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TRIAL LAW NOTEBOOK

AND

GUIDE TO KENTUCKY SENTENCING LAW

Introducing the new DPA Trial Law Notebook

In putting this notebook together, I have learned that one does not so much *author* a trial notebook as one *compiles* it. And, since the number one rule of all the best compilers is to "steal only from the best," I have ruthlessly stolen from many of my colleagues in DPA, present and past, in order to publish this volume. This notebook incorporates the comments, outlines, written work and, in some cases, the lecture materials of: Tim Arnold, Susan Balliet, Jay Barrett, Donna Boyce, Rebecca DiLoreto, Misty Dugger, Shelly Fears, LaMer Kyle-Griffiths, Bruce Hackett, Linda Horsman, Bob Hubbard, Robin Irwin, Karen Maurer, Ed Monahan, Joe Meyers, Julie Namkin, David Niehaus, John Palombi, Damon Preston, Julia Pearson, Gail Robinson, Shannon Dupree Smith, Ken Taylor, Scott West, Erin Yang, as well as anyone who ever contributed to the "Practice Corner" column of *The Advocate*, many non-DPA *Advocate* authors - including Jerry Cox, and a score of others whose work I know I have consulted and forgotten about over the last few months. As such, this notebook is a kind of culmination of training efforts which have been going on within DPA for years. My thanks to everyone who helped to make this notebook possible. Our future new attorneys thank you as well.

For the purposes of this notebook, I have divided the law into two broad categories. The first is the law one needs for a particular case, such as the law concerning murder. The second is the law one needs for any case, such as the law concerning jury selection. I have tried to restrict the materials, for the most part, to the latter. The goal of the effort was a concise presentation of basic trial law in Kentucky which might be long enough to be reasonably thorough, but short enough to be useful for easy reference. And, although some material on evidence or experts may be found in the notebook, I have made a special effort to stay away from areas covered in other DPA publications. The notebook should therefore be thought of as a companion to, and not a replacement of, both the DPA Evidence Manual and the Mental Health and Experts Manual as well.

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

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

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

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January 2008

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

DPA TRIAL LAW NOTEBOOK
Table of Contents

I. In General

II. The Jury

III. Voir Dire

IV. The Commonwealth's Case

V. The Defense Case

VI. To The Jury

VII. Initiating the Appeal

Guide to Kentucky Sentencing Law

I. IN GENERAL

NOTES

IN ABSENTIA

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

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

ADJOURNMENT

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

ADMONITIONS

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

ADVERSARIAL BOND HEARINGS

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

BIFURCATION

NOTES

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

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

Subsequent Offenses - Bifurcation is also necessary when the Commonwealth must also prove a 2nd or subsequent offense, or some other sentence enhancement, even in misdemeanor trials. *Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky.1996), *Dedic v. Commonwealth*, 920 S.W.2d 878 (Ky.1996). This requirement of enhancing subsequent offenses in a separate hearing could easily lead to trifurcated trials in the case of felonies which are also subsequent offenses. For instance, a DUI 4th trial might have a guilt phase, an enhancement phase, then a sentencing phase.

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

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

Note that this guidance from the Supreme Court requires the jury to deliberate twice during the same sentencing/PFO phase. The trial court follows KRS 532.055 prior to fixing the penalty for the underlying offenses. The court said: "The bifurcated penalty phase will decide the punishment on the specific charge after additional evidence pertaining to sentencing is heard." *Id.* The trial court then turns to KRS 532.080 for the remainder of the hearing to "(2) determine then whether the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a persistent felony offender." Note that the procedure is outlined in exactly this same way in the last paragraph of the *Commentary* to KRS 532.080.

The PFO statute also seems to require this procedure. *See Commonwealth v. Hayes*, 734 S.W.2d 467 (Ky.1987), and *Davis v. Manis*, 812 S.W.2d 505 (Ky.1991), which interpret the PFO statute to require that the defendant first be sentenced on the underlying charge before he can be convicted as a Persistent Felony Offender.

Referring to Prior Convictions – Referring to prior convictions which will be used to enhance current charges should be reserved to the penalty phase of the trial. "No reference shall be made to the prior offense until the sentencing phase of the trial, and this specifically includes reading of the indictment prior to or during the guilt phase." *Clay v. Commonwealth*, 818 S.W.2d 264, 265 (Ky.1991). Failure to do so results in "unavoidable prejudice" to the defendant. *Commonwealth v. Ramsey*, 920 S.W.2d 526, 528 (Ky.1996). (Indeed, in *Clay*, the Kentucky Supreme Court found it to be reversible error.) The exception to this comes in trials involving offenses in which the prior conviction must be proven in order to prove the underlying offense itself. For example, a defendant's prior conviction has to be mentioned and introduced during the guilt/innocence phase if the defendant is charged with Possession of a Handgun by a Convicted Felon.

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

IN CAMERA REVIEW

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

CHANGE OF LAW

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

The *procedural* law which applies to any given case, however, is governed by the rules of procedure which exist at the time of the trial, not at the time of the commission of the offense. *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky.1987). The latter part of KRS 446.110 says that, upon a change in law, "proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings."

KRS 446.110 also allows a defendant to opt-in to any new provision of law which reduces or mitigates any punishment: "If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provisions may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." In that case, the defendant needs to *file notice* of his "unqualified consent" to be sentenced under the new law. *Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky.2000). For example, a lot of death penalty defendants used this statute when life without the possibility of parole became a new sentencing option. *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky.2004), is another example. (*See also* "Ex Post Facto.")

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

NOTES

COMMONWEALTH, GENERALLY

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

CONDITIONAL PLEAS

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

CONTINUANCES

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

Continuances may be granted because the rules of discovery have not been followed, RCr. 7.24(9). *See also Mills v. Commonwealth*, 95 S.W.3d 838 (Ky.2003), in which the Commonwealth failed to disclose a witness to a robbery. In fact, in some cases they *must* be granted if requested. *See, e.g.*, *Anderson v. Commonwealth*, 63 S.W.3d 135 (Ky.2001), in which the Commonwealth did not provide medical reports until just before trial and disclosed complaining witness statements only at the end of the first day of trial. Continuances may also be granted if the indictment does not include the names of the witnesses who appeared before the grand jury, RCr 6.08, or when the court allows the Commonwealth to amend an indictment, RCr 6.16.

Unavailable Witness - When a continuance is sought because a witness is unavailable, RCr 9.04 requires that an affidavit be offered into the record stating what the testimony of the witness would have been and the due diligence the attorney has used in order to attempt to secure the witness. The Commonwealth can then agree or disagree to allow the affidavit into evidence. If the Commonwealth disagrees, the court may grant a continuance. Failure to grant a continuance is reviewed for abuse of discretion.

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

Waiver - Failure to request a continuance waives the issue. *Lefevers v. Commonwealth*, 558 S.W.2d 585 (Ky.1977). Failure to follow the requirements of the rule waives the issue. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky.2006), *corrected*. Failure to accept a court's offer to continue waives the issue. *Neal v. Commonwealth*, 95 S.W.3d 843 (Ky.2003). This is probably true even if the defendant is in custody and a continuance will only lengthen his time in jail. *U.S. v. Quinn*, 230 F.3d 862 (6th Cir.2000).

NOTES

CONTINUING OBJECTIONS

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

DAUBERT

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

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

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

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

An "ultimate issue" is, for example, whether the defendant's speeding was the cause of the accident, or whether the drugs in the defendant's possession were being held for sale. *See Commonwealth v. Alexander*, 5 S.W.3d 104, 106 (Ky.1999), *overruled by Stringer*, in which the expert was allowed to testify that the defendant's speed was the cause of the accident but the testimony did not invade the province of the jury when the jury could still have decided the defendant was not guilty because he was responding to an emergency and did not hear that the emergency call had been cancelled. The manner in which the expert can give his testimony is governed by KRE 705.

NOTES

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

In *Vires v. Commonwealth*, 989 S.W.2d 946 (Ky.1999), the Commonwealth's expert did not prepare a report. The Commonwealth had, however, turned over the results of his investigation and his testimony was based on that. So there was no reversible error. The court also ruled that the testimony of the Commonwealth's expert was not based on any undisclosed premise in *Milburn v. Commonwealth*, 788 S.W.2d 253 (Ky.1990) and *Collins v. Commonwealth*, 951 S.W.2d 569 (Ky.1997).

The Commonwealth was not required to provide the defendant with a list of the expert witnesses it intended to call when it provided the defendant with copies of the experts' reports, which plainly indicated the areas of their testimony and the science involved. *Tamayo-Mora v. Commonwealth*, 2005 WL 2318959 (Ky.2005), *unpublished*.

Admission of the testimony of a surprise expert was held to be harmless error in *Fisher v. Commonwealth*, 2005 WL 629011 (Ky.2005), *unpublished*, in which the defendant's own testimony mirrored that of the expert, and the one other thing the expert testified to was an obvious feature of the design of the firearm in question.

Parties are not required to disclose their experts in the absence of any written reports or findings. *See Brown v. Commonwealth*, 2005 WL 387437 (Ky.2005), *unpublished*, in which the Commonwealth was allowed to call a surprise expert witness on how to manufacture methamphetamine. The defendant failed to request the proper relief, which was a continuance. A defendant cannot be ordered to disclose the name of his expert in the absence of any written reports or findings. *Commonwealth v. Nichols*, 2007 WL 1723371 (Ky.App.2007), *unpublished.*

In *Jones v. Commonwealth*, 237 S.W.3d 153 (Ky.2007), the court ruled that although an expert should not be allowed to testify to an undisclosed premise, the defendant was not required to inform the Commonwealth that his expert intended to criticize the methods of the Commonwealth's DNA lab, when the defendant had complied with the rules of reciprocal discovery and the expert's testimony could have been anticipated by the Commonwealth.

RCr 7.24 requires only that the relevant reports be turned over in reciprocal discovery. RCr 7.24 does not require that a party also disclose the theories, research, studies, or literature upon which the expert's opinion will be based. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky.2006), *Collins v. Commonwealth*, 951 S.W.2d 569 (Ky.1997), *Jones v. Commonwealth*, 237 S.W.3d 153 (Ky.2007). Notes used to prepare reports are also not discoverable, *Cavender v. Miller*, 984 S.W.2d 848 (Ky.1998), *see also* RCr 7.24(2), unless they are used to refresh a witness' memory while the witness is testifying. In that case, KRE 612 requires the notes to be handed over to the adverse party.

Challenging Expert Testimony - Under *Daubert*, the burden of proving the scientific validity of the proposed evidence is on the proponent of the evidence. Nevertheless, the Kentucky Supreme Court took judicial notice of the scientific validity of a number of types of scientific inquiry in *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky.1999) (DNA, except for mitochondrial), and *Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky.1999) (microscopic hair comparison, breath testing to determine blood alcohol level, HLA blood typing in paternity tests, fiber analysis, ballistics analysis, fingerprint analysis). In the case of these types of testimony, the court need no longer hold a *Daubert* hearing, and the burden is on the challenger. See Susan Balliet, "Countering the So-Called 'CSI Effect'," *The Advocate*, vol. 29, no. 4, September, 2007, pp. 7-10.

NOTES

Counsel should continue to make Daubert challenges when necessary. In *Ragland v. Commonwealth*, 191 S.W.3d 569 (Ky.2006), *e.g.*, the case was remanded for retrial, in part, because the *Daubert* analysis conducted by the trial court did not include a consideration of the scientific reliability of the expert's conclusions regarding comparative bullet analysis. In *McIntire v. Commonwealth*, 192 S.W.3d 690 (Ky.2006), the defendant's conviction was reversed because the expert testified outside her range of expertise. The court ruled that she was not qualified to give an "expert" opinion to the effect that a non-abusing parent would have had to have been aware of the fact that the child was being abused. See also the developments in medical research which have caused some forms of shaken baby syndrome to be discredited, described in "Just Like Humpty Dumpty, Shaken Baby Syndrome Has Fallen Down," by Susan Balliet and Erin Yang, *The Advocate*, vol. 29, no. 5, November, 2007, pp. 17-19.

DEFENDANT IN SHACKLES

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

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

DEFENSE THEORIES, TYPES OF

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

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

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

DISCOVERY

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

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

NOTES

Officers and investigators are agents of the Commonwealth and any statements taken by them are in the possession of the Commonwealth, regardless of whether the Commonwealth's Attorney is personally aware of them. *Anderson v. Commonwealth*, 864 S.W.2d 909, 912 (Ky.1993). The prosecutor's duty of disclosure extends to evidence in the possession of the prosecutor, his investigators, and other state agencies as well. *Eldred v, Commonwealth*, 906 S.W.2d 694 (Ky.1995), *overruled on other grounds*.

