object and identifies exactly what question, answer, tactic, conduct or occurrence you believe is objectionable. For example: Object to the question. Objection, the witness's answer is replete with inadmissible hearsay. The defense objects to the prosecutor's characterization of the defendant as "pond scum."

3. **GROUNDS**
   A statement of the legal basis, whether statutory, decisional, procedural or constitutional, for your objection. Kentucky only requires a statement of "the specific grounds" of an objection "upon request of court...if the specific ground was not apparent from the context. "KRE 103(a)(1). Nevertheless, explaining the grounds for the objection is often necessary to persuade the trial court and to insure that the record on appeal clearly states the defense position.

4. **PREJUDICE**
   A description of how the objectionable matter will adversely impact on your client's "substantial rights" [KRE 103(a)] with specific references to the unique circumstances of your individual case. Example: If the prosecution is allowed to introduce evidence of my client's membership in a gang, the jury will infer from that information that: (1) he has committed prior "uncharged misconduct" with the gang; (2) his character is bad and is compatible with the commission of the charged violent crimes; (3) he is unbelievable as a witness due to his gang loyalties; (4) he is a member of an ongoing criminal conspiracy run by the gang; and (5) he condones and in fact encourages violent and lawless conduct. This ruling will allow the prosecution to suggest without any proof that the defendant has a prior record, has a flawed character, has been impeached as a witness, is involved in yet undiscovered ongoing crimes, and by his lifestyle explicitly rejects any semblance of law and order in the community.

5. **CONSTITUTIONALIZATION**
   Identification of the federal and state constitutional provisions which will be violated by the objectionable evidence, tactic, conduct or occurrence. Example: The prosecutor's question is intended to elicit inadmissible hearsay and the introduction of that evidence will violate the accused's rights of confrontation and cross-examination as guaranteed by the 6th and 14th Amendments to the United States Constitution and Section 11 of the Kentucky Constitution.

NOTES

6. REQUEST FOR RULING

Having voiced an objection, counsel must request that the trial court either sustain or overrule the objection. Examples: Your Honor, the defense requires a ruling on its objection. The defense objection is still pending and requires a ruling by you before the trial [hearing] can proceed.

7. RULING

"[I]f an objection is made, the party, making the objection, must insist that the trial court rule on the objection, or else it is waived." *Bell v. Commonwealth*, Ky., 473 S.W.2d 820, 821 (1971); *Harris v. Commonwealth*, Ky., 342 S.W.2d 535, 539 (1961).

8. REQUEST FOR RELIEF

When a defense counsel merely objects to an error, such as improper evidence being presented to the jury, without requesting any relief, the trial court's sustaining of the objection affords the defense as much relief as is requested. *See Wheeler v. Commonwealth*, Ky., 472 S.W.2d 254, 256 (1971). Normally the requested relief should begin with the greatest relief available, such as dismissal of the charges or mistrial. If the trial court denies that level of relief, then defense counsel should request a lesser degree of relief, such as an admonition to the jury. Defense counsel should note on the record that the defense request for the lesser relief does not waive the original request for the more substantial relief.

9. REQUEST FOR RULING ON RELIEF

Having sought a specific form of relief, counsel must request that the trial court either grant or deny, on the record, that form of relief.

10. RULING ON RELIEF

Here again a failure of counsel to insist that the trial judge either grant or deny the requested relief will undoubtedly waive the issue of whether the defense was entitled to the specific relief requested.

11. RENEWAL

Even though the trial judge previously overruled an objection, defense counsel should renew the objection at every subsequent point in the proceedings where the challenged evidence is reiterated or discussed. Example: The defense renews its prior objection to the admission of this evidence and moves this Court to reconsider its prior ruling holding this evidence admissible.

Once the component parts of the oral objection are known and appreciated, a trial lawyer is able to fashion those separate parts into a procedural device with offensive and defensive capabilities which can pierce the adversary's suspect proof or shield the defense case from the adversary's improper or illegal tactics. The often overlooked vehicle of the oral objection is a complex tool which should be artfully employed initially to persuade the trial court to rule in the objector's favor or, failing that, to preserve the trial court's error. ■

J. VINCENT APRILE II
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
e-mail: vaprile@mail.pa.state.ky.us

NOTES

INITIATING THE APPEAL: THE FINAL ACT OF PRESERVATION

NOTES

You have filed all of the motions, you have made all the objections, you have raised all of the constitutional issues, but your indigent client has still been convicted. The next step is the appeal. At the end of the trial, the last thing that a trial attorney wants to think about are the myriad of rules that surround beginning the appellate process. However, if these rules are not followed, it is possible that your client's appeal will be delayed for an inordinate amount of time, or worse, dismissed. Follow these rules, and not only will your indigent client's appeal be preserved, but the appeal will be passed on to the DPA Appellate Branch, and not left in your hands in the eyes of the Kentucky Court of Appeals or Kentucky Supreme Court!

This article discusses:

- ☐ 1. New trial motion;
- ☐ 2. Motion for judgment notwithstanding the verdict;
- ☐ 3. Order for indigent defendant to proceed on appeal *in forma pauperis*;
- ☐ 4. Order appointing DPA to represent the indigent defendant on appeal;
- ☐ 5. Notice of Appeal of Order denying *in forma pauperis*;
- ☐ 6. Bail pending appeal;
- ☐ 7. Notice of appeal;
- ☐ 8. Designation of record;
- ☐ 9. Certificate as to transcript;
- ☐ 10. Motion for Extension to Certify Record;
- ☐ 11. Notification to DPA Appellate Branch Manager.

A sample of many of these documents follows this article.

I. IMMEDIATELY AFTER THE VERDICT

There are two motions that can be filed within **5** days after the verdict is rendered. R.Cr. 10.06 allows a defendant to file a motion for new trial based on any issue **other** than newly discovered evidence. If the motion is based on newly-discovered evidence, it can be made within one year after the entry of the judgment, or "at a later time if the court for good cause so permits." R.Cr. 10.06(a)

R.Cr. 10.24 (Motion for Judgment Notwithstanding the Verdict) authorizes a motion for a judgment of acquittal within **5** days after verdict, but only if the defendant has moved for a directed verdict at the close of all the evidence. Further, if the defendant has been found guilty under an instruction when he objected to the giving of that instruction on sufficiency grounds, he may also file a motion under this rule. A motion for new trial can be joined with this motion, but there is no provision allowing any motion under this rule beyond the 5 day limit.

II. AT SENTENCING AND IMMEDIATELY THEREAFTER

1. IFP Orders and DPA Appointment

Immediately after sentencing, trial counsel must obtain an order allowing the indigent defendant to proceed on appeal *in forma pauperis* (IFP) **AND** appointing the DPA to represent the defendant on appeal. A sample motion and order are included at the end of this article. There are numerous reasons why this motion must be filed and this order must be obtained. First and foremost, the circuit clerk may be reluctant to file the Notice of Appeal without a filing fee, so this order would be needed to even begin the appeal. Second, an *in forma pauperis* order will be needed to file a timely Certificate as to Transcript. Finally, the most important reason for

obtaining this order is for the orderly passing of this case from the trial attorney to the appellate attorney.

The order must specifically refer to KRS Chapter 31 and specifically appoint DPA to represent the defendant on appeal. This order must specifically appoint DPA to the appeal, even if DPA represented the defendant at trial. If the order does not specifically appoint DPA, the Court of Appeals or Supreme Court will view the case in one of two ways: 1) it will assume that the defendant is proceeding *pro se* or, 2) *it will consider the appellant to be represented by the trial attorney.* The latter is a far more likely result. If this has occurred, often, the first notice is when the appellate court sends an order asking the attorney to show cause why the appeal should not be dismissed for failure to file a brief! Therefore, it is of the utmost importance that trial counsel obtain an order appointing DPA to represent the defendant on appeal.

2. What to do if the trial court denies the IFP Motion.

If the circuit court denies the motion to proceed *in forma pauperis*, trial counsel should immediately file, in the circuit court, a Notice of Appeal pursuant to, and specifically referencing *Gabbard v. Lair*, Ky., 528 S.W.2d 675 (1975). This will begin the process of appellate review of the denial. One item to note, *Gabbard* specifically states that the notice of appeal from the IFP order must be filed "within the time fixed by R.Cr. 12.54." However, R.Cr. 12.54 has been repealed. The old R.Cr. 12.54 required a notice of appeal to be filed within 10 days. To be safe, counsel should still file this special notice of appeal within 10 days. This notice of appeal must be served on the trial judge.

As soon as the *Gabbard* notice of appeal is filed, the circuit court clerk should prepare and certify a copy of all of the pleadings related to the IFP motion. That certified record is to be immediately sent to the Court of Appeals. *No briefs need be filed unless requested by the court*. All costs are waived, and the filing of a *Gabbard* notice of appeal tolls the time for taking any further steps in processing the main appeal.

3. Bail pending appeal

Bail pending appeal is permitted in all cases except where the defendant has been sentenced to death or life imprisonment. R.Cr. 12.78 Trial counsel is responsible for apply to the trial court for bail on appeal for the defendant. This should be done at sentencing. If trial counsel fails to apply for bail to the trial court, then the defendant cannot ask the appellate court for bail on appeal unless "application to the trial court is not practicable." R.Cr. 12.82

III. ACTION TO BE TAKEN WITHIN 30 DAYS OF FINAL JUDGMENT

1. File Notice of Appeal

R.Cr. 12.04 requires that a Notice of Appeal must be filed within **30** days after the judgment, or any adverse order other than an IFP denial, or 30 days after a timely motion for new trial is denied, whichever comes later. Under R.Cr. 12.06(2), a judgment or order is considered "entered" on the day the clerk makes a notation in the docket regarding the date and manner of service of notice of entry of the judgment or order on defense counsel *Ramey v. Commonwealth*, Ky., 824 S.W.2d 851 (1992). This can occur the same day the verdict is returned, or it could occur *days later*. *Do not file notice of appeal before the final judgment is entered.* A notice of appeal that is filed before final judgment is entered is invalid, and cannot be used to begin the appellate process.

Notice of Appeal must be filed with the circuit clerk but does not have to be served on the opposing party. The Notice must contain the names of all appellants and appellees, and a statement that the appellant is appealing from the final judgment or specified order. If Notice of Appeal is filed after a timely motion for new trial or judgment of acquittal is overruled, the notice should still state that the defendant is appealing from the *final judgment*.

2. File a designation of record in EVERY case

Within 10 days after the Notice of Appeal is filed, the trial attorney **must** file a Designation of Record for video and non-video appeals. C.R. 75.01(1) The designation of record is filed with the circuit court clerk and is served on the commonwealth's attorney, the court reporter (if any) and the clerk of the appropriate appellate court.

The designation of record must state what portions of the proceedings the appellant wishes to have included in the Transcript of Evidence. In both video and non-video appeals, counsel must **specifically** designate all dates of the trial and all dates of pretrial and post-trial

NOTES

proceedings. In addition, counsel must specifically request that voir dire, opening statements and closing statements be made part of the record, or they will not be included. C.R. 75.02(2) states:

> the transcript of proceedings shall include only those portions of the voir dire or opening statements and closing arguments by counsel which were properly objected to. . .and which are designated by one of the parties.

Failure to specifically designate voir dire, opening statements and closing arguments means that those portions of the record will not go up on appeal unless trial counsel gets an order directing that voir dire, opening statements and closing arguments are made part of the record. The best practice would be that trial counsel obtains such an order in every case, and include them in the designation of record. Such an order is incorporated in the sample IFP order included at the end of this article.

3. A Certificate of Transcript is Required in Non-Video Appeals

In an appeal where even part of the record must be transcribed by a court reporter, a Certificate as to Transcript must be filed along with the Designation of Record. C.R. 75.01(2) The Certificate must be signed by trial counsel and the court reporter, so counsel must prepare it quickly and get it to the court reporter prior to filing.

The Certificate must include the date on which the Transcript of Evidence was requested, the estimated completion date of the transcript, and a statement that satisfactory financial arrangements have been made for transcribing and preparing the requested proceedings. The IFP order is proof of satisfactory financial arrangements and should be sent to the court reporter with the certificate of transcript. Form 23 in the appendix of official forms in the rules of Civil Procedure is a form certificate of transcript.

4. If there are problems with certification of the record.

There are times, where, for various reasons, the Circuit Court clerk does or will not get the record certified in the times set out by the rules. If that happens in a case, the problem can be solved very easily. If the Clerk has not certified the record in time, then he/she must do an affidavit explaining why the record will not be timely certified. If this motion is made before the record is due to be certified, you make the request for an extension. If the record is late, the request is for an enlargement of time. When you have to file an enlargement, if the Clerk can certify the record, have them do so along with the affidavit. If they need more time to do so, have them put in the affidavit the date by which the record will be certified. That affidavit is then attached to a motion that is filed in the appropriate appellate court. A sample of one of those motions is attached for use as a guide.

5. Transfer the Case to the Appellate Branch of DPA

The final step in initiating the appeal is for the trial attorney to transmit the appeal to the DPA Appellate Branch. Trial counsel must send a notification to the DPA Appellate Branch Manager, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. (*see* KRS 31.115(2)) That notification must include:

a. The defendant's name, address and, if he is out on bond, his telephone number;
b. Name, address and telephone number of court reporter, if any.
c. A statement indicating whether the defendant is out on bail.
d. A brief statement of any suspected errors.