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

RCr 7.26, which requires the Commonwealth to provide witness statements at least 48 hours prior to trial, is not reciprocal.

Neither party in a criminal action is required to disclose a witness list in pre-trial discovery. *King v. Venters*, 596 S.W.2d 721 (Ky.1980), *Lowe v. Commonwealth*, 712 S.W.2d 944 (Ky.1996). "It is our opinion that there is no authority for requiring a defendant to furnish such a list to the Commonwealth, and we are not entirely convinced that it would be free of constitutional difficulty." *King*, at 721. *See also Commonwealth v. Nichols*, 2007 WL 1723371 (Ky.App.2007), *unpublished*, for a full discussion. Nevertheless, a court may require a defendant to provide a witness list at trial, at the outset of voir dire, for the purpose of inquiring of the jurors if any of them were "close personal friends" or "related by blood or marriage" to any of the named witnesses. *Hardy v. Commonwealth*, 719 S.W.2d 727 (Ky.1986).

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

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

Brady - "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963), *see also Sweatt v. Commonwealth*, 550 S.W.2d 520 (Ky.1977). *Brady* material also includes impeachment evidence concerning prosecution witnesses. *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), *see also Mounce v. Commonwealth*, 795 S.W.2d 375 (Ky.1990). Where a specific request is made for information prior to trial, as in *Brady*, so long

NOTES

as there is a "substantial basis" for claiming that materiality exists, "the failure to make any response is seldom, if ever, excusable." *U.S. v. Agurs*, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976).

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

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

(See also "Experts and Discovery" under "Daubert," *supra*.)

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

EX PARTE HEARINGS

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

EX POST FACTO

An ex post facto violation ocurrs when a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect of which is to deprive him of due process of law in the sense of being given fair warning that his contemplated conduct constitutes a crime. *Tharp v. Commonwealth*, 40 S.W.3d 356 (Ky.2000). *See also Purvis v. Commonwealth*, 14 S.W.3d 21 (Ky.2000). Nevertheless, if the court can construe the law as not *adding additional punishment*, this protection does not exist. For example, requiring registration and notification

NOTES

under the Sexual Offender Registration Act, for an offender who at the time of his offense was not required to register, does not disadvantage the offender to such a degree that retroactive application of the Act constitutes an improper ex post facto application of law; the designation of a sexual predator is not a sentence or punishment but simply a status resulting from a conviction of a sex crime, the purpose of the Act is remedial rather than punitive, and registration and notification under the Act impose only the slightest inconvenience to the offender but further the overwhelming public policy objective of protecting the public. *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky.2002).

NOTES

INDICTMENTS

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

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

For an indictment to be sufficient, "the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Schrimsher*, 325, quoting *Hamling v. U.S.*, 418 U.S. 87, 117-18, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590 (1974).

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

An indictment can therefore omit the signature of the foreman of the grand jury, RCr 6.06, omit the names of the witnesses who appeared in front of the grand jury, RCr 6.08, get the caption wrong, RCr 6.10(1), get parts of the description of the offense wrong, RCr 6.10(2), contain the wrong KRS citation for the offense charged, RCr 6.10(3), or omit the date the indictment was returned in open court RCr 6.10(4). Generally speaking, pursuant to RCr 6.12 none of these defects require the dismissal of the indictment. *See, e.g.*, Abramson, *Kentucky Practice*, Vol. 8, 4th Ed., Sections 12:11 and ff. (West: 2003) pp. 312-318.

Substantive Defects – Nevertheless, it is still possible for indictments to be defective in ways which might require a remedy from the court. For example, if the indictment does not name the time, place, or alleged victim, or if it is scanty with regards to the facts alleged by the Commonwealth, then the court should grant a Bill of Particulars under RCr 6.22. *Thomas v. Commonwealth*, 931 S.W.2d 446, 450 (Ky.1996). Since indictments are no longer fact pleadings but merely abbreviated notice pleadings, when a defendant requests a Bill of Particulars, he should be supplied freely with the details of the charges so he can prepare his defense. *Finch v. Commonwealth*, 429 S.W.2d 146 (Ky.1967).

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

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

Charges Barred by Double Jeopardy – For example, a person cannot be charged with both Forgery and Possession of a Forged Instrument, for the same instrument. KRS 516.080. Or, one charge might be a lesser included charge of another, both for the same act. *See* KRS 505.020 and *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky.1996). Or the defendant may have already pled to an amended misdemeanor in district court. *Commonwealth v. Karnes*, 675 S.W.2d 583 (Ky.1983).

Double-Enhancement – Double enhancement is a sub specie of double jeopardy violations. A common example is the case of a defendant charged with both Possession of a Handgun by a Convicted Felon and also with PFO 2nd. Each offense requires proof of at least one prior felony conviction. The principle of double-enhancement says that, in order to sustain convictions on *both* charges, the prosecution would have to prove that the defendant had *two separate* prior convictions. To prove both the handgun charge and the PFO charge with a single prior conviction, and in the same proceeding, would be "double-enhancement." *Jackson v. Commonwealth*, 650 S.W.2d 250 (Ky.1983), *Eary v. Commonwealth*, 659 S.W.2d 198 (Ky.1983), *O'Niel v. Commonwealth*, 114 S.W.3d 860 (Ky.App.2003). If the indictment indicates that the Commonwealth does not have the sufficient number of prior felonies to prosecute both charges, the PFO will have to be dismissed. Remember too that, under the PFO statute, some prior felonies can merge into a single prior conviction, thus reducing the number of prior convictions available to the Commonwealth even more. KRS 532.080(4).

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

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

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

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

NOTES

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

In *Wolbrecht v. Commonwealth*, 955 S.W.2d 533 (Ky.1997), the Commonwealth, in both the indictment and in its Bill of Particulars, had alleged that the defendants had actually killed the victim, then amended the indictment to allege that the defendants had been accomplices of some unknown shooter. The Kentucky Supreme court reversed the conviction, citing *Stirone*. *See also Commonwealth v. Ellis*, 118 S.W. 973 (Ky.1909), quoted in *Wolbrecht*, for the proposition that a defendant has the right to rely on the fact that he will only have to rebut evidence of which he was given notice.

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

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

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

Proof at Trial - In cases of indictments charging multiple offenses over a relatively long period of time, such as sexual abuse over a period of years, remember that when multiple offenses are charged in a single indictment, the Commonwealth must introduce evidence sufficient to prove each offense and also to differentiate each count from the others. *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky.2002). *See also Valentine v. Vonteh*, 395 F.3d 626, 634-35 (6th Cir.2000), in which the court described each charge as a "carbon copy" of the other, and thus held that the indictment had not given the defendant adequate notice.

In each of these cases, the alleged victim described a "typical" act of abuse and then simply estimated how many times it supposedly occurred. In such circumstances, one might also argue that a corollary of the requirement that multiple charges be differentiable is the requirement that, in order to be competent to testify, a witness needs to have a distinct memory of each event as a separate event. *See, e.g., Cranmer v. Commonwealth*, 2003 WL 21990216 (Ky.2003), *unpublished*, in which it was error to allow the victim in a vehicular assault case, and who had no recollection of what had happened in the accident, to testify nevertheless that it was his habit to turn his headlights on at night and to use his turn signal.

NOTES

LIMITING INSTRUCTIONS

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

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

Effect on Prosecution - The important thing to remember about limiting instructions is that they also restrict the kind of argument the prosecutor can make in closing. The prosecutor will have to confine his remarks on that evidence to the purpose for which it was introduced. "[L]awyers are obligated to use such evidence only for its proper purpose during the course of a trial. For example, evidence admitted only for credibility but not a substantive purpose must be used in closing argument only in relationship to the credibility of witnesses." Robert Lawson, *The Kentucky Evidence Law Handbook*, 4th ed., Lexis-Nexis: 2003, § 1.05[5], p. 28. *See, e.g., Zogg v. O'Bryan*, 237 S.W.2d 511 (Ky.1951). Without an instruction, however, the evidence is admitted "without limitation." KRE 105(a).

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

MISTRIAL

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

NOTES

MOTIONS IN LIMINE

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

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

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

Lanham v. Commonwealth, 171 S.W.3d 14 (Ky.2005). *See, e.g., Tucker v. Commonwealth*, 916 S.W.2d 181 (Ky.1996), *overruled by Lanham*, in which it was held that making a motion in limine to exclude KRE 404(b) evidence did not suffice to preserve all the issues arising from that evidence. The motion in limine did not specifically object to some of the details of the uncharged crime which were presented at the trial, and when there was no contemporaneous objection to those details, the Court held the issue unpreserved.

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

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

NOTICE OF DEFENSES

KRS 500.070(2) says simply, "No court can require notice of a defense prior to trial time." Important exceptions include reciprocal discovery obligations under RCr 7.24, rape shield under KRE 412, and mental health defenses under KRS 504.070.

RCr 7.26, which requires the Commonwealth to provide witness statements at least 48 hours prior to trial, is not reciprocal.

Neither party in a criminal action is required to disclose a witness list in pre-trial discovery. *King v. Venters*, 596 S.W.2d 721 (Ky.1980), *Lowe v. Commonwealth*, 712 S.W.2d 944 (Ky.1996). "It is our opinion that there is no authority for requiring a defendant to furnish such a list to the Commonwealth, and we are not entirely convinced that it would be free of constitutional difficulty." *King*, at 721. *See also Commonwealth v. Nichols*, 2007 WL 1723371 (Ky.App.2007), *unpublished*, for a full discussion. Nevertheless, a court may require a defendant to provide a witness list at trial, at the outset of voir dire, for the purpose of inquiring of the jurors if any of them were "close personal friends" or "related by blood or marriage" to any of the named witnesses. *Hardy v. Commonwealth*, 719 S.W.2d 727 (Ky.1986).

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

NOTES

PRE-TRIAL MOTIONS, GENERALLY

NOTES

Motions Which Must Be Made Before Trial – The Rules of Criminal Procedure distinguish between motions which *may* be made before trial and those which *must* be made before trial. According to the commentary to the rules, this distinction is based on Federal Rule of Criminal Procedure 12(b)(2)&(3). RCr 8.16 is permissive, and was meant to include the kinds of motions which were formerly *demurrers* under the old Code of Practice in Criminal Cases (Cr.C.), which was abolished on January 1st, 1963 when the current rules took effect. On the other hand RCr 8.18 is mandatory, and was meant to encompass what were formerly *motions to set aside or quash* the indictment. Therefore, RCr 8.18 requires that any motion which is "based on defects in the institution of the prosecution or in the indictment or information" must be made before trial. (See also RCr 9.34, which requires that, "A motion raising an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors." This rule also applies to the formation of a grand jury. *Commonwealth v. Nelson*, 841 S.W.2d 628 (Ky.1992).)

Motions Prior to Entering a Plea - RCr 8.20 says: "Time of Making Motion. The motion raising defenses or objections shall be made *before the plea is entered*, but the court may permit it to be made within a reasonable time thereafter without withdrawal of the plea." Because of this rule, at arraignment some attorneys explicitly reserve the right to make further motions after entering the plea, as if the rule covered all motions a defendant might make and a defendant has to reserve the right to make the motions or the right is waived. Nevertheless, the practice of reserving all defense motions after arraignment is unnecessary. The rule refers only to motions to quash the indictment.

"*The* motion raising defenses or objections" in RCr 8.20 is the motion "based on defects in the institution of the prosecution or in the indictment or information" in RCr 8.18. RCr 8.20 is a direct reflection of the old Criminal Code, and a vestige of the time when indictments were "fact pleadings." If one reviews the original commentary to the rules, one finds that RCr 8.20 is based on Cr.C. 157 and 158. Under those sections, a defendant at arraignment would have to either enter a plea *or* move to quash the indictment. The motion to quash the indictment had to be made *before entering a plea*. Failing to do so would waive the issue. *See*, *e.g.*, *Sloan v. Commonwealth*, 277 S.W. 488 (Ky.1925). So "the motion raising defenses or objections" in RCr 8.20 is a motion to quash the indictment, and the rule simply reflects the requirements of the old Criminal Code. Furthermore, note that the motion is not waived by failure to make it prior to entering a plea. It is only waived if not made prior to trial, RCr 8.18.

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

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

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

Competency – Competency hearings are mandatory once the defendant has raised the issue. It is a denial of the constitutional right to a fair trial for the trial court to refuse to hold a hearing. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

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

A court is not required to raise the issue of competency *sua sponte*. *See, e.g., Gibbs v. Commonwealth*, 208 S.W.3d 848 (Ky.2006).

Challenges to Constitutionality – CR 24.03 states, "When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney-General." See also KRS 418.075. Failure to follow this requirement may preclude appellate review of the constitutionality of the statute itself, but should not preclude review of whether the statute was unconstitutionally applied to a defendant. *See Crowley v. Lilly*, 2003 WL 21040256 (Ky.App.2003), *unpublished*, citing *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App.2002).

Jurisdiction – Pursuant to RCr 8.18, the two motions which can be made anytime, even after a trial, are motions to dismiss based on lack of jurisdiction and on failure of the indictment to charge an offense.

Recusal – *Judge*. "KRS 26A.015(2) requires recusal when a judge has 'personal bias or prejudice concerning a party' or 'has knowledge of any other circumstances in which his impartiality might reasonably be questioned.' KRS 26A.015(2)(a) and (e), *see* SCR 4.300, Canon 3C(1). The burden of proof required for recusal is an onerous one. There must be a showing of facts 'of a character calculated seriously to impair the judge's impartiality and sway his judgment.' *Foster v. Commonwealth*, Ky., 348 S.W.2d 759, 760 (1961), *cert. denied*, 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962), *see also Johnson v. Ducobu*, Ky., 258 S.W.2d 509 (1953). The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal. *Webb v. Commonwealth*, Ky., 904 S.W.2d 226 (1995)." *Stopher v. Commonwealth*, 57 S.W.3d 787, 794-95 (Ky.2001).

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

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

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

Prosecutor. See KRS 15.733. Prosecuting attorneys are subject to public reprimand when they enter into contingency fee agreements to pursue civil actions against individuals they are simultaneously prosecuting on criminal charges. *K.B.A. v. Marcum*, 830 S.W.2d 389 (Ky.1992).

Disqualification on retrial following remand was proper when the defendant's attorney subsequently joined the Commonwealth Attorney's office. *Brown v. Commonwealth*, 892 S.W.2d 289 (Ky.1995).

NOTES

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

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

Perhaps the most common problems requiring severance are those which have to do with issues surrounding the U.S. Supreme Court holdings in *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Under both opinions, statements may be admissible against one co-defendant but not against another. If the Commonwealth really wants to use the statement, it might require severance. *See Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky.2006), in which it was reversible error to refuse a motion to sever when the court ruled to admit evidence to impeach the defendant, in violation of *Crawford v. Washington*.

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

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

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

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

NOTES

Suppression Hearing – A motion for a suppression hearing can be made virtually any time before the evidence is actually introduced at trial, even if the trial has already begun. RCr 9.78. The hearing should be held outside the hearing of the jury. KRE 104(c), *see also Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and RCr 9.78. The preferred practice is for the court to make a ruling at the suppression hearing rather than postponing the ruling for trial. *See Hayes v. Commonwealth*, 175 S.W.3d 574, 595-96 (Ky.2005), in which it was prejudicial error to refuse to rule on the defendant's suppression motion.

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

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

Practice Tip: Suppression Hearings. RCr 9.78 requires an evidentiary hearing. Make sure the facts surrounding the search go into the record, even if the defendant and the Commonwealth both stipulate to the same facts. Hearings which do not reflect the factual basis of the suppression issue, as it was presented to the trial court, leave appellate courts with nothing to rule on. You must object to not holding an evidentiary hearing. *Commonwealth v. Jones*, 217 S.W.3d 190 (Ky.2006), *Lewis v. Commonwealth*, 42 S.W.3d (Ky.2001).

Unpublished Opinions – Effective January 1, 2007, CR 76.28(4) was amended to say: "...unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action."

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*, 438 S.W.2d 783 (Ky.1969). A motion for change of venue must comply with KRS 452.210 and KRS 452.220. Make sure that the petition is verified and accompanied by at least two affidavits. Also, make sure that the request for a change of venue is made in a timely manner, with notice to the Commonwealth. *See Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky.1999), *Whitler v. Commonwealth*, 810 S.W.2d 505 (Ky.1991) and *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky.1991). According to *Thompson v. Commonwealth*, 862 S.W.2d 871 (Ky.1993), a motion filed two days before trial is not timely. The motion must be renewed after voir dire. *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky.2000).

RIGHT TO TRIAL

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

NOTES

STIPULATIONS

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

Stipulating to issues the opponent is not prepared to prove – Be aware that stipulating to part of the Commonwealth's case will have the effect of waiving that issue on appeal. *See, e.g., Harris v. Commonwealth*, 2007 WL 3226193 (Ky.2007), *unpublished,* in which the defendant who stipulated to chain of custody could not later raise the issue on appeal.

Stipulating to issues the opponent is prepared to prove – Sometimes attorneys attempt to stipulate to an issue in order to keep an opponent's evidence out. The theory is that once a party stipulates to an issue, the production of further evidence on the issue is just cumulative, and therefore more prejudicial than probative under KRE 403. *See Old Chief v. U.S.*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), in which the U.S. Supreme Court held that it was reversible error for the trial court to refuse the defendant's stipulation to the prior conviction element of the charged offense and to then allow the prosecution to show not only the fact of the prior offense, but the specific nature of it as well.

Remember, however, that the Commonwealth does not have to accept a stipulation: "the prosecution is permitted to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the case that he does not want the jury to see." *Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003), quoting *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky.1998). Moreover, if the Commonwealth does not accept the offer to stipulate, the mere fact that the defendant *offered* to stipulate will not preserve an error under KRE 403. *Johnson,* at 439. (As David Niehaus points out in DPA's *Evidence Manual,* 5th ed., *The Advocate*, vol. 27, no. 4, Summer 2005, p. 22: "*Old Chief* is not a constitutional opinion and therefore is not binding on Kentucky Courts. The Kentucky Supreme Court has little patience for this argument." (Citing *Johnson, supra.)* He concludes: "It is unlikely to prevail on appeal.... The place to make and win this argument is at the trial level.")

SUBPOENAS

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

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

It is an abuse of subpoena power to compel a witness in a criminal case to attend pretrial interviews in the attorney's office. Subpoenas can only be used to require a witness's attendance at a formal judicial proceeding. "The government may not use trial subpoenas to compel prospective trial witnesses to attend pretrial interviews with government attorneys." *Hillard v. Commonwealth*, 158 S.W.3d 758, 764 (Ky.2005), quoting *U.S. v. LaFuente*, 991 F.2d 1406, 1411 (8th Cir.1993). See also Ethics Opinion E-423 (OPINION) adopted by the KBA Board of Governors in January 2004 and published in the March 2004 issue of the Kentucky Bench and Bar, amended by *Stengel*, below.

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It is an abuse of subpoena *duces tecum* power to compel the production of documentary or other tangible objects to the office of an attorney when other parties receive no notice and the issuance of the subpoena was not in connection with a deposition or court proceeding, requiring sanctioning with a public reprimand. *Megibow v. K.B.A.*, 173 S.W.3d 618 (Ky.2005). CR 45.01 states: "Subpoenas may not be used for any purpose except to command the attendance of the witness and production of documentary or other tangible evidence at a deposition, hearing or trial."
See also Ethics Opinion E-423.

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

PRESERVING A CLEAR RECORD ON APPEAL

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

II. THE JURY

PROCEDURE FOR SELECTING A JURY POOL

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

Failure to Follow the Procedure – This can require dismissal of the indictment when it involves a grand jury, *Gill v. Commonwealth*, 374 S.W.2d 848 (Ky.1964), *Fugate v. Commonwealth*, 233 S.W.2d 1019 (Ky.1950), or the granting of a new trial when it involves a petit jury, *Williams v. Commonwealth*, 71 S.W.2d 626 (Ky.1934).

RCr 9.34 requires that, "A motion raising an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors." This rule applies to grand juries as well as petit juries. *Commonwealth v. Nelson*, 841 S.W.2d 628 (Ky.1992). The exception is when the defendant could not have discovered the irregularities by due diligence prior to the time of trial. *Allen v. Commonwealth*, 901 S.W.2d 881 (Ky.App.1995), *Bartley v. Loyall*, 648 S.W.2d 873 (Ky.App.1982).

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

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

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

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

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

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

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

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

NOTES

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

CHECKLIST FOR INVESTIGATING A JURY PANEL

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

OTHER OBJECTIONS TO THE JURY PANEL

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

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

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

NOTES

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

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

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

Juror Also a Witness in the Case - In *Hellard v. Commonwealth*, 829 S.W.2d 427 (Ky.App.1992), *overruled on other grounds*, the defendant was charged with theft by deception and forgery based on a forged rental agreement with a video store. The owner of the video store was a member of the jury pool. The defendant moved for a continuance of her trial until a new jury pool was called. The Kentucky Court of Appeals held that, even though the issue had not been preserved, it was palpable error for the trial court to deny the motion for continuance because the "possibility of a jury according the testimony of a witness greater weight than it otherwise would have received is just too great when the witness is a member of the same jury pool." Furthermore, the court did "not feel that Hellard was required to show bias or prejudice under these circumstances." *Id.* at 429. Compare, *Colwell v, Commonwealth*, 37 S.W.3d 721 (Ky.2001), in which the complaining witness was also a member of the jury pool but no reversible error ocurred because the witness was excused before the day of trial and therefore did not mingle with other jurors prior to trial.

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

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

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

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

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

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

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

Jurors Served in a Previous Trial of the Same Defendant – Members of the jury panel who served as jurors in previous trials of the defendant must be disqualified and excused. *Gossett v. Commonwealth*, 426 S.W.2d 485 (Ky.1968). Members of the jury panel who had been empanelled to try the defendant on another charge the previous day, and others who had been in the courtroom during that trial, should have been struck for cause. *Brumfield v. Commonwealth*, 374 S.W.2d 499 (Ky.1964).

CALLING JURORS FROM THE POOL

RCr 9.30 describes the process used for the selection of the jury at trial. The specific procedure for calling names in a random way can be found at APCJ II, Sec. 10. Pursuant to RCr 9.30(2), "The jury selection process shall be conducted in accordance with Part Two (2) of the Administrative Procedures of the Court of Justice." The procedure used to be in KRS 29A.060(2), but the statute was amended in 2002. Failure to substantially follow the proper procedure requires automatic reversal, and no prejudice need be shown. *Robertson v. Commonwealth*, 597 S.W.2d 864 (Ky.1980). *See also Bartley v. Loyall*, 648 S.W.2d 873, 874-75 (Ky.App.1982), which held it was reversible error for the clerk to try to equalize the workload by calling the numbers of jurors who had participated in fewer cases before calling the numbers of jurors who had participated in more cases. Remember, too, that RCr 9.34 requires an objection to be made before voir dire.

NUMBER OF JURORS

KRS 29A.280(2) provides for 6 jurors in District Court and 12 jurors in Circuit Court. However, a defendant may agree to have fewer than 12 jurors in Circuit Court, down to as few as 6.

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

III. VOIR DIRE

NOTES

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

Although there is no statutory right to conduct voir dire in Kentucky, "part of the guarantee of a defendant's Sixth Amendment right to an impartial jury is an adequate voir dire to identify unqualified jurors. A voir dire examination must be conducted in a manner that allows the parties to effectively and intelligently exercise their right to peremptory challenges and challenges for cause." *Hayes v. Commonwealth*, 175 S.W.3d 574, 584 (Ky.2005), quoting *Morgan v. Illinois*, 504 U.S. 719, 729-30, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992).

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

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

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

Voir Dire on Reasonable Doubt – Reasonable doubt can no more be defined in voir dire than in opening statements or closing arguments. *Marsch v. Commonwealth*, 743 S.W.2d 830 (Ky.1988), *Commonwealth v. Callahan*, 675 S.W.2d 391 (Ky.1984). Nevertheless, for the Commonwealth to point out that "beyond a reasonable doubt" is different from "beyond a shadow of a doubt" is not an attempt to define reasonable doubt. It is, rather, simply to point out the obvious. *Howell v. Commonwealth*, 163 S.W.3d 442 (Ky.2005). On the other hand, "It is proper for a defendant to inform jurors in voir dire that the Commonwealth's burden of proof is 'beyond a reasonable doubt' and to inquire whether they will hold the Commonwealth to that burden." *Hayes v. Commonwealth*, 175 S.W.3d 574, 587 (Ky.2005).