A sample of such a Notification follows this article. Trial counsel should send to DPA Appellate Branch with this Notification certified copies of the Final Judgment, Notice of Appeal, Designation of Record, Certification of Transcript, IFP order and order appointing DPA with the notification. Once trial counsel has taken these steps, the Appellate Branch Manager will take the case over and ensure that the record is timely certified by the circuit clerk.

NOTES

FILE IN VIDEO CASES

_____ CIRCUIT COURT

___-CR-____

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. ORDER GRANTING IN FORMA PAUPERIS STATUS, APPOINTING COUNSEL, AND ORDERING CLERK TO PREPARE VIDEO RECORD

_____ DEFENDANT

The Defendant has moved the court for an order to prosecute the appeal of his criminal conviction in forma pauperis, and it is appears that the defendant is a pauper within the meaning of KRS 453.190 and KRS 31.110(2)(b).

IT IS HEREBY ORDERED AND ADJUDGED that the defendant may prosecute this appeal without payment of costs, and the Department of Public Advocacy is appointed to represent the defendant on appeal.

IT IS FURTHER ORDERED that the court clerk shall compile and prepare the video record of the entire proceedings pursuant to the Designation of Record, including the voir dire, the opening statements, all bench conferences, and closing arguments by counsel.

Under my hand this _____ day of _____, _____

JUDGE_____

FILE IN TRANSCRIPT CASES

_____ CIRCUIT COURT

___-CR-____

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. ORDER GRANTING IN FORMA PAUPERIS STATUS, APPOINTING COUNSEL, AND AUTHORIZING COURT REPORTER TO PREPARE TRANSCRIPTS

_____ DEFENDANT

The Defendant has moved the court for an order to prosecute the appeal of his criminal conviction in forma pauperis, and it is appears that the defendant is a pauper within the meaning of KRS 453.190 and KRS 31.110(2)(b).

IT IS HEREBY ORDERED AND ADJUDGED that the defendant may prosecute this appeal without payment of costs, and the Department of Public Advocacy is appointed to represent the defendant on appeal.

IT IS FURTHER ORDERED that the court reporter shall prepare the transcript of evidence of the entire proceedings pursuant to the Designation of Record, including the voir dire, the opening statements, all bench conferences, and the closing arguments by counsel. The court reporter shall be compensated for the preparation of the transcript of evidence by the Administrative Office of the Courts at the prevailing rates.

Under my hand this _____ day of _____, _____

JUDGE _____

FILE ONLY WHEN DENIED *IN FORMA PAUPERIS*

_____ CIRCUIT COURT

___-CR-____

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. NOTICE OF APPEAL FROM
DENIAL OF IN FORMA PAUPERIS STATUS

_____ DEFENDANT

Please take notice that the defendant appeals from the order denying 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 filed pursuant to *Gabbard v. Lair*, Ky., 528 S.W.2d 675 (1975).

_____

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

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

_____

FILE IN EVERY APPEAL

_____ CIRCUIT COURT

___-CR-____

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. NOTICE OF APPEAL

_____ DEFENDANT

Please take notice that the defendant appeals from the final judgment entered in this case. On appeal, the appellant will be _____, and the appellee will be the Commonwealth of Kentucky.

_____

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

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

_____

FILE IN EVERY CASE

COMMONWEALTH OF KENTUCKY

_____ CIRCUIT COURT

INDICTMENT NO. _____

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. DESIGNATION OF RECORD

NAME OF DEFENDANT DEFENDANT

* * * * * *

Comes now the defendant, _____, by counsel, and for his designation of record, hereby designates the entire record of the proceedings, mechanically recorded, in this matter, 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.

DATE(S)	EVENT
_____	arraignment
_____	status conference(s)
_____	pretrial hearing(s)
_____	trial (includes voir dire and opening and closing arguments
_____	new trial and/or post-trial hearing(s)
_____	final sentencing
_____	other

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Designation of Record has been mailed, postage prepaid, to the Commonwealth's Attorney, the Hon. _____, County Courthouse, _____ County, Kentucky, _____, on the court reporter, _____, _____, Kentucky _____,and on the clerk of the appellate court, at Frankfort, Kentucky on this _____ day of _____, _____.

_____

FILE IN CASES WITH TRANSCRIPTS

_____ CIRCUIT COURT

___-CR-____

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. CERTIFICATE AS TO TRANSCRIPT

_____ DEFENDANT

A transcript of the proceedings in the above-captioned action has been requested by _____, counsel for _____, on _____.

The estimated date for completion of the estimated _____ page transcript is _____.

Satisfactory financial arrangements have been made for the transcribing and preparation of requested proceedings stenographically recorded. See copy of order allowing defendant to appeal in forma pauperis, which is attached.

_____ _____

DATE COUNSEL

_____ _____

DATE COURT REPORTER

FILE WHEN MORE TIME NEEDED

COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. _____
On appeal from _____ Circuit Court
Indictment No. _____

_____ APPELLANT

VS. MOTION FOR EXTENSION OF TIME TO CERTIFY RECORD ON APPEAL

COMMONWEALTH OF KENTUCKY APPELLEE

* * * * * * * *

Comes now Appellant, by counsel, and moves this Court, pursuant to CR 73.08, for an extension of time, up to and including _____ __, ____, in which to certify the record on appeal, and as reasons therefor, states the following:

1. Attached hereto and made a part hereof is the affidavit of the Clerk of the Circuit Court, requesting an extension of time to certify the record in this case and listing the reasons necessary for such extension.

WHEREFORE, Appellant respectfully requests this Court to grant him an extension of time, up to and including _____ __, ___, in which to file the transcript of evidence in the above-styled case and an additional ten (10) days after the transcript is filed in which to certify the record.

Respectfully Submitted
_____

NOTICE

Please take notice that the foregoing Motion will be filed in the Office of the Clerk of the _____ on _____ ___, ___.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been served on plaintiff by first-class mail to the Hon. A. B. Chandler, III, Attorney General, Commonwealth of Kentucky, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on _____ __, ____.

_____

TRIAL ATTORNEY'S NOTIFICATION TO DPA APPELLATE ATTORNEY UPON TRANSFER OF CASE

1. Name and present address and phone number of defendant: **Ted A. Evans, Hardin County Detention Center, P.O. Box 1390, Elizabethtown, KY 42702, 270-769-5215**

2. Name, address and phone number of defense attorney: **Steve Mirkin, Elizabethtown DPA office**

3. Name, address and phone number of Court Reporter: **Video record (I have a copy here in the Elizabethtown office)**

4. Name and phone number of Circuit Clerk: **Ralph Baskett, Hardin Circuit Court, 270-766-5000**

5. County: **Hardin**

6. Judge: **Hon. Janet Coleman**

7. Indictment No(s): **99-CR-211**

8. Date jury returned verdict(s): **April 24, 2000**

9. Date of Filing Motion and Grounds for New Trial and/or for Judgment N.O.V. (Please attach copy): **May 1, 2000**

10. Date Motion for New Trial and/or for Judgment N.O.V. Overruled: **June 27, 2000**

11. Date Final Judgment was entered by Judge (Please attach copy): **Hasn't been entered yet. Here the Commonwealth Attorney's office prepares the Final Judgments, and they are often late in doing it. Thejudge is in the middle of a two-week vacation, and by the time she returns I will be on vacation. Rather than take any chances of missing a deadline inadvertently, I am filing the Notice of Appeal now. I will forward the Final Judgment and Order Appointing DPA as soon as I get them.**

12. Charges convicted of and sentence(s) imposed: **Trafficking in Controlled Substance I (Cocaine), Second Offense, 15 years If more than one sentence, how were they run?**
Consecutively _____ Concurrently _____

13. Date Notice of Appeal filed (Please attach copy): **7/10/00**

NOTES

14. Date Designation of Record and Certificate as to Transcript filed (Please attach copy): **7/10/00**

15. Date order entered allowing defendant to proceed *in forma pauperis* on appeal (Please attach copy): **See #11 above**

16. Amount of bail pending appeal $50,000: **Is defendant on bail pending appeal? Yes___ No X**

17. Brief statement of suspected errors which occurred during procedures below (attach separate pages if necessary).

1) ***Batson*** **issue. Commonwealth struck all 3 blacks from the panel, without appropriate race-neutral reasons. Trial court made a finding that we had established prima facie case, but found Commonwealth's race-neutral reasons to be sufficient. Record does not support that.**

2) Prosecutorial misconduct on closing argument. Commonwealth misstated application of entrapment defense, and characterized the defendant as a "career trafficker" without any evidence to support same. Motions for mistrial and for admonition to jury overruled.

3) Incompetent evidence at sentencing phase. Only evidence of prior conviction was the probation officer reading from a prior PSI, which he had not prepared himself, and which was dated prior to imposition of sentence for the relevant offense. ■

John Palombi
Assistant Public Advocate
100 Fair Oaks Lane, Ste 302
Frankfort, KY 40601
Tel: (502) 564-8006 Fax: (502) 564-7890
E-mail: jpalombi@mail.pa.state.ky.us

NOTES

The Three Aspects of Effective Relief: Must, Can, Should

Millard Farmer and Joe Nursey in *The Building Blocks of Capital Cases: Motions and Objections*, **The Champion**, Vol. 8, No. 2 (March 1984) at 16, 20 detail the three components of requests for relief being made in a motion or an objection:

The relief requested should be written in at least three parts. The motion should request:

a remedy which it would be error to deny,

a remedy which can be granted,

and a remedy which aims for a more "perfect" level of justice but which will not be granted under the current state of the law.

It is important that the prayer for relief state that the alternative requests for relief are lesser acceptable alternatives for relief. Requesting relief in this comprehensive manner takes advantage of the established law as well as the developing law. Since the prosecution often does not or even cannot appeal the relief granted by motions, the body of existing case law is never an accurate measure of the relief that may be given in response to motions and basing motions on existing case law alone is simply inadequate representation. Almost every motion should request, and anticipate use of, an evidentiary hearing. Creativity in the type of relief requested, as well as the quality of the evidence supporting the relief requested, may often be decisive in bringing about favorable results. ■

NOTES

Extraordinary Writs in Adult and Juvenile Cases

I. Introduction: Why Writs?

One of the hallmarks of a successful attorney is that she realizes that there are many avenues of relief from unfair judicial decisions. In much the same way as a chess player will think several moves ahead to decide which move is most likely to lead ultimately to victory, a good lawyer will constantly try to anticipate the judge's decision on every issue, and to figure how to deal with that decision when it causes injustice for the client. Typically, this means properly preserving the error for appeal – hence the need for a manual on preservation.

But what about those decisions that cannot be "fixed" on appeal? For example, an appeal cannot truly correct an improper pretrial decision to admit confidential records into evidence – by the time the appeal is heard, the records will have been permanently placed in the public domain, and the damage will have been done. Likewise, other decisions, such as a decision by the Department of Juvenile Justice to revoke a client's supervised placement, simply do not have a formal appeal as an option. In those situations, what does an attorney do then to protect the client's interests?

It is for dealing with just those situations that the common law writs emerged. Generally referred to as "extraordinary" writs, these actions developed as a means to correct administrative and judicial decisions that, for one reason or another, could not be dealt with through the ordinary appeals process. While these writs might be rare, when they are properly used they can be a potent tool to prevent injustice. Consequently, knowing when writs can win cases, and understanding the process for using those writs, is an essential part of an attorney's arsenal.

II. What is a Writ?

(A) The common law writs are civil actions against judges or other persons and are analogous to injunction actions against private parties.

(B) Under current law, these actions are properly referred to as "original actions," although courts continue to use the language of common law writs.

(C) Under current law, the following extraordinary actions are available:
  (1) Actions against judges are authorized by:
    (a) CR 76.36 - against circuit or Court of Appeals judges;
    (b) CR 81 - against district court judges;
    (c) RCr 4.43(2) and KRS Chapter 419 - only for purposes of complaining about "the action of a district court respecting bail."

  (2) Actions against custodians of prisoners or mental hospital inmates are authorized by KRS Chapter 419 and KRS 202A.151.

  (3) Where there is no statutory provision for appealing a decision of an administrative body, such actions can be maintained under CR 81.

III. Types of Actions

The type of proceeding you use depends on the situation confronting the client.

(A) If you are asking the court to direct the actions of an inferior court judge or an administrative agency, you must decide whether you want relief in the nature of a "prohibition" of an order of "mandamus." CR 76.36 (rule for actions in Court of Appeals); CR 81 (rule for actions in circuit court).

(1) Writ of Prohibition

(a) A prohibition forbids the judge or official from taking an action or enforcing an order that has already been entered.

(b) For prohibition the petitioner must show, depending on the circumstances,

(i) (A) that the judge is acting outside her jurisdiction, and

(B) that there is no adequate remedy by appeal, *Commonwealth v. Williams*, Ky.App., 995 S.W.2d 400 (1999); or

(ii) (A) that the judge is acting erroneously within his jurisdiction,

(B) that there is no adequate remedy by way of appeal, and

(C) that great harm or irreparable injury will result if the higher court does not intervene now. See *Sisters of Charity Health Systems v. Raikes*, Ky., 984 S.W.2d 464 (1999).

(c) While the possible applications for this writ are boundless – so long as one of the tests listed above has been met – writs of prohibition have previously been used for the following:

(i) To challenge a pretrial order releasing (or admitting into evidence) confidential information. *F.T.P. v. Courier Journal & Times Inc*., Ky., 747 S.W.2d 444 (1989); *Angelluci v. Southern Bluegrass MH&R Center*, Ky., 609 S.W.2d 928 (1980).