However, the use of an analogy *is* an attempt to define reasonable doubt, and it violates the 14th Amendment safeguard "against the dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *See, e.g., Rice v. Commonwealth*, 2006 WL 436123 (Ky.2006), *unpublished*, in which the prosecutor used the example, during voir dire, of deciding to marry someone. *See also Marsch, supra*, in which the prosecutor, during voir dire, used the example of himself as a hypothetical witness to an auto accident. "In all those cases [where this court found an impermissible attempt to define 'reasonable doubt'], some

attempt was made to use other words to convey to the jury the meaning of 'beyond a reasonable doubt'" *Howell, supra,* at 447, quoting *Simpson v. Commonwealth*, 759 S.W.2d 224, 226 (Ky.1988).

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

TIMING OF STRIKES FOR CAUSE

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

STRIKES FOR CAUSE, GENERALLY

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

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

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

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

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

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

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

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STRIKES FOR CAUSE, EXAMPLES

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

Juror Has Formed Opinion Regarding Guilt - *Neace v. Commonwealth*, 230 S.W.2d 915 (Ky.1950), *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky.1992), *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky.1993).

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

The following is meant to be illustrative but not exhaustive.

Juror Has A Close Relationship With a Party:

- Juror discussed the case with a relative of the victim. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky.1993).
- Married to a person who was a second or third cousin of the victim. *Marsch v. Commonwealth*, 743 S.W.2d 830 (Ky.1987).
- First cousin to victim. *Pennington v. Commonwealth*, 316 S.W.2d 221 (Ky.1958).
- Juror's mother was a first cousin to victim's mother. *Leadingham v. Commonwealth*, 201 S.W. 500 (Ky.1918).
- Juror's wife was a second cousin of defendant. *Smith v. Commonwealth*, 734 S.W.2d 437 (Ky.1987).
- But *see George v. Commonwealth*, 885 S.W.2d 938 (Ky.1994), where the Court held that no error occurred when the trial court allowed a juror to remain on the jury after she realized during testimony that she was the victim's third cousin.

Juror Has A Close Relationship With a Witness:

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

NOTES

Juror Has A Close Relationship With Attorney:

- Prospective and actual jurors who had previously been represented by the prosecutor and who stated they would seek out such representation in the future (although attorney/client relationship does not automatically disqualify a juror). *Fugate v. Commonwealth*, 993 S.W.2d 931, 938 (Ky.1999), *Riddle v. Commonwealth*, 864 S.W.2d 308 (Ky.1993).
- Juror knew both the Commonwealth Attorney and the chief investigating officer in the crime. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky.1993).
- Juror had business dealings with the prosecution. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky.1993).
- Juror's wife and the prosecutor were first cousins by marriage (however, relationship by blood and affinity are treated the same for purposes of juror disqualification). *Thomas v. Commonwealth*, 864 S.W.2d 252, 256-7 (Ky.1993).
- Uncle of the Commonwealth Attorney. *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky.1985).
- Secretary of the Commonwealth Attorney. Position gave rise to a loyalty to employer that would imply bias. *Randolph v. Commonwealth*, 716 S.W.2d 3 (Ky.1986), *overruled on other grounds*.
- Manager of an ambulance service, which had a contract with the Ambulance Board for which the prosecutor was the attorney, and who had been asked as manager of the Ambulance Board to participate in the search for the defendants (who were charged with escape) and who had been held hostage in a previous escape. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (1992).
- County attorney at the time of the defendant's preliminary hearing. *Godsey v. Commonwealth*, 661 S.W.2d 2 (Ky.App.1983).
- Juror was being represented by the prosecutor on a legal matter at the time of trial. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky.1992).
- Prosecutor was cousin's son-in-law. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky.1992).
- But *see Sholler v. Commonwealth*, 969 S.W.2d 706, 709 (Ky.1998), wherein the trial court did not abuse its discretion in refusing to dismiss for cause a potential juror who knew the Commonwealth attorney through mutual friends and their mutual membership in a large card club.

Juror Has Other Biases:

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

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REHABILITATING BIASED JURORS

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

Where potential jurors' attitudes and past experiences created a reasonable inference of bias or prejudice, their affirmative responses to the "magic question" did not eradicate the bias and prejudice. *Alexander v. Commonwealth*, 862 S.W.2d 856, 865 (Ky.1993), *overruled on other grounds*.

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

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

PEREMPTORY STRIKES

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

However, *Morgan* was itself overruled on December 20, 2007 in *Shane v. Commonwealth*, 2007 WL 4460982 (Ky.2007), *to be published, not yet final*. So the *Thomas* rule is once again the law: being forced to use a peremptory challenge on a juror who should have been struck for cause is a denial of the full use of a defendant's peremptory strikes and, as such, is reversible error *per se*.

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

Additional peremptories are required when alternate jurors are seated and also when co-defendants are tried together. RCr 9.40(1),(2), and (3). When alternates are seated, there is one more strike *per side* and also one more *per defendant*. In addition, when co-defendants are tried together the defense gets one more defense strike for each co-defendant, to be exercised independently of any other defendant.

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

	"per side"		"per defendant"	
	pros.	def.	co-def 1	co-def 2
normally	8	8		
w/altern.	1	1	1	1
co-defs			1	1

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

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

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

BATSON CHALLENGES

The Equal Protection Clause of the 14th Amendment prohibits the discriminatory use of peremptory strikes in order to exclude members of a cognizable minority from participation in jury service. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Batson applies to both prosecutors *and* defendants. *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky.App.1998).

"[A] criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." *Powers v. Ohio*, 499 U.S. 400, 401, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Batson challenges can also be made to peremptory strikes which are discriminatory on the basis of gender. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky.App.1998). (*Hannan v. Commonwealth*, 774 S.W.2d 462 (Ky.App.1989), which says that *Batson* does not apply to gender discrimination in the use of jury strikes, was decided *before J.E.B.*)

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

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

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

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

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

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

NOTES

CHECKLIST FOR STRIKING JURORS

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

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

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

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

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

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

If you choose to use your peremptory challenges to remove jurors who should have been struck for cause, put into the record that you are doing so, and state by name the jurors you would have used the peremptories on, if you had not had to use them on the jurors who should have been struck for cause. Or write the names on a note and have it entered into the record. Ask for additional peremptory challenges in order to be able to use your peremptories in the way they were intended. This will preserve the issue for review.

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

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

NOTES

EXERCISING PEREMPTORIES

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

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

SWEARING OF THE JURY

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

IV. THE COMMONWEALTH'S CASE

ORDER OF TRIAL

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

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

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

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

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ANNOUNCING "READY"

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

SEPARATION OF WITNESSES

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

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

Other witnesses however, including victims, must meet the "essential to the presentation of the case" exception under (3) and generally should not be allowed to remain in the courtroom during testimony. *See Justice v. Commonwealth*, 987 S.W.2d 306 (Ky.1998), and especially *Mills v. Commonwealth*, 95 S.W.3d 838 (Ky.2003), in which it was ruled prejudicial error to allow the victim to remain in the courtroom when the victim was the only witness to the robbery, his credibility was crucial, and listening to the other Commonwealth's witnesses describe the perpetrators and the details of the robbery allowed the victim to take the stand with a completely refreshed memory.

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

Counsel is free to talk to his or her own witnesses, but it is a violation of the rule to communicate to witnesses who are yet to testify what the testimony of other witnesses has been. *Smith v. Miller*, 127 S.W.3d 644 (Ky.2004).

READING THE INDICTMENT

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

PROSECUTION THEORY OF THE CASE

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

See also Stumpf v. Mitchell, 367 F.3d 594 (6th Cir.2004), *overruled on other grounds by Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398. 162 L.Ed.2d 143 (2005), in which it was ruled a due process violation for a prosecutor to use two conflicting theories concerning the identity of the shooter to convict both the defendant and his accomplice in two separate proceedings.

Note that a *defendant* cannot alternatively argue two mutually exclusive theories of defense, such as self-defense and accident. *Grimes v. McAnulty*, 957 S.W.2d 223 (Ky.1998).

PROSECUTION OPENING STATEMENT

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

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

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

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

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

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

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

Computer Generated Visual Evidence - *Demonstrative* computer generated visual evidence (CGVE) usually consists of still images or animation which merely illustrates a witness' testimony, while *substantive* CGVE usually consists of computer simulations or recreations which are preared by experts and which are based on mathematical models in order to recreate or reconstruct an accident or event. The admissibility of CGVE is analyzed in the same way as hand-drawn diagrams or photographically created evidence; it has to be relevant, is subject to exclusion on grounds of prejudice, confusion, or waste of time, is subject to the trial court's discretion over the mode and order of presentation of evidence, has to be authenticated by testimony of a witness that he or she has personal knowledge of the evidence's subject matter, and that the evidence is accurate. CGVE which is merely illustrative of a witness' testimony does not normally depend for admission on testimony as to how the data was gathered or put into the computer. *Gosser v. Commonwealth*, 31 S.W.3d 897 (Ky.2000).

NOTES

PROSECUTION WITNESSES

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

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

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

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

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

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

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

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

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

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

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

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

Commonwealth's witness was improperly allowed to testify while holding a Bible. *Brown v. Commonwealth*, 983 S.W.2d 513 (Ky.1999).

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

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

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

Habit Evidence – Prosecution witnesses should not be allowed to testify to the habits or routines of a certain class of people in order to show that the defendant acted in the same way. What other people usually do is not evidence of what the defendant did. For example, it was reversible error for the prosecution's witness to testify that the defendant matched the profile of a pedophile. "Profile" evidence is inadmissible in any criminal case to prove either guilt or innocence. *Dyer v. Commonwealth*, 816 S.W.2d 647, 652 (Ky.1991), *overruled on other grounds. See also Tungate v. Commonwealth*, 901 S.W.2d 41, 43 (Ky.1995) and *Pendleton v. Commonwealth*, 685 S.W.2d 549, 553 (Ky.1985). Likewise, it was error to admit testimony that methamphetamine users are usually skinny and that 85% of them also use the product. *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky.2005), and reversible error to allow testimony that 90% of all abused children delay the reporting of the abuse. *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky.2002). Finally, it was error to solicit evidence that coal truck drivers run red lights and blow their horns, implying that the defendant, a coal truck driver, acted likewise. *Johnson v. Commonwealth*, 885 S.W.2d 951, 953 (Ky.1994).

NOTES

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

Charts – Admission of a chart drawn by an absent informant was hearsay and reversible error. Cross-examination of the witness concerning the hearsay did not waive the objection to the admission of the evidence. *Salinas v. Commonwealth*, 84 S.W.3d 913 (Ky.2002). It was error for the court to admit into evidence police-created crime scene reconstruction diagrams through the testimony of an officer who had not been present at the scene at the time of the shooting and thus did not have personal knowledge of the locations of persons and items represented in the diagram. His testimony was investigative hearsay. *Gosser v. Commonwealth*, 31 S.W.3d 897 (Ky.2000).

OBJECTIONS

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

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

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

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

NOTES

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

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

Request Relief - If an objection is overruled, the contemporaneous objection (see RCr 9.22) preserves the issue on appeal. On the other hand, if an objection is sustained, there is no further issue preserved for appeal unless the defendant also then requests a mistrial or admonition which is then denied. "An admonition is appropriate only if the objection is sustained." *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky.2002). "In the absence of a request for further relief, it must be assumed that appellant was satisfied with the relief granted, and he cannot now be heard to complain." *Baker v. Commonwealth*, 973 S.W.2d 54, 56 (Ky.1998). "[M]erely voicing an objection, without a request for a mistrial or at least an admonition, is not sufficient to establish error once the objection is sustained." *Hayes v. Commonwealth*, 698 S.W.2d 827, 829 (Ky.1985). The exact same situation obtains when a trial court offers an admonition and the defendant declines to accept it – it is the same as never asking for one. So request further relief!

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

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

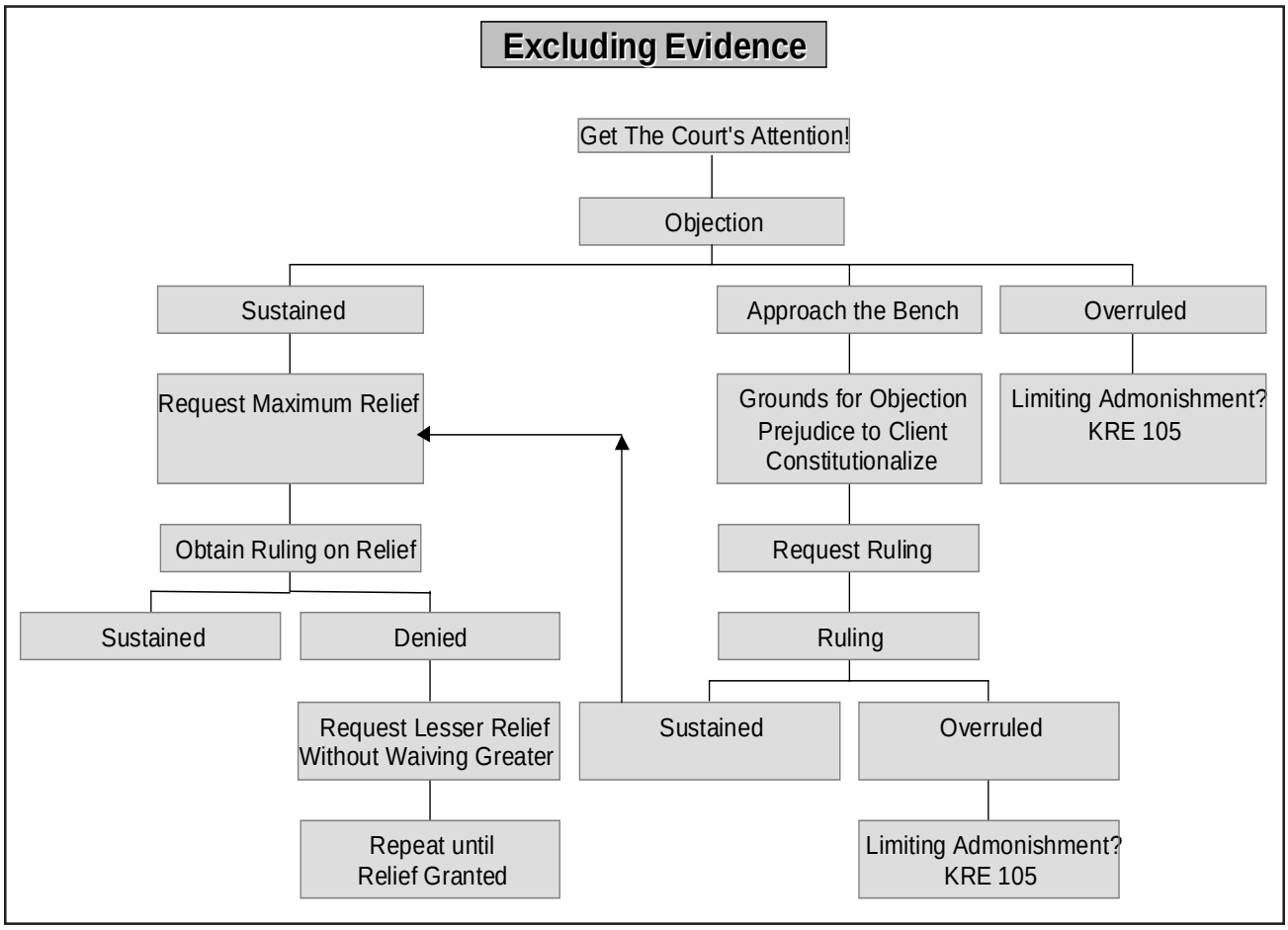
Judge's Job at Trial – As David Niehaus says in the *Evidence Manual*, 5th ed., p. 51, "Under the rules [of evidence], a judge is something more than an umpire waiting to be called upon to resolve an evidentiary dispute." Aside from ruling on the order, mode of presentation, and admissibility of evidence, the two main duties of a trial judge, according to the Kentucky Rules of Evidence, are to: (1) help the jury find the truth, KRE 102 and 611(a)(i), and (2) make sure the jury is not misled or confused, KRE 403. Either of these can always serve as the grounds for an objection.

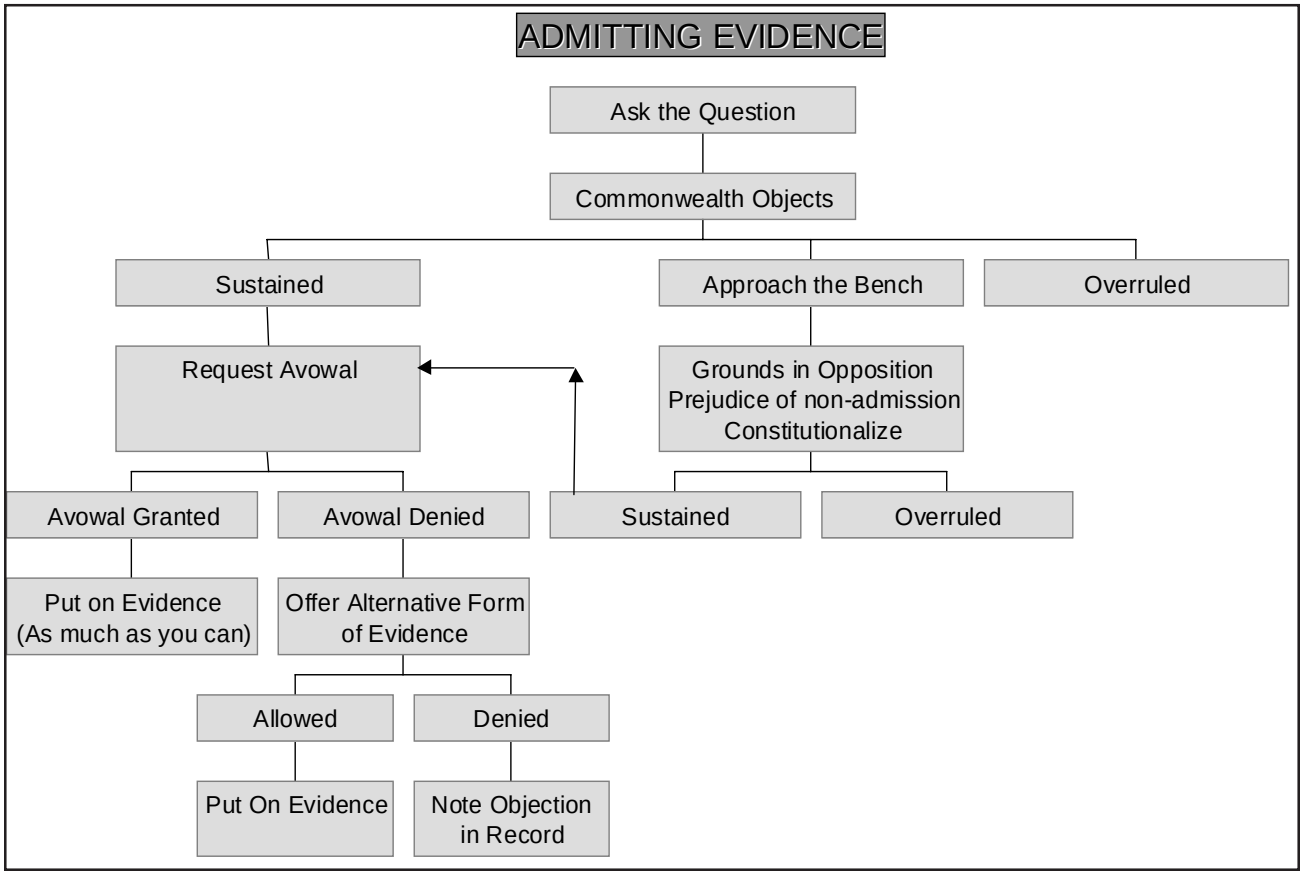
Constitutional Grounds – Failure to constitutionalize your grounds for objection could mean that your client may some day be barred from appealing to the Federal District Court or the U.S. Supreme Court. In order to appeal to either of those courts, the defendant will have to be able to show that the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

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

NOTES

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 34 (1960) *Holbrook v. Knopf*, Ky., 847 S.W. 2d 52 (1993) *Colbert v. Commonweal*th, Ky., 43 S.W. 3d 777(2001)
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*, 222 Ky. 73, 299 S.W. 1082 (1927) *Commonwealth v. Baker*, Ky., 11 S.W. 3d 585 (2000)
Double Jeopardy	5th	13	*Benton v. Crittenden*, Ky., 14 S.W. 3d 1 (1999)
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. Spaulding*, Ky., 991 S.W. 2d 651 (1999)
Equal Protection	5th, 14th	1, 2, 3, 59	*Yost v. Smith*, Ky., 862 S.W. 2d 852 (1993) *Commonwealth v. Brown*, Ky. App., 911 S.W. 2d 279 (1995) *Commonwealth v. Howard*, Ky., 969 S.W. 2d 700 (1998)
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	*Jackson v. Commonwealth*, Ky., 113 S.W. 3d 128 (2003) *Whitler v. Commonwealth*, Ky., 810 S.W. 2d 505 (1991)
Informed of Nature of Accusation	6th	11	*Whitler v. Commonwealth*, Ky., 810 S.W. 2d 505 (1991)
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)
Counsel (Right to Counsel, Effective Counsel, Self-representation, Hybrid Representation)	6th (No right to hybrid representation recognized by U. S. Supreme Court)	11	*Ivey v. Commonwealth*, Ky. App., 655 S.W. 2d 506 (1983) [Effective counsel] *Hill v. Commonweal*th, Ky., 125 S.W. 3d 221 (2004) [Self-representation, hybrid representation] *Baucom v. Commonwealth*, Ky., 134 S.W. 3d 591 (2004) [Right to hybrid representation]
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*, 84 Ky. 583, 2 S.W. 235 (1886)
Present a Defense	6th, 14th	11	*Beaty v. Commonwealth*, Ky., 125 S.W. 3d 196 (2003) [right to due process includes "the right to present a defense"]
Prohibition Against Ex Post Facto Laws	Art. 1, Sec. 10	19	*Martin v. Chandler*, Ky., 122 S.W. 3d 540 (2003)
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	*Fraser v. Commonwealth*, Ky., 59 S.W. 3d 448 (2001) *Stahl v. Commonweal*th, Ky., 613 S.W. 2d 617 (1981)
Unanimous Verdict	None	7	*Miller v. Commonwealth*, Ky., 77 S.W. 3d 566 (2002)


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

CROSS-EXAMINATION

NOTES

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

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

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

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

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

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

Parole or Probation – Refusal to allow cross-examination on the fact that the witness was on probation was reversible error when the witness was crucial to Commonwealth's case, and the witness's testimony lacked corroboration. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), *Commonwealth v. Cox*, 837 S.W.2d 898 (Ky.1992). But compare *Davenport, supra*, in which the witness' probation was in another county and his testimony was corroborated by other prosecution witnesses.

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

Prior Inconsistent Statements - A hostile witness may not escape impeachment with a prior inconsistent statement simply by saying, "I don't remember." *Wise v. Commonwealth*, 600 S.W.2d 470 (Ky.App.1978). *See* the *Evidence Manual*, 5th Edition, p. 62, for a handy script to use in laying a foundation under KRE 613.

DIRECTED VERDICTS

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

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

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

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

V. THE DEFENSE CASE

RIGHT TO PRESENT A DEFENSE

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

NOTES

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

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

Finally, one should also remember *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), in which it was held that long-standing exceptions to the hearsay rule (such as statements against penal interest) could not be upheld at the expense of the basic right to confront.

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

AVOWALS

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

Effective May 1, 2007, however, the rule has changed. It now says: "the *substance of the evidence* was made known to the court by offer or was apparent from the context within which questions were asked." According to Professor Underwood, this rule change brings Kentucky much more in line with most federal courts and several other jurisdictions. He writes: "After all, what matters is that the substance of the excluded evidence be apparent to the reviewing court." *Kentucky Evidence 2005-2006 Courtroom Manual*, LexisNexis, 2005, p. 10. Attorney avowals are now sufficient in Kentucky, although KRE 103(b) still says that the court: "may direct the making of an offer in question and answer form."

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

NOTES

Necessary to Preserve Error – KRE 103(a) explicitly says that failure to make an avowal waives the issue of the excluded evidence. When evidence is being excluded, failure to make an avowal has exactly the same effect of never objecting when evidence is being introduced. For example, the error by the trial court in sustaining objections to cross-examination of a witness could not be a basis for reversal when the defendant failed to request an avowal, in *Jones v. Commonwealth*, 833 S.W.2d 839 (Ky.1992).

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

DEFENDANT TESTIFYING

A defendant has a constitutional right to testify which cannot be waived by counsel or refused by a court. *Quarels v. Commonwealth*, 142 S.W.3d 73 (Ky.2004). A defendant also has a statutory right to testify in his own behalf under KRS 421.225. This statute also provides that the defendant's failure to testify "shall not be commented upon or create any presumption against him."