(ii) To prohibit the Commonwealth from trying a defendant in violation of his double jeopardy rights. *St. Clair v. Roark*, Ky., 10 S.W.3d 482 (1999); *McGinnis v. Wine*, Ky., 959 S.W.2d 437 (1998). This circumstance includes preventing retrial where defendant was previously tried and acquitted in federal court, *Benton v. Crittenden*, Ky., 14 S.W.3d 1 (1999); as well as where retrial is ordered after a mistrial, where the defendant objected to the original mistrial. *Grimes v. McAnulty*, Ky., 957 S.W.2d 223 (1998).

(iii) To prohibit the court for requiring the defense to turn over a witness list. *King v. Venters*, Ky., 576 S.W.2d 721 (1980).

(iv) To prohibit the Commonwealth from trying a juvenile whose case was not properly transferred from the juvenile court. *Johnson v. Bishop*, Ky.App., 587 S.W.2d 284 (1979).

(v) To prohibit the trial court from enforcing an order compelling a party to sign an unrestricted medical authorization. *Geary v. Shroering*, Ky.App., 979 S.W.2d 134 (1998).

(2) Writ of Mandamus

(a) A mandamus directs the subordinate judge or official to take action - but it *cannot* tell her what action to take.

(b) For mandamus the petitioner must show:

(i) that the judge has refused to do some act that the law requires him to do;

(ii) that there is no adequate remedy by way of appeal; and

(iii) that great harm or irreparable injury will result if the higher court does not require the judge to act. See *Humana v. NKC Hospitals*, Ky., 751 S.W.2d 369 (1988), and *Southeastern United Medigroup v. Hughes*, Ky., 952 S.W.2d 195 (1997).

(c) As with writs of prohibition, one is entitled to the writ for any circumstance which meets the test for mandamus stated above in part (b). Previous cases on mandamus have included the following:

(i) To compel the disqualification of opposing counsel. *Shoneys Inc. v. Lewis*, Ky., 875 S.W.2d 514 (1994), *Commonwealth v. Miracle*, Ky., 10 S.W.3d 117

NOTES

(1999); *but see University of Louisville v. Shake*, Ky., 5 S.W.3d 107 (1999) (Holding that the petitioner was not irreparably harmed by the allegedly unethical conduct of opposing counsel, and therefore that the writ was not authorized).

(ii) To compel enforcement of a prior appellate court judgment. *Ellis v. Jasmin*, Ky., 968 S.W.2d 669 (1998).

(iii) To compel the trial court to return exculpatory evidence to the defendant for testing, where the evidence is of such a nature that it cannot be tested without destroying the evidence. *McGregor v. Hines*, Ky., 995 S.W.2d 384 (1999).

(iv) To compel the Department of Juvenile Justice to release a juvenile from active custody, when the Department took custody based on an erroneous decision to revoke the child's supervised placement. *L.M. v. Kelly*, Franklin Circuit Court, Civil Action No.: 99-CI-469.

(v) To compel the trial court to decide a dormant case or motion. *Collier v. Conley*, Ky., 386 S.W.2d 270 (1966) (holding that trial judge was required to decide dormant 11.42 motion).

(3) Hybrid Writs of "Prohibition and/or Mandamus"

(a) As mentioned previously, common law writs have been formally abolished, even though the language of "mandamus" and "prohibition" continues to be widely used by courts and litigators. Thus, the use of the common law name in a petition is essentially surplussage, and there is no rule against simply styling the writ as a writ of "mandamus and/or Prohibition."

(b) The test for determining whether to grant a "writ of mandamus and/or Prohibition" is basically the same as whether to grant a writ of prohibition.

(c) Though by no means required, many attorneys now style their writs as writs of "prohibition and/or mandamus" on the principle of "better safe than sorry."

(4) Writs against lower court judges are to be filed in the next highest court, regardless of the duration of the potential sentence. Thus, a writ to contest the decision of the circuit court is filed in the Court of Appeals, a writ to contest the decision of the district court is filed in the circuit court, etc.

(5) Writs against administrative agencies are filed in the circuit court of the county where the agency is located (generally, Franklin Circuit Court).

(B) Habeas Corpus and RCr 4.43 appeals

(1) Occasionally referred to as the "great writ," the term "habeas corpus" literally means "you have the body." It has been historically been used as a means to compel a jailer or prison warden to release an inmate from custody. Kentucky's constitution provides that the "the writ of habeas corpus shall not be suspended . . .." Ky. Const., § 16.

(2) Under KRS Chapter 419, the authorized relief is release from custody. KRS 419.130(2).

(3) Habeas corpus is designed to be an expedited proceeding of a summary nature, and therefore not appropriate for issues where there are factual disputes. *Commonwealth v. Marcum*, Ky., 873 S.W.2d 207 (1994); KRS 419.110(1)

(4) Habeas is appropriate under the following circumstances:

(a) Where the judgement is void (as opposed to merely voidable). Generally refers to situations where defendant is being held on a judgment which was modified outside the timelines, or where there has been a total denial of counsel. *Marcum, supra*.

NOTES

(b) To secure review of a district court's bail determination. RCr 4.43(2). However, if habeas corpus is the right procedural method to seek review of bail set by the district court, then the circuit court must also have the authority to modify pretrial release conditions. KRS 23A.080(2); RCr 4.43(2).

(c) Where the actions of the custodian are so absolute and arbitrary as to violate § 2 of the Kentucky Constitution. For example, where the Department of Corrections released a prisoner into the custody of Louisiana authorities, in clear violation of Kentucky law, the Supreme Court has held that the transfer "operated as a forfeiture of the Commonwealth of Kentucky's right to enforce completion of the sentence under which it was holding him at the time of transfer." *Yost v. Smith*, Ky., 862 S.W.2d 852, 854 (1993).

(d) To order release of a person incarcerated or institutionalized past the statutory time limits. *Commonwealth v. Brown*, 911 S.W.2d 279 (1995) (Habeas authorized to compel release of mental patient held longer than seven days without probable cause hearing). Also should apply to individuals held longer than 60 days without indictment. *See* RCr 5.22.

(5) Appealing the bail determination of the circuit court is properly done through an appeal to the Court of Appeals under RCr 4.43.

IV. Importance of a written order

(A) In general, you must *always* have a written order to complain about.

(1) CR 58(1) provides that an order is not effective before it is signed by the judge and entered on the docket of the court.

(2) You should not rely on oral decisions made on video or audio tape.

(a) Ask the judge to write something down or tender an order yourself.

(b) It can be handwritten if necessary.

(3) Remember that in district court the docket sheet signed by the judge is the order of the court. RCr 11.04(4).

(B) If the court refuses to enter a written order, you should submit an affidavit with your writ setting forth the fact that you asked for a written ruling, and the court refused. As a practical matter, the higher court will rely on your assurances as a member of the bar, rather than force you to file a mandamus to compel the judge to render a decision.

V. Mechanics of Filing for Mandamus or Prohibition in the Court of Appeals

(A) In the Court of Appeals, CR 76.36 prescribes the procedure to follow.

(1) Because leave to prosecute an action is conditioned on payment of a filing fee and because this is an original civil action commenced in the Court of Appeals, you must tender with your pleadings a motion to proceed *in forma pauperis* and appoint counsel, preferably with the completed KRS 31.120 affidavit attached.

(a) The affidavit is an AOC form that you can pick up at the civil suit desk or from most bench clerks.

(b) If you don't have time to get the affidavit or your client is not available, your representation in the motion that your client is indigent enough to rate appointed counsel in the circuit court is usually good enough. *West v. Commonwealth*, Ky., 887 S.W.2d 338 (1994).

(c) Tender an order with this motion.

(2) The format of the pleadings is described in CR 76.36(1).

(a) You must name the judge as the Respondent.

(b) The Commonwealth of Kentucky is the Real Party in Interest. CR 76.36(8).

NOTES

(c) Any codefendants who may be named in the indictment but who for any reason don't want to join should be accounted for in the text of the motion although it is not required by rule.

(3) CR 76.36(1)(b) only requires a recitation of facts by you. You should also try to obtain a videotape of the proceedings about which we are complaining.

(a) Submission of the video is authorized by CR 76.36(5) which allows attachment of *exhibits*, affidavits and counter affidavits.

(b) Pay particular heed to the last sentence of subsection (5) which says categorically that oral testimony will not be heard in the appellate court.

NOTE: The videotape is not a substitute for a fair and complete statement of the material facts.

(4) You must tell the Court exactly what you want it to do.

(a) Usually this is phrased as a request for an order prohibiting the lower court judge from enforcing his order of such and such a date.

(5) The memorandum is usually a separate pleading although the rule does not demand it. If you have an uncomplicated case, there is no reason not to put everything in a single document. Write clear captions so the court will know that everything is there.

(6) Everything filed in the Court of Appeals goes in quintuplicate. (Original and 4 copies). [CR 76.36(3)].

(7) A copy of everything you file must be served on the judge and the real party in interest, the Commonwealth. Though it is not required, you are permitted to provide courtesy copies to non-parties (*e.g.* codefendants) when you think it would be to your advantage to do so.

(8) Depending on the time constraints, file the original and four (4) copies of everything in one of the following ways:

(a) By mail addressed to Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

(b) By delivery to that address by an investigator or yourself.

(c) By delivery to the local chambers of the Court of Appeals but only if you are going to be seeking immediate relief (*i.e.* a stay of the circuit court order) and only after getting the clerk of the court's O.K.

(9) Time for responses:

(a) If you deliver the service copies to the Commonwealth and the judge, the Commonwealth will have 10 days to answer.

(b) If you mail service copies to either or both, the Court of Appeals tacks on the three mail days authorized by CR 6.05 so the Commonwealth's response is due 13 days after mailing.

(B) CR 76.36(4) allows you to seek "intermediate relief," usually a stay of the circuit judge's order if you need relief before the 10 day response period expires.

(1) The only ground on which relief can be granted is "immediate and irreparable injury" before a hearing may be had on the petition.

(2) Although it is not required in writ cases, it sometimes helps if you can show that you asked the circuit judge to reconsider. Consider RCr 12.82.

(3) To obtain relief, you must draft another pleading, filed in quintuplicate with the others and served on the judge and the Commonwealth, explaining why you need the relief.

NOTES

(4) As a matter of self-interest, we try to accommodate the Commonwealth so they will try to accommodate us in other cases but in all cases you must give notice.

(5) You must call the Clerk of the Court of Appeals (1-502-573-7920) in Frankfort and he will try to find a judge to hear this motion.

(6) The order of a single judge is only good until a three-judge panel can consider the motion for intermediate relief.

(C) Disposition of the Petition

(1) As soon as a response is filed or the response time expires, the case is given to the next available motion panel at the Court of Appeals. CR 76.36(6).

(2) These panels meet twice a month but not at regular intervals so it is hard to say how long it will take.

(3) If the case is complicated or involves new or difficult issues of law the panel may work on it for several weeks before deciding.

(D) Appealing an Adverse Decision on the Writ.

(1) If you lose your petition, you are entitled to one appeal as of right. CR 76.36(7).

(2) You must file notice of appeal in the Court of Appeals within 30 days of the decision.

(3) Within 30 days of the notice of appeal, you must file a statement of appeal and a brief in Supreme Court. CR 76.36(7)(c).

(a) The requirements for the statement of appeal are pretty straightforward, and our set out in CR 76.36(d).

(b) The requirements for the brief are found in CR 76.12.

(c) Be sure to serve the Clerk of the Court of Appeals with the statement of appeal. 76.36(d)

(4) You may want to ask an appeals attorney for help if you plan do go down this road.

VI. Mechanics of Filing for Mandamus or Prohibition in the Circuit Court

(A) These actions are treated as ordinary civil actions in the circuit court with a few exceptions.

(1) You will need an *in forma pauperis* (IFP) motion and an order for the circuit judge to sign.

(a) KRS 31.110(1)(a) allows us to represent clients in any necessary ancillary litigation. *Abernathy v. Nicholson*, Ky., 899 S.W.2d 85 (1995).

(i) Use the AOC affidavit form except in cases of extreme emergency.

(2) No process need issue. *Stallard v. McDonald*, Ky. App., 826 S.W.2d 840 (1992).

(a) It is sufficient to serve a copy of all pleadings on the district judge and on the county attorney as provided in CR 5.02.

(3) Because this is a civil action, the Commonwealth will have twenty (20) days to file an answer.

(4) CR 76.01 says that Rule 76 "applies only to practice and procedure in the Court of Appeals and Supreme Court." Although we usually follow the CR 76.36 format of pleadings it is not necessary.

(B) Where to go

(1) You must start by getting a circuit judge to sustain your IFP motion. In most circuits, any judge can sign the motion, even if they will not preside over the action.

(2) If you are not seeking a stay, all you have to do is make sure that the district judge and the county attorney are served.

NOTES

(a) If you need a stay, the authority for granting it is Section 109 of the Constitution as interpreted in *Smothers v. Lewis*, Ky., 672 S.W.2d 42, 44 (1984). That case says that once a court has jurisdiction of a case, it can enter any order necessary to proper disposition of the case. KRS 23A.080(2) may also cover this. The standard for relief is showing immediate and irreparable harm before the case can be heard.

(3) If the stay is denied, you can seek relief in the Court of Appeals. This is by means of a motion for discretionary review, CR 76.20 and an intermediate motion pursuant to CR 76.33.

(4) After the Commonwealth files its answer, the case proceeds as with any other civil case.

(a) At this level further proof can be taken at hearings or by deposition.

(b) You can file a summary judgment motion. CR 56.

(c) In rare occasions you can ask for a bench trial, although this should be unnecessary if you have filed the audio tape from district court.

(5) If the Commonwealth does not respond, file a motion for default judgment under CR 55. CR 55.04 requires establishment of your client's right to relief in addition to mere failure to answer because the case involves the Commonwealth.

(6) If you lose, you must file a civil appeal which has several required steps right after the notice is filed. See an appellate attorney. (Keep in mind that CR 59, particularly CR 59.05, applies in a writ case and that the timely *service*, not filing, of a CR 59 motion stops the running of appeal time. CR 62.01.)

VII. Habeas Corpus

(A) It is a statutory action which means that its procedural requirements must be adhered to strictly. There are local procedural rules as well. CR 1(2).

(B) KRS 419.020 requires the following pleadings:

(1) A petition stating how your client came to "detained without lawful authority or is being imprisoned when by law he is entitled to bail." KRS 419.020.

(2) An affidavit of probable cause executed by you or your client adopting the petition as grounds showing probable cause to believe that the detention is improper.

(3) A "writ" for the judge to sign, *i.e.* an order captioned "Writ of Habeas Corpus" for the judge to sign. This order directs the custodian to produce the prisoner for hearing at the time set by the judge in the order.

(C) KRS 419.060 requires personal service by hand delivery to that person.

(1) Mail is *not* sufficient service.

(2) If you can't hand the papers to the custodian personally, KRS 419.060(3) allows you to leave the papers at his office.

(3) At some point the person effecting service must make a return notation to the file.

(D) Again, if a hearing on the writ itself can't be scheduled immediately, Section 109 and *Smothers v. Lewis, supra*, authorize you to ask for immediate release.

(E) Otherwise, the writ is disposed of at a summary bench trial at which evidence may be produced. Usually, if there is an audio tape of the district court proceedings this won't be necessary.

(F) If you lose, the case can be appealed to the Court of Appeals but the procedure is quite different from a normal appeal. The procedure in KRS 419.130(1) is mandatory. Two days before you file the "Notice of Appeal," you need to serve your opponents. It should be clear on the face of the "Notice of Appeal" that it is a habeas corpus case, or the Court of Appeals may inadvertently treat it as an ordinary civil case. Habeas appeals are assigned to the next available motion panel for resolution.

NOTES

VIII. RCr 4.43 Appeals of Circuit Court Bail Decisions

(A) RCr 4.43 permits the Court of Appeals to review the bail decisions of the circuit court, and establishes an expedited process for doing so.

(B) Procedure under RCr 4.43.

(1) To challenge a bail decision the defendant has to file a "notice of appeal" from the bond judgment, in the manner provided by RCr 12.04. RCr 4.43(1)(a). You would be well advised to make it plain on the face of the notice that you are appealing from a bond decision.

(2) When the notice of appeal is filed, the clerk of the circuit court is to prepare and certify an appellate record, consisting of the portion of the court record which is relevant to the question of bail. The clerk is to transmit that record within 30 days of the notice of appeal. RCr 4.43(1)(b). As it is generally the responsibility of the party who has taken the appeal to ensure that the record is properly certified, you would be well advised to check with the clerk to ensure that appropriate progress is being made. The faster the record gets to the Court of Appeals, the faster the appeal will be decided.

(3) Within 15 days after the record is sent to the Court of Appeals, the appellant (*i.e.* your client) must file a brief with the Court of Appeals. The brief is to be no longer than five pages long, and must comply with the formatting requirements of CR 76.12. RCr 4.43.

(4) Oddly, RCr 4.43 also directs the appellant to file a statement of appeal "required by CR 76.06." RCr 76.06 has long since been repealed, however, and George Geohegan, Clerk of the Court of Appeals, advises that a statement of appeal is longer required.

(5) The Commonwealth has 10 days to file a brief, but is not required to do so.

(C) While this process is "expedited" by the standards of the Court of Appeals, you should still be prepared for the process to take several months, even under the best of circumstances.

IX. Final Thoughts

Below is a list of significant recent writ cases. Reading through these cases, it is clear that writs have been used as a potent tool for dealing with those rare cases when an appeal just is not enough. That being the case, an attorney dealing with an adverse decision would be well advised to consider whether an appeal can return the client to where he was prior to that decision. If so, then the client will likely have to just wait it out. Regrettably, our system tolerates your client's incarceration much better than your client does. However, if the client will lose something that an appeal will come too late to restore, such as the ability to test a particular piece of evidence, or the confidentiality of a particular piece of information, then a writ might be the right course of action to take.

IMPORTANT WRIT CASES

Shumaker v. Paxton, Ky., 613 S.W.2d 130 (1981) - seminal prohibition case - is always cited.

Haight v. Williamson, Ky., 833 S.W.2d 821 (1992) - violation of constitutional rights, standing alone is insufficient.

Shobe v. EPI Corp., Ky., 815 S.W.2d 395 (1991) - discovery orders generally not subject to writ.

Tipton v. Commonwealth, Ky. App., 770 S.W.2d 239 (1989) - Commonwealth may seek writ on non-final district court order because appeal not authorized.

Courier Journal & Times v. Peers, Ky., 747 S.W.2d 125 (1988) - news media may proceed by writ when press excluded from proceedings or court records.

FTP v. Courier Journal & Times, Ky., 774 S.W.2d 444 (1989) - juvenile may proceed by writ where confidentiality of juvenile court proceedings concerned.

NOTES

Holbrook v. Knopf, Ky., 847 S.W.2d 52 (1993) - writ proper remedy where claim of unconstitutional blood test is made.

Angelluci v. Southern Bluegrass MH&R Center, Ky., 609 S.W.2d 928 (1980) - writ proper method to protect confidential psychiatric records.

Summitt v. Mudd, Ky., 679 S.W.2d 225 (1982) - appropriate remedy to force disqualification of prosecutor who formerly was P.D.

Summitt v. Hardin, Ky., 627 S.W.2d 580 (1982) - Habeas corpus case, witness held for contempt not released at end of trial -writ granted.

Campbell v. Schroering, Ky. App., 763 S.W.2d 145 (1988) - circuit judge committed witness for contempt without representation of counsel prohibition granted.

Commonwealth v. Marcum, Ky., 873 S.W.2d 207 (1994) – habeas corpus is appropriate remedy where trial court judgment is a nullity, and other form of collateral attack is inadequate.

Petit v. Raikes, Ky., 858 S.W.2d 171 (1993) - venue is not typically a writ issue.

Yost v. Smith, Ky., 862 S.W.2d 852, 854 (1993) – writ of habeas corpus will issue where custodians actions are "absolute and arbitrary" in violation of § 2 of the Kentucky Constitution.

Regency Pheasant Run Ltd. v. Karem, Ky., 860 S.W.2d 755 (1993) - may file original action to test validity of appointment of retired judge.

Volvo Car Corp. v. Hopkins, Ky., 860 S.W.2d 777 (1993) - mandamus authorized in discovery case because of potential loss of evidence.

Appalachian Regional Health Care, Inc. v. Johnson, Ky., 862 S.W.2d 868 (1993) - prohibition not granted because failed to show how confidentiality would be irreparably lost.

Blakeman v. Schneider, Ky., 864 S.W.2d 903 (1993) - contempt is tested by original action.

Commonwealth v. Hughes, Ky., 873 S.W.2d 828 (1994) - prohibition is in aid of appellate jurisdiction and therefore subject to dismissal for mootness where appeal impossible or not necessary.

Adventist Health Systems v. Trude, Ky., 880 S.W.2d 539 (1994); overruled on other grounds by *Sisters of Charity Health Systems v. Raikes*, Ky., 984 S.W.2d 464 (1999). - lack of remedy by appeal is inflexible requirement.

Kuprion v. Fitzgerald, Ky., 885 S.W.2d 679 (1994) - mandamus to challenge the constitutionality of Jefferson Circuit Family Court established by order of Chief Justice.

Wyatt, Tarrant & Combs v. Williams, Ky., 892 S.W.2d 584 (1995) - Court of Appeals had no writ jurisdiction where party failed to pursue available appeal earlier.

K-mart Corp. v. Helton, Ky., 894 S.W.2d 630 (1995) -mandamus/prohibition on question of discovery and attorney disqualification.

Abernathy v. Nicholson, Ky., 899 S.W.2d 85 (1995) - party may pursue administrative writ only when no other relief available.

Potter v. Eli Lilly Co., Ky., 926 S.W.2d 449 (1996) - prohibition dealing with post-judgment investigation of civil settlement - proper because CR 60.02 not applicable.

McKinney v. Venters, Ky., 934 S.W.2d 241 (1996) - prohibition sought to preclude destructive testing of evidence for DNA. Court holds that appeal after conviction is the appropriate remedy.

Lovell v. Winchester, Ky., 941 S.W.2d 466 (1997) - mandamus to disqualify opposing counsel on ground of previous representation.

May v. Coleman, Ky., 945 S.W.2d 426 (1997) - mandamus filed by prisoner to require judge to appoint "lay assistant" to help with civil action. Capable of evading review exception stated.

Owens Chevrolet v. Fowler, Clerk, Ky., 951 S.W.2d 580 (1997) - mandamus to force clerk to accept filing sent by UPS which did not show date of mailing.

NOTES

Southeastern United Medigroup Inc. v. Hughes, Ky., 952 S.W.2d 195 (1997) - discussion of prohibition/mandamus remedies and confidential information. Appellate standard for law is de novo; for fact, abuse of discretion.

Grimes v. McAnulty, Ky., 957 S.W.2d 223 (1997) -prohibition is appropriate remedy to prevent retrial in criminal case.

McGinnis v. Wine, Ky., 959 S.W.2d 437 (1998) - double jeopardy case considered on writ of prohibition.

Commonwealth v. Miracle, Ky., 10 S.W.3d 117 (1999) – Commonwealth is entitled to writ to force disqualification of defense counsel.

St. Clair v. Roark, Ky., 10 S.W.3d 482 (1999) – double jeopardy can be litigated through a writ of prohibition, but the court is not required to grant a writ on double jeopardy grounds, where there is also an adequate remedy on appeal.

Commonwealth v. Ryan, Ky., 5 S.W.3d 113 (1999) – Commonwealth is entitled to writ of prohibition where trial court erroneously forbade consideration of death as a sentencing option.

Cavender v. Miller, Ky., 984 S.W.2d 848 (1998) – defendant is not entitled to a writ to gain access to police officer's notes prior to pretrial suppression hearing; defendant has adequate remedy on appeal.

University of Louisville v. Shake, Ky., 5 S.W.3d 107 (1999) – denying writ of mandamus to compel disqualification of opposing counsel where petitioner failed to show irreparable harm if counsel was permitted to continue on the case.

Ellis v. Jasmin, Ky., 968 S.W.2d 669 (1998) – Supreme Court issued mandamus against circuit court judge, to compel that judge to enforce an order of the Supreme Court.

Commonwealth v. Williams, Ky.App., 995 S.W.2d 400 (1999) – Commonwealth entitled to writ of prohibition to overturn judges decision to suppress evidence.

Geary v. Schroering, Ky.App., 979 S.W.2d 143 (1998) – writ of prohibition granted to prohibit enforcement of pretrial order compelling plaintiff in personal injury action from signing a blank medical authorization. ■

The author would like to thank David Niehaus of the Jefferson District Public Defender Office, whose outline forms the basis of this article.

Tim Arnold
Assistant Public Advocate
100 Fair Oaks Lane, Ste 302
Frankfort, KY 40601
Tel: (502) 564-8006 Fax: (502) 564-7890
E-mail: tarnold@mail.pa.state.ky.us

NOTES

NOTES

The Value of Facts Woven Together Into a Tapestry of Purpose Unleashing the Power to Persuade To Benefit Your Client In The Trial and Appellate Arenas

> Outside a man walking along the edge of the highway crossed over and approached the truck. He walked slowly to the front of it, put his hand on the shiny fender, and looked at the *No Riders* sticker on the windshield. For a moment he was about to walk on down the road, but instead he sat on the running board on the side away from the restaurant. He was not over thirty. His eyes were very dark brown and there was a hint of brown pigment in his eyeballs. His cheekbones were high and wide, and strong deep lines cut down his cheeks in curves beside his mouth. His upper lip was long, and since his teeth protruded, the lips stretched to cover them, for this man kept his lips closed. His hands were hard, with broad fingers and nails as thick and ridged as little clam shells. The space between thumb and forefinger and the hams of his hands were shiny with callus.
>
> The man's clothes were new-all of them, cheap and new. His gray cap was so new that the visor was still stiff and the button still on, not shapeless and bulged as it would be when it had served for a while all the various purposes of a cap-carrying sack, towel, handkerchief. His suit was of cheap gray hardcloth and so new that there were creases in the trousers. His blue chambray shirt was stiff and smooth with filler. The coat was too big, the trousers too short, for he was a tall man. The coat shoulders peaks hung down on his arms, coat flapped loosely over his stomach. He wore a pair of new tan shoes of the kind called "army last," hob-nailed and with half-circles like horseshoes to protect the edges of the heels from wear. This man sat on the running board and took off his cap and mopped his face with it. Then he put on the cap, and by pulling started the future ruin of the visor. His feet caught his attention, he leaned down and loosened the shoelaces, and did not tie the ends again. Over his head the exhaust of the Diesel engine whispered in quick puffs of blue smoke. (*Grapes of Wrath*, John Steinbeck)

What a picture, painted indelibly in the mind's eye. Where does it take you? What does it make you think about? How do you feel towards this man? Do you wonder what he is thinking? Are you waiting in some anticipation to see what he might do next? Can you step inside his shoes for a minute? Feel those stiff clothes. Rub your calloused hands together. Wiggle your big toes in those hard soled, hob-nailed shoes.