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

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

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

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

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

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

If the question of a client committing perjury arises during trial, Rule of Professional Conduct 3.3 requires defense counsel to bring the existence of a potential conflict to the attention of the court. Before the attorney does this, however, "she must in good faith have a firm basis in

NOTES

objective fact for her belief, beyond conjecture and speculation, that the client will commit perjury. ... Counsel must rely on facts made known to her by her client, not on a subjective belief that the client might be lying or that the client's consistent version of events differs from other evidence." Counsel must then state "all material acts" necessary to establish the conflict between herself and the client. Details are not necessary, "a clear statement of the nature of the problem will suffice." The court may allow defense counsel to ask the defendant, "What do you have to say to the jury?" and then allow the defendant to proceed in narrative form. Counsel should not abandon the defendant by leaving the courtroom. *Brown v. Commonwealth*, 226 S.W.3d 74, 84 (Ky.2007).

NOTES

DEFENSE WITNESSES

Truthfulness of Other Witnesses - A prosecutor cannot badger a defendant or other defense witnesses into characterizing prosecution witnesses as liars. Witnesses should not be asked to give opinions regarding the truthfulness of other witnesses, as that is the province of the jury. *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky.1997), citing *Howard v. Commonwealth*, 12 S.W.2d 324, 329 (Ky.1928) : "Although to aid in the discovery of truth reasonable latitude is allowed in the cross-examination of witnesses, and the method and extent must from the necessity of the case depend very largely upon the discretion of the trial judge, yet, where the cross-examination proceeds beyond proper grounds or is being conducted in a manner which is unfair, insulting, intimidating, or abusive, or is inconsistent with the decorum of the courtroom, the court should interfere with or without objection from counsel. The court not only should have sustained the objections to this character of examination, but should have admonished counsel against such improper interrogation."

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

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

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

Intimidating Defense Witnesses - Prosecutorial misconduct required reversal of a murder conviction when two witnesses informed the prosecutor that they had lied in grand jury testimony and the prosecutor then promised both that he would not prosecute for perjury if they testified truthfully at trial; and then kept the promise to the one witness he called but repudiated the promise to the other who was proposed as a defense witness, causing that second witness to decline to appear and preventing the defendant from presenting exculpatory evidence. *Cash v. Commonwealth*, 892 S.W.2d 292 (Ky.1995). Compare, *Rushin v. Commonwealth*, 2003 WL 22359522 (Ky.App.2003), *unpublished*, in which the court found no prosecutorial misconduct when the Commonwealth threatened to indict a defense witness for perjury if she contradicted her sworn testimony to the grand jury, but the threat did not involve breaking any promise that had been made to the witness. On the other hand, it was a violation of due process and a substantial interference with the witness' free and unhampered choice to testify when the prosecutor threatened to revoke the witness' immunity if he testified at trial. *U.S. v. Foster*, 128 F.3d 949 (6th Cir.1997).

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

DIRECTED VERDICTS, RENEWING

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

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

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

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

Timing – A motion for directed verdict *may* be made at the end of the Commonwealth's case but *must* be made at the close of all the evidence. *Kimbrough v. Commonwealth*, 550 S.W.2d 525 (Ky.1977), *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky.1998). If a *specific* motion was made at the end of the Commonwealth's case, a later renewal of the motion "on the same grounds" will preserve the issue without need to repeat the specifics. *Hill v. Commonwealth*, 125 S.W.3d 221, 230 (Ky.2004). If no defense evidence is presented, the motion need not be renewed

NOTES

because the court has heard no additional evidence. *Scruggs v. Commonwealth*, 566 S.W.2d 405 (Ky.1978). If the court hears any more evidence after the close of the Commonwealth's case-in-chief, then the motion for directed verdict must be renewed, whether the presentation of additional evidence ends with the defense case or with the Commonwealth's rebuttal evidence. *Baker, supra.* "In effect, therefore, a motion for directed verdict made only at the close of one party's evidence loses any significance once it is denied and the other party, by producing further evidence, chooses not to stand on it." *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky.1997).

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

Kentucky courts have clearly interpreted a motion for directed verdict as a motion for acquittal on *everything, i.e., on all counts*. In *Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky.1978), the court said that a directed verdict is only appropriate, "when the defendant is entitled to complete acquittal *i.e.* when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses." Therefore, when your defense is that the evidence is insufficient to sustain a guilty verdict on *any* charge, your motions for directed verdict are sufficient to preserve the claim on appeal. *See Combs v. Commonwealth*, 198 S.W.3d 574 (Ky.2006).

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

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

VI. TO THE JURY

INSTRUCTIONS

Legal Standard – A court is required to give instructions applicable to every state of the case covered by the indictment and deducible from or supported to any extent by testimony. *Commonwealth v. Collins*, 821 S.W.2d 488 (Ky.1991), *Gabow v. Commonwealth*, 34 S.W.3d 63 (Ky.2000), *overruled on other grounds*. Jury instructions must be complete, and the defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions. *Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky.2006). Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses supported by the evidence, that duty does not include instructing on theories without any evidentiary foundation. *Houston v. Commonwealth*, 975 S.W.2d 925 (Ky.1998). See also RCr 9.54(1).

NOTES

A jury must be instructed on the presumption of innocence. RCr 9.56(1). A jury must also be instructed on the defendant not testifying, if requested to do so by the defendant. RCr 9.54(3).

NOTES

Defense Theory of the Case – The rule is that the defendant's contention that he is not guilty is adequately presented to the jury in that part of the instructions requiring him to be acquitted unless he is proven guilty beyond a reasonable doubt. But when he admits one or more of the essential elements of the crimes charged but attempts to avoid conviction by proving facts or circumstances in excuse (*i.e.*, relies on an *affirmative defense*), "such defendant is entitled to a concrete or definite and specific instruction on the defendant's theory of the case." *Hayes v. Commonwealth*, 870 S.W.2d 786, 788 (Ky.1993). *See also, e.g., Slaven v. Commonwealth*, 962 S.W.2d 845 (Ky.1997), *Sanborn v. Commonwealth*, 754 S.W.2d 534, 549-550 (Ky.1988), *Kohler v. Commonwealth*, 492 S.W.2d 198 (Ky.1973), *Rudolph v. Commonwealth*, 504 S.W.2d 340 (Ky.1974), and *Taylor v. Commonwealth*, 995 S.W.2d 355 (Ky.1999).

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

Objecting to – See the discussion above under "Directed Verdicts, Renewing." RCr 9.54(2) states: "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." *See Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky.2003).

Preserving - Tendering an instruction and arguing to the court in support of the instruction is not sufficient to preserve the objection. A party must specifically object to the instructions given by the court before the court gives those instructions. *Commonwealth v. Collins*, Ky., 821 S.W.2d 488 (Ky.1991), *see also Baker v. Commonwealth*, 973 S.W.2d 54 (Ky.1998), and *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky.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*, 957 S.W.2d 246 (Ky.1997), RCr 9.54(2), *see also Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky.2000).

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

Interrogatories - Trial courts may use fact-based interrogatories (special verdicts) in the jury instructions in a criminal case if, and only if, the interrogatories are accompanied by verdict forms which authorize the return of general verdicts. The interrogatories cannot take a jury step-by-step to any one verdict, and the court cannot direct a general verdict of guilty based

upon the jury's answer to the interrogatories. They should be used only sparingly and with due consideration of the defendant's rights to due process. *Commonwealth v. Durham*, 57 S.W.3d 829 (Ky.2001).

NOTES

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

PROSECUTION CLOSING ARGUMENT

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

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

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

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

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

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

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

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

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

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

Practice Tip: Being Explicit. Lest you think that you have already been told enough times to be clear and explicit about your position while speaking on the record, please note that, in some very recent decisions, remarks which would normally be understood as nothing more than ordinary politeness and civility have been interpreted on appellate review as waivers of some very important issues. In *Alley v. Commonwealth*, 160 S.W.3d 736 (Ky.2005), defense counsel spent a good deal of time arguing that his client should not be forcibly medicated to gain competency to stand trial. The trial court refused to rule on the issue, saying there was no proper motion before the court on the matter. Defense counsel's response was "That's fine. We understand." The appellate court ruled that defense counsel had, by saying that, waived the issue he had fought over so long and hard. In *Lattner v. Commonwealth*, 2006 WL 2924653, (Ky.App.2006), *unpublished*, the defendant had testified that he was against the use of drugs. The prosecutor wanted to impeach the defendant with a former conviction for drug possession. Defense counsel objected. The trial judge responded by saying that he thought the defendant had opened the door to the impeachment by setting himself up as a "innocent lamb type guy." Defense counsel's response was, "That's fine." Even though the appellate court explicitly acknowledged that defense counsel had objected to the intended impeachment, it ruled that defense counsel had waived the issue on appeal by then saying "That's fine." So, be polite, but be explicit.

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IMPROPER CLOSING ARGUMENTS, EXAMPLES

NOTES

The following is meant to be illustrative but not exhaustive.

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

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

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

Irrelevant Matters:

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

Matters Not in Evidence:

- A lawyer shall not knowingly or intentionally allude to any matter that will not be supported by admissible evidence. SCR 3.130-3.3(e).
- A prosecutor may not mention facts prejudicial to the defendant that have not been introduced into evidence. *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky.1992), *Bowling v. Commonwealth*, 279 S.W.2d 23 (Ky.1955).
- It was error for the prosecutor to argue there was a vast store of incriminating evidence which the jury was not allowed to hear because of the rules of evidence. *Mack v. Commonwealth*, 860 S.W.2d 275 (Ky.1993).
- Where the trial court ruled that part of a tape recording was not admissible, it was error for the prosecutor to tell the jury he "wished" it could have heard those parts that had been excluded. *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky.1982).

Misstatements of Law, Evidence:

- It was improper for the prosecutor to misstate the testimony of the psychologist both on cross-examination and in closing argument. *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky.1984).
- A prosecutor misstated the law on insanity when he told the jury the test was whether the defendant knew right from wrong. *Mattingly v. Commonwealth*, 878 S.W.2d 797 (Ky.App.1994).

Personal Opinions, Beliefs, Knowledge:

- A lawyer shall not state a personal opinion as to the justness of a cause, the credibility of a witness or the guilt or innocence of an accused. SCR 3.130-3.4(e).
- It is always improper for the prosecutor to suggest the defendant is guilty simply because he was indicted or is being prosecuted. *U.S. v. Bess*, 593 F.2d 749 (6th Cir.1979).
- It is improper for a prosecutor to tell the jury that he knows of his own personal knowledge that the persons referred to by the defendant's alibi witness were "rotten to the core." *Terry v. Commonwealth*, 471 S.W.2d 730 (Ky.1971).

Credibility and Character of Witnesses:

- A lawyer shall not state a personal opinion as to the credibility of a witness, including the defendant. SCR 3.130-3.4(e).
- The personal opinion of the prosecutor as to the character of a witness is not relevant and is not proper comment. *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky.1982).
- It is improper for a prosecutor to comment that he has known and worked with a police officer for a long time, that the officer is honest and conscientious, and that the officer's word is worthy of belief. *Armstrong v. Commonwealth*, 517 S.W.2d 233 (Ky.1974).
- When the defendant is on trial for possession of a controlled substance, it is improper for a prosecutor to try to make the defendant appear to be involved in trafficking. *Jacobs v. Commonwealth*, 551 S.W.2d 223 (Ky.1977).
- It is error for the prosecutor to comment on the defendant's spouse's failure to testify. *Gossett v. Commonwealth*, 402 S.W.2d 857 (Ky.1966).

Failure of Accused to Testify:

- The Commonwealth should not comment on the defendant's failure to testify. *Powell v. Commonwealth*, 843 S.W.2d 908 (Ky.App.1992).
- A prosecutor violates a defendant's right to remain silent when he tells the jury, for example, that if the defendant, who was a passenger in the car, had really been innocent, he would have accused the other individual in the car of committing the crime. *Churchwell v. Commonwealth*, 843 S.W.2d 336 (Ky.App.1992).
- A prosecutor violates a defendant's right to remain silent when he tells the jury that the defendant would have denied ownership of the pouch containing drugs if he were innocent. *Green v. Commonwealth*, 815 S.W.2d 398 (Ky.App.1991).
- In a joint trial, counsel for the co-defendant may not comment on the defendant's failure to testify. *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky.1977).