How has this author captured our interest? How does his literary art relate to our task of building a compelling theory of the case in the trial or appellate arena? You will find in the work of John Steinbeck four key components: preparation, imagination, empathy, and patience. Without them he would be unsuccessful. He could not transport us over time and space into the world he has created.

It has been said that a trial lawyer is building a model of events that occurred outside of the courtroom and that once that model is constructed, it supplants external reality. Kestler, Jeffrey, *Questioning Techniques and Tactics*, (August 1999) 3rd edition.

Whatever the *objective truth* once was (assuming there ever was *one objective truth*) becomes irrelevant for when a trial works, as envisioned by our system of justice, the only truth

available to jurors and appellate jurists alike, is that brought into the courtroom. Yet, to succeed the theory of the case developed for litigation must explain, in a manner favorable to the defense, the immutable facts and must have supporting themes and tell a story that is sufficiently compatible with the life experiences of the judge and jury to persuade that important audience.

NOTES

As lawyers we are all educated to accept that what occurs in the courtroom is the model of events that define the parameters of the litigation for the future. However, the best of us know that it can be extraneous, technically *off the record* factors that help or hurt us on the way to achieving our litigation purpose. It can then be important to draw into that courtroom model those factors of injustice that may deter us from achieving our purpose at trial-the prosecutor in the hallway conferring with jurors, the judge giving his side-bar signals to the prosecutor or witness and demonstrating unfair favoritism to the commonwealth. Those facts become a part of our client's story and by our *on the record*, detailed objections, we make them a part of our model of unfairness that will lead to ultimate relief for our client's cause. We weave them into our theory of the case and story of injustice.

Preparation is what permits us to do that. What permits us to smack dab that unexpected event into the heart of our case – armed police officers rushing a key prosecution witness by the jury room just as the jurors were walking out to communicate that the witness was in mortal danger from your client or his comrades - is preparation. As defense lawyers we must prepare not simply to disassemble the prosecution's model of conviction. No, we must build our own model to demonstrate our client's story of injustice. That model, our model will then be the one debated about in the jury room and the appellate court. To prepare our model requires a fully constructed plan of action before we enter the courtroom. Each witness fits into that plan. Each area of voir dire furthers our objective to persuade with our compelling theory of the case. The questions we pursue on voir dire enable us to determine who as a result of beliefs and/or life experiences is highly unlikely to give a fair hearing to our presentation at trial. These same questions also permit us to raise to the forefront in the jurors' minds events in their own lives that parallel the most important and persuasive themes and facts in our client's story. In this way, we plow the fields by preparing, readying the jurors for what is to come.

Every expected question and action of the prosecution fits into that plan. Because we are so well prepared and we see our model so clearly, we are quick to put every unexpected answer, every unexpected event into its rightful place in our prepared model. Having prepared, even for the unexpected, we are afraid of no fact, witness or development because the story we have to tell is based on evidence we are prepared to use and on a defense well grounded in the law.

Imagination is also key. We must use our imagination to travel back in time to the key events that have landed our client in the courtroom fighting for his liberty or his life. We have to feel, hear, see, touch, and smell what our client and other key witnesses saw, heard, touched, and smelled. Then, we have to imagine ourselves being the decision-makers, the jurors, the trial judge, and the appellate jurists. What will they be thinking about as they decide what to do with our client and his case? To benefit from a vibrant imagination, we must remove our law school lens. See this case as others see it. Once you have touched, smelled, heard and glared at the facts, decide what persuades you and what will truly persuade others. The cases with the richest, and therefore the most persuasive set of facts at the appellate stage are those wherein the trial or post-conviction lawyer exercised her or his imagination to bring compelling facts to life! One example of this can be found in the case of *Kyles v. Whitley*, 115 S.Ct. 1555, 514 U.S. 419, 131 L.Ed.2d 490 (1995). The cert. petition in Kyles secured review by the United States Supreme Court, not because of its lengthy dissertation of the legal principles, but because it relied upon compelling *facts,* well developed in the court below.

Empathy. Most of us know as criminal defense lawyers that we should have empathy for our clients. Our imagination serves little purpose if we place heavy judgment on all of our client's actions. Judgement, before understanding, impedes our ability to walk in another's shoes. However, we can also miss the boat if we do not have empathy for the other players in the

drama. Without empathy for the victim, we may completely overlook where our case is most vulnerable to attack. We tend to think of judges, jurors and prosecutors as highly judgmental people. Yet, are we careful enough not to be too judgmental in our own way? If we see all of these players as "evil" or "misguided" or "easily manipulated" will we have really understood what persuades them, what it will take to get them to vote for our client? To get into the heads of these key decision-makers we must have empathy for them. Empathy allows defense counsel to truly understand the motivations of all the characters in the courtroom drama. Then, counsel can determine where s/he wants to put the spotlight for the trier of fact and for the appellate record. Is it helpful to your client's case to expose the motivations of the prosecutor, the judge, the victim, or an apparently disinterested witness Empathy allows the defense to tell a story of "real" people, who act in reasonable ways, to explain why your client is not guilty.

Our highest goal may not be so much to slay the dragon as to conclude the litigation with no one against our client, but rather everyone for him or her and his or her case. Empathy is critical to achieve such a stupendous result.

Finally, we must have **patience**. First, patience with our clients. They cannot tell their stories in five minutes or less. Their stories are not set out for strangers as easily as their addresses, phone numbers and dates of birth. We come to them as strangers even though with often-burgeoning caseloads we may see our clients en masse. They approach us as individuals with many unresolved fears. We must have patience to hear their stories. Second, patience with victims and other key witnesses. Knowing that truths are not told on first visits, we have to leave the door open to second and third visits when the case merits it. Third, we must have patience to tell these stories right. Patience requires that we fit each and every witness, prosecution or defense, into the model or story presented. Patience requires the defense to avoid seeking only conclusions from the witnesses. Rather, we must have the patience to get out the details (facts) that compel the witness (and therefore the fact finder) to reach the conclusion we want and no other one. Patience dictates that we use the defense examination of a witness to teach the jury who that witness is and why his or her testimony should be believed or distrusted. A patient approach to constructing our case at trial, ensures that we keep our presentation interesting, we draw out facts that alert and awaken, rather than deaden or bore our fact finders. Fourth, we must have patience with judges and prosecutors in our dealings with them before the case ever goes to trial. The proportion of cases that are tried are infinitesimal to the proportion carried by most public defenders. Yet, it takes time to persuade, time to educate. Motion practice, negotiation, prodding – patient and continuous efforts to change the viewpoints that key decisionmakers have about our clients. Fifth, we must act with patience in our efforts to persuade jurors, judges and appellate jurists. Know they may not get it the first time. Hence, the value of repetitious and familiar themes. Hence, the value of making and building your record and proving repeatedly for the judge that s/he is creating reversible error if s/he does not finally rule your way or proving for the appellate jurists that indeed these repeated errors prejudiced your client's right to a fair trial. Finally, patience with ourselves. It takes time to do a case right and there is always more that could have been done. Lessons learned on today's case that will fortunately or unfortunately benefit only tomorrow's client.

Which brings us full circle to preparation. Without it we would not have our own indestructible and very complete model, a tapestry of facts pointing to the current injustice surrounding our client only to be made right by the jury, the judge or the appellate jurists whom we must skillfully persuade. ■

REBECCA BALLARD DILORETO
Post Trial Division Director
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006 Fax: (502) 564-7890
E-mail: rdiloret@mail.pa.state.ky.us

NOTES

NOTES

10 Factors to Make the Threshold Showing for Funds

Having the constitutional and statutory right to funds for resources for the defense of an indigent is critical. It does not mean a simple request for those funds will be adequate to persuade a judge or an appellate court to authorize them. A particularized showing to the fact-finder will be persuasive.

Particularized Showing Persuades and Preserves

Competent criminal defense attorneys make developed factual and legal showings to the trial judge when requesting funds for resources for two reasons:

1) most often *persuading* the judge requires a particularized showing of the reasonableness of the need; and

2) if the funds are denied, the issue must be fully *preserved* for the appellate court to address the issue on the merits and for the appellate advocate to be able to *persuade* the appellate judicial fact-finders.

When the request for funds for resources is general and undocumented, the Constitution does not require giving the indigent the money. In *Caldwell v. Mississippi*, 472 U.S. 320, 105, 1633, 2637 n.1, 86 L.Ed.2d 231 (1985) Justice Marshall writing for the Court found "no deprivation of due process" in the denial of funds for an investigator, fingerprint examiner and ballistics expert based on the defense's "undeveloped assertions that the requested assistance would be beneficial." *Id.*

When the particularized showing is made our state and federal Constitutions require funds for help for the indigent. In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 1096, 84 L.Ed.2d 53 (1985) the Court termed this a "threshold showing," and found it was made in that case by the following facts: "Ake's mental state at the time of the offense was a substantial factor in his defense;" the trial court was put on notice of the need by a request by the defense; the defendant's sole defense was insanity; the defendant's behavior was bizarre; there was a need to assess competency; a state psychiatrist felt the defendant incompetent; when found competent 6 weeks later it was only on the condition that he be medicated; state psychiatrists felt he was mentally ill; the burden of showing a defendant insane is on the defense. *Id.* at 1097-98. "Taken together, these factors make clear that the question of Ake's sanity was likely to be a significant factor in his defense." *Id.*

In *Sommers v. Commonwealth*, Ky., 843 S.W.2d 879 (1992), the Court found the particularized showing was made based on a substantial evidentiary showing. The evidence included an affidavit from the Kentucky State Police concerning the unworkable conflict the police would be put in if working for the defense, and an affidavit from the Kentucky Correctional Psychiatric Center (KCPC) concerning its inability to provide the help the defense needed.

10 Components of the Persuasive Request for Funds

There is a recognized methodology or standard of practice for demonstrating the reasonable necessity for funds for defense expert resources in a particular case. That persuasive evidentiary showing, most usually made *ex parte*, involves the following ten dimensions:

1. Type of the resource;
2. Nature and stage of assistance;
3. Who will provide the help, qualifications of that person, costs of their help;

4. Reasonableness of both the rates and total cost;
5. Factual basis for the resources *in this case* including the theory of the case and relevant themes;
6. Counsel's observations, knowledge, insights about this case and this defendant;
7. Legal bases for expert *in this case*;
8. Legal reasons for *defense* resources;
9. Inadequacy of or unavailability of state resources;
10. Evidentiary documentation.

These have been the components of the national practice for some time. *See, e.g.*, Edward C. Monahan, *Obtaining Funds for Experts in Indigent Cases*, *The Champion*, Vol. 13, No. 7 (August 1989) at 10; Nancy Hollander & Lauren M. Baldwin, *Expert Testimony in Criminal Trials*, *The Champion*, Vol. 15, No. 10 (Dec. 1991) at 12; Paul C. Giannelli, *The Constitutional Right to Defense Experts*, *Public Defender Report*, Vol. 16, No. 3 (1993); Nancy Hollander & Barbara E. Bergman, *Every Trial Criminal Defense Resource Book* (1995) §46:8. The evolution since the 1980s includes making this threshold showing more specifically, more explicitly, more *thematically*. The necessity for an expert to effectively communicate the client's *story* is the focus of the showing to the judge.

Persuasively Presenting The 10 Dimensions

Persuasively presenting these 10 factors is straight forward and matter of common sense.

1. **Type of Resources.** Precisely detail to the fact-finder the type of help needed, *e.g.*, a specialist in hair analysis, investigator, pharmacologist, mental health expert, interpreter, additional counsel, serologist, transcript, out-of-state witnesses, and travel expenses.

2. **Nature and Stage of Assistance.** Describe the stage at which the resources will be needed:
   a) pretrial,
   b) trial,
   c) penalty phase before the jurors,
   d) sentencing before the judge.

   Specifically describe what assistance will be required:
   a) investigating,
   b) testing,
   c) interviewing,
   d) evaluating,
   e) consulting,
   f) rebutting,
   g) presenting mitigation in capital cases,
   h) testifying.

   Following are six examples to illustrate ways to communicate the nature and stage of expert help:
   a) a psychologist to evaluate and testify both pretrial and at trial to the voluntariness of the defendant's waiver;
   b) a social worker to find the client's records, interview persons relevant to culpability, develop a social history and testify at the sentencing phase;
   c) a consulting mental health expert to provide expertise on the mental health dimensions of the case: developing cross-examination of the state's mental health expert, identifying the mental health theory of the case, advising on what kind of mental health disciplines are called for by the facts of the case;
   d) a psychiatrist to testify at trial to the defendant's state of mind.
   e) a pathologist to determine cause of death as either intentional strangulation or suffocation from an accidental fire.
   f) a firearms/gunshot wound expert to determine the range and direction of fire, entrance and exit wounds, residues.

NOTES

NOTES

2. **Name, Qualifications, Fees.** Fully explain who the expert you want to hire is, his or her qualifications, the hourly rate for the work and the expected range of the total costs for the services.