Inflammatory, Abusive Language:

- It is error for a prosecutor to make demeaning comments about the defendant and defense counsel. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky.1988). The prosecutor must stay within the record and avoid abuse of the defendant and counsel. *Whitaker v. Commonwealth*, 183 S.W.2d 18 (Ky.1944).
- A prosecutor must not be permitted to make unfounded and inflammatory attacks on the opposing advocate. *U.S. v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

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- It is improper, for example, for a prosecutor to refer to a defendant as a "black dog of a night," "monster," "coyote that roamed the road at night hunting women to use his knife on," and "wolf." *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky.1988).
- A prosecutor may not encourage a verdict based on passion or prejudice, or for reasons not reasonably inferred from the evidence. *Bush v. Commonwealth*, 839 S.W.2d 550 (Ky.1992). *See also Clark v. Commonwealth*, 833 S.W.2d 793 (Ky.1991), *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky.1989), *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky.1989), *Ruppee v. Commonwealth*, 754 S.W.2d 852 (Ky.1988), and *Estes v. Commonwealth*, 744 S.W.2d 421 (Ky.1988).

Local Prejudice:

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

Golden Rule:

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

Send a Message:

- In both *Commonwealth v. Mitchell*, 165 S.W.3d 129 (Ky.2005), and *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky.2006), the Kentucky Supreme Court clearly indicated it had lost patience with this form of argument but could not reverse the cases because defense counsel did not object and the argument did not rise to palpable error. However, in *McMahon v. Commonwealth*, 2007 WL 4208652 (Ky.App.2007), decided Nov. 30, 2007, *to be published, not yet final*, the court reversed the defendant's conviction for this kind of argument when defense did object and when there was no need for this type of argument because defense counsel had conceded there was sufficient evidence to convict.

Jury Responsibilities:

- A prosecutor may not minimize a jury's responsibility for its verdict or mislead the jury as to its responsibility. *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky.1992).
- A prosecutor may not argue to jurors that a not guilty verdict (or a guilty verdict on a lesser-included offense) is a violation of their oath. *Goff v. Commonwealth*, 44 S.W.2d 306 (Ky.1931), *Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky.2002).

Effect of Verdict:

- It is prosecutorial misconduct for a prosecutor to repeatedly refer the jury to the danger to the community if it turned the defendant loose. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky.1988).
- Neither the prosecutor, defense counsel, nor the court should relate to the jury the future consequences of a particular verdict anytime during a criminal trial. *Woodward v. Commonwealth*, 984 S.W.2d 477 (Ky.1998).
- It is error for a prosecutor to urge the jury to convict in order to protect community values, preserve civil order, or deter future lawbreaking. *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir.1991). It is error for a prosecutor to tell the jury that if they do not convict, they have no right to complain when they become victims of crime. *Dennis v. Commonwealth*, 526 S.W.2d 8 (Ky.1975).
- It is error for a prosecutor to appeal to the community's conscience in the context of the war on drugs and to suggest that drug problems in the community would continue if the jury did not convict the defendant. *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991).
- The Commonwealth is not at liberty to place upon the jury the burden of doing what is necessary to protect the community. *King v. Commonwealth*, 70 S.W.2d 664 (Ky.1934).

Demonstrations:

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

Reading Law to the Jury:

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

CONTACT WITH JURORS

KRS 29A.310(2) prohibits contact between jurors and witnesses or officers of the court after they have been sworn. If this occurs, the proper procedure is for the court to hold a hearing. *Henson v. Commonwealth*, 812 S.W.2d 718 (Ky.1991), *see also Combs v. Commonwealth*, 198 S.W.3d 574 (Ky.2006). Likewise, jurors should not be contacted after they begin deliberations. KRS 29A.320(1), RCr 9.74. But *see Combs v. Commonwealth*, 198 S.W.3d 574 (Ky.2006), in which a juror personally delivered a verdict to the judge's office in the mistaken belief that it was proper procedure.

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

DELIBERATIONS

"[A]ny decision to allow the jury to have testimony replayed during its deliberations is within the sound discretion of the trial judge." *Baze v. Commonwealth*, 965 S.W.2d 817 (Ky.1997).

However, all information given to the jury after deliberations have begun must be given in open court, before the entire jury, in the presence of the defendant, and with counsel. RCr 9.74

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

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

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

"Non-testimonial exhibits" may be allowed into the jury room. RCr 9.72, *Burkhart v. Commonwealth*, 125 S.W.3d 848 (Ky.2004) (the exhibit was a surveillance video from a security camera).

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

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DEADLOCK, THE "ALLEN CHARGE"

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

UNANIMOUS VERDICT

A defendant is entitled to a unanimous verdict under the 6th Amendment and Section 7 of the Kentucky Constitution. *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). See also RCr 9.82(1). Unanimity becomes an issue when the jury is instructed that it can find the defendant guilty under either of two theories, since some jurors might find guilt under one theory, while others might find guilt under another. The rule is that if the evidence would support a conviction under either theory, the requirement of jury unanimity is satisfied. If the jury is instructed on a theory under which it could not have found guilt, however, then the requirement of unanimity is violated because, in that situation, there is no way to know that every juror voted for conviction under the proper theory. *Davis v. Commonwealth*, 967 S.W.2d 574 (Ky.1998). *See also Wells v. Commonwealth*, 561 S.W.2d 85 (Ky.1978), *Boulder v. Commonwealth*, 610 S.W.2d 615 (Ky.1980), *Hayes v. Commonwealth*, 625 S.W.2d 583 (Ky.1981), *Burnett v. Commonwealth*, 31 S.W.3d 878 (Ky.2000).

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

INCONSISTENT VERDICTS

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

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

However, an exception to this rule seems to have been carved out in *Robinson v. Commonwealth*, 2007 WL 2459196 (Ky.App.2007), *to be published, not yet final*. In that case, the conviction of the principal had been reversed after the Kentucky Supreme Court ruled that, as a matter of law, no offense was committed. The Kentucky Court of Appeals held that since complicity requires the commission of an underlying offense, the defendant's complicity conviction would have to be reversed as well.

TRUTH - IN - SENTENCING, KRS 532.055

NOTES

Nature of Prior Convictions - The jury may be informed of the "nature" of the defendant's prior convictions, but that term is generic, rather than specific, and is meant to include the "kind, sort, type, order, or general character of the offense." Detailed testimony by the victim of the defendant's prior assault on her exceeded the scope of the statute. *Robinson v. Commonwealth*, 926 S.W.2d 853, 855 (Ky.1996). Likewise, warrants and citations including factual information concerning the defendant's prior convictions also exceeded the scope of the statute. *Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky.1998).

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

Proof of Prior Convictions - Proof of the defendant's prior convictions in the form of a certified computer printout from the Kentucky State Police was admissible and certified copies of the judgments of conviction themselves were not necessary, despite the best evidence rule, in a case in which there was no dispute whatsoever as to the defendant's prior convictions. *Hall v. Commonwealth*, 817 S.W.2d 228 (Ky.1991), *overruled on other grounds*.

It is error to allow the introduction of prior convictions which are still pending on direct appeal or have been granted discretionary review, but not if they are being attacked collaterally. This is true for truth-in-sentencing as well as for PFO purposes. *Melson v. Commonwealth*, 772 S.W.2d 631 (Ky.1989), *Thompson v. Commonwealth*, 862 S.W.2d 871 (1993), *overruled in part by St. Clair, below, Kohler v. Commonwealth*, 944 S.W.2d 146 (Ky.App.1997), *Tabor v. Commonwealth*, 948 S.W.2d 569 (Ky.App.1997).

The word "conviction" is ambiguous, however, and can refer either to an initial conviction after a guilty verdict or guilty plea, or it can refer to the more refined legal conception of a final judgment after all appeals have been exhausted. In some statutes, the word conviction refers to the former event. For example, a person is a "convicted felon" for purposes of the handgun statute (KRS 527.040) the moment the verdict or plea occurs. *See Thomas v. Commonwealth*, 95 S.W.3d 828, 829 (Ky.2003). Also, based on a meticulous reading of the phrase "prior record of conviction" in KRS 532.025(2)(a)(1), the Kentucky Supreme Court has ruled that prior convictions, for purposes of the aggravator which must be found before imposition of the death penalty is possible, are also merely "a plea of guilty accepted by the trial court or a jury's or judge's verdict of guilty." *St. Clair v. Commonwealth*, 140 S.W.3d 510, 570 (Ky.2004), *overruling in part Thompson*. *Melson*, *supra*, was presumably not affected by the decision in *St. Clair*. (But *see Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky.2005), in which the Kentucky Supreme Court seems to have applied *St. Clair* in a non-capital, truth-in-sentencing case.)

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

Juvenile Convictions -A defendant's juvenile adjudications may be introduced during the penalty phase if the crime was one which would have been a felony if committed by an adult. KRS 532.055(2)(a)(6). The portion of that same statute which allows the use of juvenile adjudications for the purposes of impeachment during the guilt/innocence phase, however, has been ruled unconstitutional. *Manns v. Commonwealth*, 80 sw3d 439 (Ky.2002).

Challenging Prior Convictions - When the prosecution offers evidence of prior convictions based on guilty pleas, the burden shifts to the defendant to show that the pleas were not valid. The Commonwealth is not required to prove both that the prior conviction occurred and that it

NOTES

was constitutionally proper. The defendant's prior convictions were properly admitted when he failed to meet the burden of demonstrating the invalidity of the pleas. *See Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992), *Dunn v. Commonwealth*, 703 S.W.2d 874 (Ky.1986). This includes even misdemeanor convictions introduced for the purposes of truth-in-sentencing. *McGinnis v. Commonwealth*, 875 S.W.2d 518 (Ky.1994), *overruled on other grounds*.

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

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

Victims – Victim impact evidence is largely irrelevant to the issue of guilt or innocence and should be reserved for the penalty phase of the trial. *Bennett v. Commonwealth*, 978 S.W.2d 322 (Ky.1998). KRS 532.055 defines "victims," pursuant to KRS 421.500(1). That statute defines a victim in one of four ways, but only allows for the testimony of *one* witness. *Terry v. Commonwealth*, 153 S.W.3d 794 (Ky.2005). Only one victim impact statement should be considered by the trial court.

Mitigation – Proper mitigation evidence does not include the sentences received by co-defendants for the same crime, *Commonwealth v. Bass*, 777 S.W.2d 233, 236 (Ky.1989), or plea offers made by the prosecution, *Neal v. Commonwealth*, 95 S.W.3d 843, 847 (Ky.2003).

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

Bail Pending Appeal - RCr 12.78 permits the trial court to grant bail pending appeal in any case except one in which the defendant has been sentenced to either life or death. *Defense counsel needs to request this at sentencing.* An appellate court will not deal with the issue of bail unless "application to the trial court is not practicable," or unless the trial court denied the request. In most situations, if the request has simply never been made at the trial court level, the court of appeals will send the defendant's attorney back to the trial court.

KRS 532.070 allows a judge to convert an indeterminate sentence of one year on a Class D felony to a determinate sentence of 12 months in the local jail, if the prison sentence would be unduly harsh. This statute only applies to jury verdicts and is not applicable to guilty pleas. *Bailey v. Commonwealth*, 70 S.W.2d 414 (Ky.2002).

Practice Tip: Parole Eligibility. The Commonwealth might not present all the evidence relevant to parole eligibility to the jury. If it does not, and it applies in your case, make sure the jury also knows about such things as (1) lack of good time credit, (2) lack of parole eligibility until completing the sex offender treatment program, and (3) the additional 5-year period of conditional discharge.

PERSISTENT FELONY OFFENDER, KRS 532.080

For the relationship between truth-in-sentencing and PFO proceedings, see "Bifurcation."

Burden of Proof - A defendant may be convicted by reasonable inferences which are a logical consequence of the evidence presented. The Commonwealth retains the burden of proving every element beyond a reasonable doubt, but jurors can make inferences based on the evidence. *Martin*

v. Commonwealth, 13 S.W.3d 232 (Ky.2000), *overruling Hon v. Commonwealth, 670 S.W.2d 851,* which required proof of all elements of PFO by direct evidence. For example, proof of the defendant's age at the time of a prior offense may be inferred from proof of the defendant's date of birth. *Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky.2002).

Challenging Prior Convictions - When the prosecution offers evidence of prior convictions based on guilty pleas, the burden shifts to the defendant to show that the pleas were not valid. The defendant's prior convictions were properly admitted when he failed to do so. *See Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992), *Dunn v. Commonwealth*, 703 S.W.2d 874 (Ky.1986).