   For example, Dr. Jones is a practicing clinical forensic psychologist with the following vitae indicating her education, experience and licensing. She charges $200 per hour for out-of-court work and travel and $500 per day to testify. Her estimate of a total fee for testing, interviewing, travelling, and reporting is $2,500 - $3,000 plus necessary expenses with an additional fee of $500 per day for testifying.

3. **Reasonableness of Rates and Total Cost.** Demonstrate to the judge that the hourly rate and total expected costs are within the range of rates and total costs for competent work by similar qualified experts in the region. An affidavit from one or more other experts could demonstrate the reasonableness of the costs. The attorney could represent by affidavit or otherwise to the court that these fees are within the range of other fees quoted to the attorney by other professionals. Courts have for some time found significant hourly rates, *Matter of Machuca*, 451 N.Y.S.2d 338 (NY 1982), and significant total amounts to be reasonable in these times when expert services are very costly. *United States v. Bryant*, 311 F.Supp. 726 (D.C. 1970).

4. **Factual Basis, Theory, Themes *in this Case*.** Communicate the specific *facts, theory, and themes in this case* which justify the particular resources requested. *This is the most critical part of the threshold showing*. It must be case specific and fully developed to be persuasive. For the adversarial system to work, defendants have to be able to effectively present their defense. Several brief illustrations follow:

   A) THIS CLIENT IS SEVERELY MENTALLY & EMOTIONALLY ILL. Eugene is mentally and emotionally ill, and brain damaged. His illnesses are chronic and severe. A vulnerable man rendered chronically ill, Eugene raped and killed the 12-year-old girl. For his sentencers to both consider and give effect to the statutory mitigation of mental illness and emotional disturbance, a psychiatrist, psychologist, social worker and neurologist are necessary. They are necessary to investigate and evaluate and rebut the prosecution's case that the defendant intentionally killed, and to provide in the penalty phase all evidence that lessens the defendant's culpability. Funds for a psychologist in a case with these facts were obtained in *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980).

   B) REASONABLE NOT RECKLESS DRIVING. Jeff Jones did not drive recklessly. Jeff was driving at a reasonable speed and within the speed limit. The road and terrain are very challenging, especially in difficult weather. The physical evidence shows that Jeff drove his truck in a reasonable manner. The killing of the 4 campers in the tent was a tragic accident. An accident reconstructionist is necessary to analyze all the evidence to demonstrate that the driving was not reckless and to counter the prosecutor's evidence and expert testimony. For the successful request of an accident reconstruction expert in a case with these facts. *State v. Van Scoyoc*, 511 N.W.2d 628 (Iowa App. 1993).

   C) ACCIDENTAL FIRE CAUSED THE DEATHS. The fire was not intentionally set and the victims were not suffocated. The defendant set a space heater in a place that ignited the fire. The fire began through accident or negligence at most. The cause and origin of the fire is the subject of dispute by reasonable experts and the defense is entitled to its perspective on that. The cause of death is also in dispute. The two girls did not die of suffocation. The low level of carbon monoxide in them present multiple explanations and the defense is entitled to investigate those with its own pathologist. Funds for an arson independent expert and an independent pathologist were obtained in a case where these facts were presented. *Sommers v. Commonwealth*, Ky., 843 S.W.2d 879 (1992).

D) MACHINES ARE NOT PERFECT. Don Gimble is a decent, hardworking man whose arrest for DUI was due to poorly executed police procedures, incomplete investigation, an improperly administered a preliminary breath test (PBT), and a malfunctioning breathalyzer. A fallible machine must be prevented from improperly condemning Don. An expert in breath analysis is necessary to demonstrate the substantial limitations of the breath-testing machine, and to rebut the prosecutor's evidence.

E) TRIAL BY ORDEAL WITHOUT FUNDS FOR HELP. Richard Smith robbed and raped the victim but he was insane at the time. The state has an expert who will testify the defendant is sane, despite his substantial history of schizophrenia, his documented need for anti-psychotic medication to control somatic delusions, a mental health report indicating possible brain damage and his official commitment to a mental institution. The defense has no psychiatrist, no psychologist, no neurologist and no social worker to investigate, evaluate and testify that the defendant was insane. The defense has no comparable expert to rebut the prosecution expert and no one to assist defense counsel to prepare to challenge and cross-examine the state's expert. If the defense continues to have its hands tied behind its back, this will be a trial by ordeal. *Binion v. Commonwealth*, Ky., 891 S.W.2d 383 (1995).

F) LEVEL PLAYING FIELD NEEDED FOR FAIRNESS. John did not kill Joan. He was not present when Joan was killed. The blood samples were contaminated and degraded. DNA results are subject to false positives and have questionable validity when the samples are heavily contaminated. The state has had the blood samples tested by highly trained state experts with the sophisticated DNA testing. In order for there to be a level playing field the defense is entitled to independent testing of the samples and a defense DNA expert to evaluate, testify and rebut. *Husske v. Commonwealth*, 448 S.E.2d 331 (Va. App. 1994).

G) HAIR ANALYSIS BY MICROSCOPIC COMPARISON IS NOT SCIENTIFICALLY RELIABLE. A critical set of evidence against George Smith is comparisons of his hair with hair found at the scene of the crime. While the Kentucky Supreme Court held in *Johnson v. Commonwealth*, Ky., 12 S.W. 3d 258 (2000) that trial judges can take judicial notice that hair analysis has achieved the status of scientific reliability, the Court affirmatively stated, "judicial notice does not preclude proof to the contrary." *Id*. at 262. Under *Johnson*, I have the burden to prove to the satisfaction of you as the trial judge that hair analysis is no longer deemed scientifically reliable, and in light of other courts *Williamson v. Reynolds*, 904 F. Supp. 1529, 1552 (E.D. Okl. 1995) reversed on other grounds, *Williamson v. Ward*, 110 F.3d 1508, 1523 (10th Circ. 1997), finding hair analysis unavailable, I need funds to present that proof to your satisfaction.

6. Counsel's Observations, Knowledge and Insights. To the extent legally and ethically appropriate, relate *ex parte* the observations or statements of your client, witnesses, state experts that you or your defense team know. For example, "My client has acted bizarrely in my presence. He makes statements that are hard to make sense of. He said that the University of Kentucky would not win another national championship until he is released. He believes I am working for the prosecution. He has hallucinated during my interviews with him, *e.g.*, he hears the voice of his dead brother telling him not to cooperate with me."

7. Legal Bases for Expert *In This Case*. Tell the judge the legal justification for the funds and for the resources *in this case*: a) others do not have a legal duty to provide funds, b) the standard is *reasonably necessary*, and c) the state and federal constitutional basis.

Legal Justification. Four examples follow:

a) The mental state of my client which the state has made an essential element of the crime is in question because of the following…. which provides a question of whether his conduct was fully intentional.

NOTES

NOTES

b) The influence of the drugs my client ingested in his body and his subsequent behavior is relevant to the defendant's state of mind and requires scientific analysis. Such analysis must be conducted by a pharmacologist to identify the characteristics of the drugs ingested by the defendant, the way various drugs interacted, and the amount of time they remained in the body. Other relevant testimony should include a mental health expert who can offer an evaluation of the influence of the drugs on the defendant's mental state, behavior, as well as *why* the defendant took the drugs, became an addict, the potential for rehabilitation, and the interaction of the drugs with the defendant's personality.

c) The medical analysis of the victim's body and cause of death in a homicide or cause of injury in a sex abuse case is subject to question because the defendant did not commit this act and the analysis done by the state's doctor involves substantial aspects of judgment and interpretation of testing upon which qualified experts disagree. *See, e.g., Ake, supra*, *Sommers v. Commonwealth*, Ky., 843 S.W.2d 879 (1992) (arson and pathology expert) and *Hunter v. Commonwealth*, Ky., 869 S.W.2d 719 (1994) (meaningful access to justice).

d) The testing done by experts in this scientific area involves a series of judgments. Reasonable people differ over judgments. Science, especially clinical science, involves constant shifts in hypotheses and conclusions as new technologies and concepts emerge. Probability, not certainty or singularity, is the rule and it is an error to believe that one scientist can speak definitively for an entire discipline, especially when interpreting the data of a complex case. There are often two views to the scientific conclusion. Jurors are entitled to decide which interpretation, analysis, and judgment to rely on. The introduction of this reality into the courtroom can be frustrating, but is necessary if the adversary system is to work for a citizen-accused.

Legal duty of others. Some judges may expect the family or friends of the indigent defendant to foot the bill for experts if they have the money. Just as the wealth of those not legally responsible for an indigent defendant does not affect the defendant's right to prosecute an appeal *in forma pauperis*, *Stinnett v. Commonwealth*, Ky., 452 S.W.2d 613, 614 (1970) or to institute a dissolution of marriage suit *in forma pauperis*, *Tolson v. Lane*, Ky., 569 S.W.2d 159, 161 (1978), so too the monied family and friends of a defendant cannot constitutionally be a bar to the defendant receiving funds from the government to hire his own experts.

Legal Standard. Most courts, statutes, and rules have followed the lead of the federal statute's standard of ***reasonably necessary***.

That is also Kentucky's statutory, KRS 31.200, and caselaw standard. *Young v. Commonwealth*, Ky., 585 S.W.2d 378 (1979). *Ake's* standard for when a defendant is entitled to the help of a psychiatrist is: "*when the defendant's mental condition is seriously in question.*" *Ake*, *supra* at 82.

In explaining the *reasonably necessary* standard, the Massachusetts Supreme Court *Commonwealth v. Lockley*, 408 N.E.2d 834 (Mass. 1980) stated: "This standard is essentially one of the reasonableness, and looks to whether a defendant who was able to pay and was paying the expenses himself, would consider the document, service or object' sufficiently important that he would choose to obtain it in preparation for his trial. The test is not whether a particular item or service would be acquired by a defendant who had unlimited resources, nor is it whether the item might conceivably contribute some assistance to the defense or prosecution by the indigent person. On the other hand, it need not be shown that the addition of the particular item to the defense or prosecution would necessarily change the final outcome of the case. The test is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires.

"In making this determination under that statute, the judge may look at such factors as the cost of the item requested, the uses to which it may be put at trial, and the potential value of the item to the litigant." *Id.* at 838.

Constitutionalize. Ask for this relief under every conceivable state and federal constitutional guarantee. These examples include the Kentucky constitutional sections, as examples of state provisions:

A. United States Constitution, 14th Amendment Due Process
1) Due Process fairness.
2) Due Process right to present a defense.
3) Due Process right to disclosure of favorable evidence.
4) Due process right to fair administration of state created right.

B. Kentucky Constitution, Section 2 Due Process.
C. United States Constitution, 14th Amendment Equal Protection
D. Kentucky Constitution, Sections 2 & 3, Equal Protection
E. United States Constitution, 14th and 6th Amendment Right to Effective Assistance of Counsel
F. Kentucky Constitution, Section 11 Right to Effective Assistance of Counsel
G United States Constitution, 14th and 6th Amendment Right to Confrontation
H. Kentucky Constitution, Section 11 Right to Confrontation.
I. United States Constitution, 14th and 6th Amendment Right to Compulsory Process
J. Kentucky Constitution, Section 11 Right to Compulsory Process
K. United States Constitution, 14th and 8th Amendment Reliable Sentencing, Produce Mitigating Evidence; Rebut aggravating evidence.
L. Kentucky Constitution, Section 17, Cruel Punishment.

If all the necessary funds are not obtained, you will want to insure that you have made the proper showing under all the potential grounds to have reversible error on appeal or in federal habeas.

8. Legal and Practical Reasons for *Defense* Resources. Delineate why *independent defense* expert help is critical. Investigation must be done by someone who acts at the direction of the defense attorney and whose work is totally confidential. The investigation is focused on marshalling the defense and rebutting the state's evidence. Expert testing and analysis must likewise be confidential and at the direction of the attorney. The defense is entitled to an expert who will help in cross-examining the state's expert, who will marshal the defense, and who will rebut the state's expert. There are at least two sides to any complex process. An expert is needed to tell the *rest of the story*.

Binion v. Commonwealth, Ky., 891 S.W.2d 393 (1995) held that a state expert is not sufficient to satisfy due process. A defense expert is required: "We are persuaded that in an adversarial system of criminal justice, due process requires a level playing field at trial.... [T]here is a need for more than just an examination by a neutral psychiatrist." *Id.* at 386. As a practical matter, *Ake*, itself, requires that the expert be a defense expert by requiring an indigent be offered an expert who will *marshal* the defense, *rebut* the state's expert and *assist* in cross-examining the state's expert. Other caselaw recognizes the essential need for a *defense* expert. *See, e.g., DeFreece v. State*, 848 S.W.2d 150 (Tex. Cr.Ct. 1993), *Lindsey v. State*, 330 S.E.2d 563 (Ga. 1985); *Halloway v. State*, 361 S.E.2d 794 (Ga. 1987); *Palmer v. Indiana*, 486 N.E.2d 477 (Ind. 1985); *State v. Gambrell*, 347 S.E.2d 390 (N.C. 1986); *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990); *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985); *Cawley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991). *But see Granviel v. Lynaugh*, 581 F.2d 185 (5th Cir. 1981).

9. Inadequacy or Unavailability of State Resources. Persuasively communicate to the court that state experts, themselves, acknowledge they are unable to perform as defense experts, and communicate what those state experts say. This will likely require some persuasive investigation with the state experts. Two Kentucky examples illustrate some approaches.

NOTES

Forensic Psychiatric Facility. The Kentucky Correctional Psychiatric Center (KCPC) is the state's forensic mental health facility. Their employees are not able to help cross-examine the state's expert. They do not work at the direction of the defense attorney. They do not work to marshal the defense. Their work is for the court. It is not confidential. Under Kentucky statutes, their work is limited to "neutral" evaluations on incompetency and insanity. A February 24, 1994 letter from CHR Commissioner Angela M. Ford to public defender Steve Mirkin demonstrates these limitations:

This is given in response to your letter to me of February 14, 1994, wherein you have requested that the Cabinet for Human Resources supply you with an expert witness on to assist you in the preparation of a death penalty case on behalf of Mr. _____, who has been charged with two (2) counts of murder in _____ County. The assistance which you have requested, as presented in your letter, is as follows:

"...I expect such assistance will include: evaluation of records, witness statements and other materials obtained through the defense's efforts; *confidential* evaluation of the accused; consultation with counsel as to availability and viability of potential defenses, and potential penalty phase strategies, as well as direction for further investigation to develop such defenses or strategies; assistance in the preparation and presentation of direct testimony of exerts and/or lay witnesses necessary to lay the foundation for expert opinions; assistance in the planning and preparation of cross-examination

expert and lay witnesses to be called by the Commonwealth on mental health matters; and expert testimony on the accused's behalf, with preparation for such testimony, as well as for cross and redirect examination."

This is to advise that the Cabinet is unable to provide you with the specific assistance which you have requested because of both budgetary considerations and the need for the Cabinet to observe its objectivity in performing the court-ordered forensic evaluations under the Kentucky Penal Code as specifically set forth by KRS 504.060-504.110. Staff at the Kentucky Correctional Psychiatric Center (KCPC) do perform court-ordered evaluations for individuals charged with felonies to ascertain competency to stand trial and the capacity of the defendant to appreciate the criminality of the defendant's conduct. Depending upon the clinicians' conclusions, the evaluation may or may not favor the defendant. KCPC staff do observe the confidentiality of records, information, and their evaluations relating to defendants and consistent with any requirements which may exist in the court order for the evaluation.

I will confirm your understanding that KCPC clinical staff, including Dr. _____ who has evaluated Mr. ____, are available to review available and relevant background information and material concerning the persons whom they evaluate, and which could constitute useful input for their evaluations. They are also available to consult with legal counsel to clarify the findings of their evaluations (if not prohibited by the court order), however, they are not available to provide ongoing consultation with counsel for purposes of preparing for trial or developing legal defenses....

In 1999, the General Counsel for the Cabinet for Human Resources signed the following affidavit:

1. My name is Ellen M. Hesen and I am an Attorney-at-Law, duly licensed to practice within the Commonwealth of Kentucky. I am the General Counsel to the Secretary for Human Resources ("the Cabinet");
2. The Cabinet's Department of Mental Health and Mental Retardation Services operates the Kentucky Correctional Psychiatric Center ("KCPC"), a 97-bed, maximum security, inpatient psychiatric hospital located in LaGrange, Oldham County, Kentucky.
3. KCPC is the only forensic psychiatric facility in the Commonwealth of Kentucky for the purpose of function of providing inpatient evaluation, care, and treatment for mentally ill or mentally retarded persons who have been charged with or con-

NOTES

victed of a felony, who are referred by District and Circuit Courts in all 120 counties of the Commonwealth. In addition, KCPC serves prisoners in need of acute or long-term inpatient psychiatric treatment who are admitted from the various penal institutions within the Department of Corrections;

4. KCPC has a statutory duty to serve courts of the Commonwealth of Kentucky by providing objective evaluations of a criminal defendant's competency to stand trial and/or of the existence of a mental defect or disease at the time of the alleged criminal act;
5. It is the Cabinet's official policy that it would be impossible for KCPC to maintain its objectivity and credibility with the courts, if it permits members of its professional staff to act as expert witness for either the defense or the prosecution. For this reason, it has been the long-standing policy of the Cabinet to decline request for members of its professional staff to serve as expert witnesses in the preparation of criminal cases, either for the defense or the prosecution;
6. In addition to maintaining its objectivity and credibility with the courts, there are manpower concerns as well. KCPC currently employs three full-time Staff Psychiatrists, who evaluate persons charged with felonies, to determine their competency to stand trial and/or their criminal responsibility at the time of the alleged offense. In addition to performing evaluations, KCPC's Staff Psychiatrists are often required to testify at court proceedings throughout the Commonwealth to assist the courts in making competency-related determinations. As a consequence, each KCPC's Staff Psychiatrists have heavy caseloads and time commitments, which limit their ability to act as expert witnesses in the preparation of criminal cases;
7. While the Cabinet declines requests for members of its professional staff to serve as expert witnesses in the preparation of criminal cases, members of its professional staff are available to review relevant background information and materials, if it would provide useful input for their evaluation of a specific patient. Professional staff are also available to consult with counsel for either the defense or the prosecution to clarify the findings of their evaluations;
8. Further Affiant sayeth naught.

These limitations are recognized in *Binion*, *supra*, which observed that "the Director of KCPC stated that it was incapable of acting in the capacity of a defense expert...." 891 S.W.2d at 385.

KSP. The Kentucky State Police (KSP) and their lab personnel are not able to help cross-examine the state's expert. They do not do work at the direction of a defense attorney. They do not help marshal the defense. Their work is done on behalf of investigating police officers or prosecutors, not defense attorneys. A Kentucky State Police captain directs the KSP lab. The lab personnel are employees of the Kentucky State Police. KSP Lab personnel refuse to meet with defense attorneys until the prosecutor is contacted. There is a dramatic conflict for them when one of their employees has already tested the evidence and arrived at an opinion since they have an understandable vested interest in the integrity and reliability of the work of the employee who first tested the material. It is unlikely that one colleague will criticize another colleague. Understandably, the KSP lab is an integral part of the prosecution team.

Access to a neutral state expert even by subpoena is not constitutionally sufficient. "Before *Ake*, the ability to subpoena and question a neutral expert on whose examination both the state and the defense were relying may have satisfied due process. *See United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568, 73 S.Ct. 391, 394-95, 97 L.Ed. 549 (1953) However, *Ake* expressly disavows the result in *Smith* and explains that the requirements of due process have fundamentally changed that decision.... The ability to subpoena a state examiner and to question that person on the stand does not amount to the expert assistance required by *Ake*." *Starr v. Lockhart*, 23 F.3d 1280, 1289-91 (8th Cir. 1994).

8. Evidentiary Documentation. There are a variety of effective methods of producing persuasive evidence to document your representations to the court: scientific articles; letters or

NOTES

affidavits from your own expert (who may give you a free, short affidavit); from the operators of the state facilities (who do not want to work for the defense); other practicing attorneys (who experience these realities); calling these same persons to testify at an evidentiary hearing; subpoenaing the state experts who have tested the evidence in this case and asking them questions to prove their inability to perform as required for the defense, or the limits of the science.

Questions to the state's experts can occur at your *ex parte* hearing, a pretrial hearing or prior to the expert's testifying at trial. This may allow you to prove some favorable facts otherwise difficult or impossible to show. It can also provide your request with more persuasive clout since you are proving or corroborating your position through the prosecution's witnesses. The prosecution expert is likely to testify favorably in these areas since it is in the expert's self-interest to support the profession's purpose and necessity, and the expert's own special worth. Questions like the following are possible areas of inquiry:

IT IS AN EXPERTISE

a. The area you are testifying on is an area of expertise?
b. It is not an area that is within a layperson's knowledge?
c. You have studied a long time and have a lot of experience to be qualified as an expert?
d. Tell us the education, training, experience you have been required to complete?
e. Who has trained you?
f. Your expertise has a lot of dimensions not within layperson's knowledge? Tell us what those are.
g. You have conducted tests in this case which are not within a lay person's knowledge?
h. Your opinion is an expert's and is based on training, experience and testing, not within the competence of laypersons?
i. I am not qualified as an attorney to render an expert opinion in this area, am I?

TIME/REASONABLE FEE/ AVAILABILITY OF DEFENSE EXPERTS

a. How long have you spent analyzing the evidence in this case?
b. It took a long time?
c. What is the going rate for an expert in private practice to do this kind of testing, analysis, report writing and testifying?
d. Are there any experts in this state, region or country that can do this kind of testing in criminal cases who do not work for law enforcement agencies?
e. Are there other people as experienced and as capable to do the analysis testing and to render an opinion?
f. Are there experts more experienced than you?

STATE EXPERT NOT NEUTRAL

a. You work for the State Police Lab?
b. Your ultimate boss is the Commissioner of State Police?
c. The person in charge of the state Lab system is a captain in the state police?
d. You refused to talk to me without first notifying the prosecutor?
e. You refused to talk to me without the prosecutor being present or waiving his presence?
f. You do not work at my direction?
g. You test based on police requests?
h. You returned the test results back to the police in this case?
i. You are not a defense expert?
j. You would not help me cross-examine one of your co-workers or any prosecution witness?
k. How many times have you testified at the request of the prosecution?
l. How many times at the request of the defense?
m. Your files are not confidential to only the defense?

NOTES

POSSIBILITIES OF DIFFERENT RESULTS/OPINION; MORE TESTING POSSIBLE

a. Your expertise involves standard tests?
b. What are they?
c. Which did you do?
d. What other tests could be done but were not?
e. Other experts can do the tests you did not do?
f. In doing your tests, you do not always get exactly identical results each time you do the test on the same sample?
g. The opinion you rendered involves doing tests, observing what is there and what isn't there, analyzing the results to reach your conclusion?
h. The art of rendering an opinion, reaching a conclusion involves your professional *judgment* based on your training, experience, analysis and test results?
i. That is one reason why two experts can disagree?
j. Because their judgments, based on the same data, can be different?
k. It is possible that a different examiner could come to a different conclusion than you?
l. It is possible that you could have made a mistake in your testing?
m. Have you ever made an error in your testing?
n. All tests have an error rate?
o. What are the error rates of the tests you have run?

These series of questions can help persuade the judge that the work of the expert is outside the knowledge of laymen and lawyers, that it is an expensive process so the seemingly large amount of money you are asking for is quite reasonable, that the state expert is not neutral since the expert works for the prosecution, and that competent experts do arrive at different conclusions so the defense is entitled to its own expert to test the conclusions of the state's experts from the defense perspective.

CONCLUSION

Resources for an effective defense are at hand. Doing the obvious will return rich dividends to insure the expert resources necessary for fair process and reliable results for the indigent-accused and in which the courts and the public can have confidence. Not doing the obvious will be at the peril of your client. ■

James J. Clark, Ph.D.
School of Social Work
University of Kentucky
Lexington, KY 40506
Tel: (859) 257-2929

Edward C. Monahan
Deputy Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
Tel: (502) 564-8006 Fax: (502) 564-7890
E-mail: emonahan@mail.pa.state.ky.us

NOTES

NOTES

Confidential Request for Funds: Lack of Money Does Not Mean Less Protection

Funds for experts and other resources lose much of their meaning if obtained at the expense of confidentiality. Fortunately, our Constitution caselaw, and statutes increasingly recognize the need for requests for funds by indigents to be confidential without the prosecutor, public or media present. Without this confidential process, indigents are penalized by their poverty into prematurely revealing their defense strategies. With this confidential process, the attorney/client privilege is insured.

Non-Confidential Requests Create Constitutional Problems

A request for funds for experts or other resources must contain enough information to meet the *threshold showing* which is necessary to justify the fourteenth amendment right to the defense resources. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 1091, 1096, 84 L.Ed.2d 53 (1985). Almost necessarily, that *threshold showing* will contain privileged information about the defense which the prosecutor is either never entitled to discover or not entitled to discover at this early juncture of the proceedings.

A non-indigent criminal defendant selects and hires experts, investigators, etc. without knowledge of the prosecutor or court. In the civil arena, information about the retention of an expert by a party is not discoverable. *See, e.g.*, *Newsome v. Lowe*, Ky.App., 699 S.W.2d 748 (1985). In order to obtain public funds for resources, indigents rightly have to present information to a neutral judge who decides whether the requested assistance is reasonably necessary. But revealing that confidential information to the prosecution in a way that a non-indigent criminal defendant does not have to reveal it violates equal protection.

Ex parte proceedings increase the information available to the judge and increase the reliability of his or her decision. In assessing the request for public funds, the judge is entitled to the thoughts, reasoning and strategy of the defense, including matters within the attorney/client privilege, but the prosecutor is not entitled to that privileged information. Therefore, an *ex parte* proceeding has the pragmatic effect of allowing judges to obtain more information from the defense for the judge to make a decision since the proceeding is confidential. When a judge has more information, his or her decision is likely to be more reliable.

Kentucky's Authority

With rare exception, criminal defendants are not required to reveal their defense prior to trial. While KRS Chapter 31 provisions do not explicitly recognize the right to make requests for funds for resources *ex parte*, KRS 500.070(2) implicitly recognizes such proceedings as it states, "No court can require notice of a defense prior to trial time."

The necessary implication of this statutory provision is that a defendant cannot be required to reveal his defense by having to make his threshold showing in front of the prosecutor, public or media.

RCr 1.08, which addresses the service of motions, recognizes the *ex parte* nature of some motions by stating, "...every written motion other than one that may be heard *ex parte*...must be served upon each party."

Ake Requires Requests Be *Ex Parte*

Ake, supra, makes the statement, "when the defendant is able to make an *ex parte* threshold showing to the trial court...." "The intention of the majority of the *Ake* Court that [the threshold showing] hearings be held *ex parte* is manifest...." *McGregor v. State*, 733 P.2d 416 (Okla.Ct.Crim. App. 1987).

Ake has been relied on by other courts to find that proceeding *ex parte* is constitutionally required. An "indigent defendant who requests that evidence supporting his motion for expert psychiatric assistance be presented in an *ex parte* hearing is constitutionally entitled to have such a hearing...." *State v. Ballard*, 428 S.E.2d 178, 179 (N.C. 1993). Preventing a defendant from proceeding *ex parte* improperly forces him to "jeopardize his privilege against self-incrimination and his right to the effective assistance of counsel, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." *Id.*

"Only in the relative freedom of a non-adversarial atmosphere can the defense drop inhibitions regarding its strategies and put before the trial court all available evidence of a need for psychiatric assistance. Only in such an atmosphere can the defendant's privilege against self-incrimination and his right to the effective assistance of counsel not be subject to potential violation by the presence of the State." *Id.* at 183.

Kentucky Caselaw: *Ex Parte* Process and the 5th & 6th Amendments

While no published Kentucky appellate level decision has held it reversible error to fail to allow an indigent criminal defendant to make his request for funds *ex parte*, the Kentucky Supreme Court has held in an unpublished opinion that the *ex parte* process is required in a highly analogous situation.

In the extraordinary writ case of *Jacobs v. Caudill*, Ky., 94-SC-677-OA (Sept. 2, 1994) (unpublished) the Kentucky Supreme Court unanimously held that the hearing to "determine petitioner's competency to voluntarily and intelligently waive any defenses or otherwise direct his defense...." had to be conducted in accord with the 5th and 6th amendments. "To avoid any possible violation of the petitioner's constitutionally protected rights, it is mandated that when issues arise in said hearing involving petitioner's attorney-client privilege, right against self-incrimination or his right to prepare and present a defense, said proceedings shall be conducted by the trial court *in camera* and *ex parte*, but on the record."

No competent criminal defense attorney who practices his cases ethically would reveal any defense information prematurely, absent some strategic advantage.

In *McCracken County Fiscal Court v. Graves*, Ky., 885 S.W.2d 307 (1994) the Kentucky Supreme Court set out a very helpful principle: *Indigents are entitled to be represented to the same extent as monied defendants*.

The Court said, "We also take this opportunity to offer a bit of guidance to trial courts for the purpose of future determinations of what constitutes a reasonable and necessary indigent expense. In KRS 31.110(1)(a), it is stated that a needy defendant is entitled: To be represented by an attorney to the same extent as a person having his own counsel is so entitled. While this certainly cannot mean that an indigent defendant is entitled to have any and all defense-related services, scientific techniques, etc., that a defendant with unlimited resources could employ, we think it is a useful standard as a starting point. At a minimum, a service or facility the use of which is provided for by statute should be considered by a trial court, as a matter of law, to be 'reasonable and necessary.'" *Id.* at 313.

There "is no need for an adversarial proceeding, that to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with non-indigent defendants." *McGregor, supra*, at 416.

In other contexts, the Kentucky Supreme Court has recognized the necessity for courts to function *ex parte*. In *West v. Commonwealth*, Ky., 887 S.W.2d 338 (1994) the Court held that a trial

NOTES

judge has jurisdiction to enter an order pursuant to RCr 2.14(2) after an *ex parte* hearing appointing public defender to an indigent being questioned by police and ordering that the questioning be stopped so the defendant could consult with the attorney. "By virtue of its general jurisdiction, the circuit court frequently acts *ex parte* in criminal matters. A clear example of such an act is in the issuance of search warrants. RCr 13.10." *Id.* at 341 n.1.

It is not reversible error for a trial court to conduct an *ex parte* hearing on the issue of funds for experts. In *Baze v. Commonwealth*, Ky., 965 S.W.2d 817 (1997) the Court stated, "On cross-appeal, the *Commonwealth* argues that the trial judge committed error in allowing the defense counsel to proceed *ex parte* in requesting funds for experts. Although we believe it is prudent to discourage *ex parte* proceedings in a trial of this importance, we do not find reversible error in this case." *Id.* At 826. See also *Sanborn v. Commonwealth*, Ky., 975 S.W.2d 905, 909-910 (1998) where the Court said, "There is no authority to support *ex parte* motions for hearings for expert funding in a RCr 11.42 proceeding." *Ake v. Oklahoma*… is not a post-conviction case. The issue is that case related to the preparation of a trial defense and the right to access to psychiatric examination. It does not apply to every matter relating to the funding of experts for indigent defense at every stage in a criminal case. *See Baze*…" In *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377, 381 (1999) the trial judge was presented with a one sentence *ex parte* letter requesting appointment of an investigator by *pro se* defendants. The Court stated that such a letter "is not a substitute for a properly presented motion. Thus, the issue was never properly before the trial court and is not preserved for review."

Ex Parte Used in Many Other Contexts

Proceeding *ex parte* is commonly recognized as appropriate in other settings. Eleven examples of Kentucky statutes, rules, and caselaw which permit proceeding *ex parte* follow:

1) **CR 65.07(6) Interlocutory relief:** allows *ex parte* grant of emergency relief when a movant will suffer irreparable injury before a motion can be heard by a panel;

2) **CR 5.01 & RCr 1.08 Service:** exempts serving pleadings which may be heard *ex parte*;

3) **CR 6.04 Time for Motions:** serving written motions which may be heard *ex parte*;

4) **CR 53.05 Domestic Relations, Commissioners, Meetings:** allows proceeding to be conducted *ex parte* if a party fails to appear at the time and place appointed;

5) **CR 65.08(7)**: Interlocutory relief pending appeal from final judgment;

6) **CR 76.38**: Reconsideration of appellate orders;

7) **CR 77.02(1)**: Hearings outside judicial district;

8) **KRS 209.130(1)**: *Ex parte* order for protection when "it appears probable that an adult will suffer immediate and irreparable physical injury or death if protective services are not immediately provided...."

9) **KRS 620.060(1)**: *Ex parte* emergency custody order "when it appears to the court that there are reasonable grounds to believe, as supported by affidavit or by recorded sworn testimony, that the child is in danger of imminent death or serious physical injury or is being sexually abused and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child."

10) **KRS 645.120(3)**: Emergency involuntary hospitalization of a child that as a result of mental illness needs immediate hospitalization for observation, diagnosis or treatment. This can occur by telephone.

11) ***West v. Commonwealth*, Ky., 887 S.W.2d 338, 341 (1994).** Circuit court can consider *ex parte* request for appointment of counsel under RCr 2.14. "By nature of its general jurisdiction, the circuit court frequently acts *ex parte* in criminal matters." *Id.* at 341 n.1.

NOTES

The Federal Statute & Rule

Since 1964, the Criminal Justice Act, 18 U.S.C. 3006A(e)(1), has provided that requests by indigents for funds for resources be done *ex parte* if the defendant wants that confidential process.

That statute states, "Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application."

The federal Anti-Drug Abuse Act's provisions involving federal capital prosecutions provide for an *ex parte* hearing for funding of resources when there is a showing of a need for confidentiality: "No *ex parte* proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made part of the record available for appellate review." 21 U.S.C. §848(q)(9).

Federal Rule of Criminal Procedure 17(b) allows applications for subpoenas by defendants unable to pay for their service be done *ex parte* to the court." See *Holden v. United States*, 393 F.2d 276 (1st Cir. 1968). That rule states, "**Defendants Unable to Pay**. The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense."

Other Caselaw

An indigent defendant is entitled to ask for funds for expert help *ex parte* to avoid prejudicing the defendant by "forcing him to reveal his theory of the case in the presence of the district attorney." *Brooks v. State*, 385 S.E.2d 81 (Ga. 1989). The "use of *ex parte* hearings...is a well recognized technique available to any party" who is faced with the dilemma of being "forced to reveal secrets to the trial court and prosecution" in order to support" a motion. *State v. Smart*, 299 S.E.2d 686, 688 (S.C. 1982).

"Where counsel for defendant objects to the presence of Government counsel at such a hearing, the failure to hold an *ex parte* hearing is prejudicial error." *Mason v. Arizona*, 504 F.2d 1345, 1352 n.7 (9th Cir. 1974). "The manifest purpose of requiring that the inquiry be *ex parte* is to insure that the defendant will not have to make a premature disclosure of his case." *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970). *See also United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972).

Standing of the Funding Authority

Under KRS 31.185 fiscal courts, all 120 counties now pay a fixed sum into a statewide indigent resources fund with the state paying anything above this fixed amount.

When the county fiscal courts had sole responsibility for these funds, the county clearly had standing to challenge the court's determination. After July 15, 1994, the effective date of the amendment to KRS 31.185, the only entity likely to have standing to challenge the authorization of funds or their amount is the Finance and Administration Cabinet since county fiscal courts must pay a fixed amount of money into the statewide special fund, and only the state has financial obligation if the fund is exhausted.

Presence of Attorney for Funding Authority

The ultimate funding authority, now the Commonwealth of Kentucky through the Finance and Administration Cabinet, is not legally entitled to be present at any *ex parte* hearing. *See Boyle County Fiscal Court v. Shewmaker*, Ky.App., 666 S.W.2d 759, 762-63 (1984).

The presence of counsel for the funding authority "would create unnecessary conflicts of interest; in any event, county counsel's presence cannot be permitted because such petitions are entitled to be confidential." *Corenevsky v. Superior Court*, 204 Cal.Rptr. 165, 172 (Cal. 1984) (In Bank). The funding authority's right to challenge the awarding or amount of funds is available after entry of the order.

NOTES

Local Rules

For some time, Fayette County has had a local rule, Rule 7 (formerly Rule 8B), that requires *ex parte* hearings when indigents request funds for an expert or other resource. It reads, "Rule 7. Requests For Funds For Expenses In Criminal Cases:

A. Ex Parte Request For Funds. A defendant in a pending criminal proceeding, who is a needy person as defined by KRS Chapter 31, may apply ex parte to the Court, without notice to the Commonwealth's Attorney, for the payment of investigative, expert or other services necessary for an adequate defense.

B. Hearing. After reviewing the application, the Court may approve the application without a hearing or assign the application for a hearing. No persons other than the defendant, the defendant's attorney and Court personnel shall attend the hearing unless otherwise authorized by the court.

C. Sealing of Proceedings. The Clerk shall seal that portion of the record containing the application and the proceedings thereon including the record of the hearing and any order issued as a result thereof, except as otherwise authorized by the Court. The disclosure of the application or proceedings thereon may be punishable as a contempt of Court."

Conclusion: Lack of Money Does Not Mean Less Protection

Nationally, the trend is to permit funds requests to be made *ex parte*. "Six states allow for the procedure via legislation, these states being California, Kansas, Minnesota, Nevada, New York, and Tennessee. Nine other states have judicially allowed for *ex parte* hearings on these requests: Arkansas, Florida, Georgia, Hawaii, Indiana, Michigan, North Carolina, Oklahoma, and Washington." *State v. Touchet*, 642 So.2d 1213, 1218 (La. 1994). Requesting funds for resources to insure a competent defense must be *ex parte* to make sure that obtaining appropriate funds is done without sacrificing confidential information. Indigents are entitled to the same confidential aid that monied defendants do not even have to seek. *Poverty should not be a penalty.* ■

Edward C. Monahan
Deputy Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
Tel: (502) 564-8006 Fax: (502) 564-7890
E-mail: emonahan@mail.pa.state.ky.us

NOTES

Table of Cases

Topic/Translation Table

* *Rule amended February 16, 1999, effective March 1, 1999.*

THE ADVOCATE

Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

BULK RATE
U.S. POSTAGE PAID
FRANKFORT, KY 40601
PERMIT #664

Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

- **2001 DPA Annual Public Defender Conference**
  Lexington, KY
  June 11-13, 2001

- **2001 Litigation Persuasion Institute**
  Kentucky Leadership Center
  Faubush, KY
  October 7 – 12, 2001

NOTE: DPA Education is open only to criminal defense advocates. For more information:
`http://dpa.state.ky.us/train/html`

****

**** KACDL ****

- **KACDL Annual Conference**
  Covington, KY
  November 10, 2000

For more information regarding KACDL programs call or write: Linda DeBord, 3300 Maple Leaf Drive, LaGrange, Kentucky 40031 or (502) 243-1418 or George Sornberger at (502) 564-8006, ext. 230.

****

For more information regarding NLADA programs call Tel: (202) 452-0620; Fax: (202) 872-1031 or write to NLADA, 1625 K Street, N.W., Suite 800, Washington, D.C. 20006; Web: http://www.nlada.org

****

For more information regarding NCDC programs call Rosie Flanagan at Tel: (912) 746-4151; Fax: (912) 743-0160 or write NCDC, c/o Mercer Law School, Macon, Georgia 31207.

**** NCDC ****
2001 Trial Practice Institute
June 17-30, 2001
July 15-28, 2001

****

- **78th Annual Conference**
  Grand Hyatt Hotel
  Washington, DC
  November 29 - December 2, 2000

- **Appellate Defender Training**
  New Orleans, LA
  November 16-19, 2000

- **Life in the Balance**
  Albuquerque, NM
  March 3-6, 2001