The proper time to raise the question of the constitutional validity of a prior conviction is in a pretrial motion, and the trial court did not err in refusing to allow the defendant to put on evidence raising the issue when the defendant waited until the sentencing/PFO phase to do it. *Commonwealth v. Gadd*, 665 S.W.2d 915 (Ky.1984), *Diehl v. Commonwealth*, 673 S.W.2d 711 (Ky.1984). However, *see Graham v. Commonwealth*, 952 S.W.2d 206, 209 (Ky.1997), especially the dissent, for a discussion of how complicated the case law on this subject has become: "the most conscientious of counsel is uncertain of whether to raise a challenge, what type of challenge is appropriate and what court to file in.." *See also Hodges v. Commonwealth*, 984 S.W.2d 100 (Ky.1998), in which failure to challenge a prior conviction upon the occasion of the first use of that conviction for enhancement purposes waives later attempts to challenge the same prior conviction. Uncounseled prior convictions appear to remain an exception to this rule. One should argue that uncounseled prior convictions can be attacked at any time, even collaterally. See also Brian Scott West, "Ignorance of the Law Is an Excuse: Suppressing Prior Guilty Pleas Under *Boykin v. Alabama*, *The Advocate*, vol. 23, no. 3, May 2001, pp. 50-56.

Sequence of Prior Offenses – In the case of prior convictions used for purposes of PFO, the prior offenses have to have resulted in *convictions prior to the date of the current offense*. Convictions which occurred after the current charge, but before the defendant's sentencing on the current charge, cannot be used. *Bray v. Commonwealth*, 703 S.W.2d 478 (Ky.1985), *see also Dillingham v. Commonwealth*, 684 S.W.2d 307, 309 (Ky.App.1985). "[T]he philosophy underlying the legislation is that a person who *commits* a felony after having been *convicted* of a felony has doubt cast on his ability to be rehabilitated and that a person who commits a felony after having been convicted of a felony the second time may well be incorrigible and deserving of more extended incarceration. It has always been the *progressive* acts which so designate an individual." *Bray*, at 479-80.

Identity – A name is direct prima facie evidence of the identity of a person. *Braden v. Commonwealth*, 600 S.W.2d 466 (Ky.App.1978). Once the case has been made, however, the burden shifts to the defendant to show he is not the person who was previously convicted. *Jones v. Commonwealth*, 457 S.W.2d 627, 631 (Ky.1970).

Merger of Prior Offenses – KRS 532.080(4) says that "two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned." So, what if the person is probated on his first prior offense, then commits his second prior offense while on that probation, then serves both sentences either concurrently or in an uninterrupted consecutive sentence? Those two prior offenses *do not merge*. The "concurrent/consecutive sentence break applies only to those who may have committed more than one crime but who have received their sentences for all of the crimes committed before serving any time in prison." *Adkins v. Commonwealth*, 647 S.W.2d 502, 506 (Ky.App.1982). The same is true in the case of offenses committed while on parole. *Williams v. Commonwealth*, 639 S.W.2d 788, 790 (Ky.App.1982). The court noted that, "the rehabilitative efforts on his first conviction failed, the rehabilitative efforts on his second conviction failed, and he is, under the statute, a persistent felony offender in the first degree upon receiving his third conviction." *See also Combs v. Commonwealth*, 652 S.W.2d 859 (Ky.1983).

NOTES

A later-imposed concurrent sentence is deemed to have commenced at the beginning of the original sentence, so that, even if the second sentence standing alone would have fallen within the 5-year time period for use in PFO proceedings, the sentence instead began and ended with a prior sentence which did not fall within the 5-year period, when the two sentences ran concurrently to each other. *Lienhart v. Commonwealth*, 953 S.W.2d 70 (Ky.1997).

Merger of Prior Offenses and Double Jeopardy – When a defendant has twice been convicted for trafficking in a controlled substance, he can be convicted of both trafficking as a subsequent offender and PFO 2nd, even though the two prior convictions would merge into one conviction under the PFO statute. *Morrow v. Commonwealth*, 77 S.W.3d 558 (Ky.2002), *overruling Gray v. Commonwealth, 979 S.W.2d 454 (Ky.1998).*

Separate Indictments – A defendant may be indicted for PFO in an indictment separate from the current offenses. *Price v. Commonwealth*, 666 S.W.2d 749 (Ky.1984). Nevertheless, the defendant must at least be arraigned on the charge before he can be tried on it. The defendant has a right to notice of the charges. *Hudson v. Commonwealth*, 171 S.W.3d 743 (Ky.2005).

PFO CHECKLIST

1) *At Least 21 Years Old at Time of Sentencing. See Hayes v. Commonwealth*, 660 S.W.2d 5 (Ky.1983), in which it was not error when defendant was not over 21 at the time of the offense but was over 21 at the time of sentencing.

2) *Stands Convicted of a Felony for Current Offense.* This has been interpreted to require that the defendant be first sentenced on the underlying current offense before he can be convicted as a Persistent Felony Offender. *Commonwealth v. Hayes*, 734 S.W.2d 467 (Ky.1987), *Davis v. Manis*, 812 S.W.2d 505 (Ky.1991).

3) *Prior Conviction Was for a Sentence of One Year or More.* Out-of-state convictions that were misdemeanors in North Carolina, but which carried sentences of up to 2 years, were felonies for PFO purposes when the defendant received sentences of 18 months and 2 years, even if the sentences were probated. *Ware v. Commonwealth*, 47 S.W.3d 333 (Ky.2001). An indeterminate sentence of one year modified to a definite sentence of less than one year under KRS 532.070(2) qualifies as a prior conviction for PFO purposes as well. *Commonwealth v. Doughty*, 869 S.W.2d 53 (Ky.1994).

4) *Defendant Was at Least 18 at the Time the Prior Offense Was Committed.* "For purposes of the Penal Code, a person is 'over the age of 18' from the first moment of the day on which his 18th birthday falls." *Garret v. Commonwealth*, 675 S.W.2d 1, 1 (Ky.1984).

5) *PFO 1st*, 2 Priors or 1 Prior Sex Crime as Defined by KRS 17.500; *PFO 2nd*, 1 Prior.

6) *Prior Was Served Out within 5 Years of Date of Current Offense.* For purposes of PFO 1st, only one of the prior felonies has to meet this or one of the following criteria. *Howard v. Commonwealth*, 608 S.W.2d 62, 64 (Ky.App.1980).

OR

7) *On Probation or Parole for the Prior Offense at Time of Current Offense.*

OR

8) *Discharged from Probation or Parole within 5 Years of Date of Current Offense.*

OR

9) *In Custody for Prior Offense at Time of Current Offense.* See KRS 532.080(4), which says these offenses do not merge into one offense with the prior offense for which the person was imprisoned.

OR

10) *Escaped from Custody for Prior Offense at Time of Current Offense.* This refers to offenses committed after an escape. Escape charges themselves fall under the previous criteria of offenses committed while in custody. *Damron v. Commonwealth*, 687 S.W.2d 138 (Ky.1985).

NOTES

Practice Tip: Remember to renew a motion for directed verdict at the close of the PFO evidence. Although the jury is only determining a question of status, it is still making a finding of fact.

NOTES

PRESENTENCE INVESTIGATION REPORTS (PSI)

Importance Of - There is not likely to be any document which will have a greater impact on the post-sentencing life of the defendant than the PSI. The contents of the PSI will affect: the classification the client will receive and what restrictions may come with that, what kind of work he will be allowed to do and where he can do it, what kind of statutory credit he will receive and, last but not least, whether he will be paroled. The PSI follows the client throughout the prison system.

For instance, upon in-processing at LaGrange, the inmate will be classified as to custody level (maximum, close, medium, restricted, or minimum). His classification will affect which institutions he can go to, job assignments, cell or dorm assignments, eligibility for furloughs, and eligibility for community-based rehabilitation and reassimilation programs. The classification is carried out on a scoring system of different categories in which heavy reliance is placed on the contents of the PSI. Information in the PSI can effect the client's scores in such categories as "severity of current offense," "prior assaultive offense history," "escape history," "alcohol/drug abuse," and "prior felony incarceration."

The "crime story" section of the PSI may also affect classification. For example, even if the client pled to Robbery 2nd Degree, which does not involve injury to the victim, the classification officer can read the "crime story" taken from the arresting officer's citation and determine that an injury did occur and, on that basis, invoke KRS 197.140 to determine that the client is ineligible to work outside the walls of the prison.

The parole board is also often more interested in the alleged facts of the case than the charge to which the client ultimately pled. The board will even consider, against the client, the facts surrounding charges that were dismissed, if it appears they were only dismissed as part of a plea deal, and not because they were unfounded.

Waiving - RCr 11.02(1) says that a defendant may waive his PSI. On the other hand, KRS 532.050(1) says that a PSI cannot be waived, although it can be delayed until after sentencing upon written request of the defendant when the defendant will not be getting released from custody. This is not the contradiction it appears to be. On the one hand, a defendant can waive inspection and controversion of the PSI, *Alcorn v. Commonwealth*, 557 S.W.2d 624 (Ky.1977), and a court can sentence a defendant without one (although this is frowned upon, *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky.App.2003).) On the other hand, a PSI *will be* prepared in *every* felony case, whether the defendant wishes to participate in the final result or not. The PSI will be written regardless of whether the defendant reviews it. So, do not waive review of the PSI unless the client is getting some more important benefit.

Practice Tip: PSI's. When faced with misleading or incorrect information in a PSI, make sure to do the following:
1) Specifically identify what should be corrected or omitted. If the PSI was prepared from the original police reports but a jury found the client guilty of only a lesser offense, object to any reference to allegations concerning the originally charged offense.
2) Specifically inform the court of exactly what the PSI should say instead.
3) Make a motion on the record that only the amended PSI be submitted to the Department of Corrections. Memorialize the amendments in an order for the judge to sign, if necessary.
4) If the court denies your relief, make sure the record clearly reflects what you think the PSI should say.
5) Offer to help write the PSI. Offer to send information to be included on the PSI if it might be helpful to the client.

NOTES

See, e.g., Mills v. Commonwealth, 2005 WL 2317982 (Ky.2005), *unpublished*, in which the Kentucky Supreme Court found it difficult to ascertain whether the corrected PSI had ever made it to the Department of Corrections.

VII. INITIATING THE APPEAL

Some of what follows applies only to employees of the DPA:

Within 5 Days - A motion for new trial under RCr 10.06 must be filed within 5 days after the verdict is returned. (The exception is a motion for new trial based on newly discovered evidence (CR 60.02), which must be filed within a year or "at a later time if the court for good cause so permits.") It can cover any issue arising from the trial. RCr 10.02(1). *Johnson v. Commonwealth*, 17 S.W.3d 109 (Ky.2000).

A motion for judgment notwithstanding the verdict under RCr 10.24 must also be filled within 5 days of the verdict and, since it is essentially a renewed motion for directed verdict, *i.e.*, a complete acquittal, it can only be filed if the defendant moved for a directed verdict at the close of all the evidence.

Remember that in *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky.1992) and other prior cases, the Court has recognized that cumulative error may be a ground for reversal even if each individual error is not sufficient to require reversal. In *Funk*, the court found that the cumulative effect of prejudice from three trial errors was sufficient to require reversal.

If you miss the deadline, move for an extension and then file the motions.

Soon Thereafter – Complete a motion to proceed in forma pauperis. Get a new affidavit of indigency on the defendant and attach it to the motion before filing the motion with the clerk.

Tender the in forma pauperis (IFP) order to the judge. Remember that the IFP order must (1) specifically refer to KRS Chapter 31, and (2) specifically appoint DPA to the appeal. DPA must be (re-)appointed to the appeal even if DPA represented the client at trial. Otherwise, the appellate court and DPA consider the appellant to be represented on appeal by trial counsel, or to be proceeding pro se. *And then trial counsel gets a letter from the appellate court ordering him or her to show cause why the appeal has not been perfected and why it should not then be dismissed.* (See the sample motions and orders in this volume.)

Within 30 Days – RCr 12.04 requires that the notice of appeal be filed within 30 days of the final judgment or within 30 days of the denial of the motion for new trial. The exception to this is when the court denies the motion to proceed in forma pauperis. (See sample forms.) The notice need not list the issues on appeal or the name of any particular attorney who will be representing the defendant.

Within 10 days of filing the notice of appeal, a designation of record must be filed. One must be filed *in every case*. The designation of record states what portions of the trial-level proceedings are to be included in the appellate record. It must include the *specific dates* of the proceedings which are to be included in the record. A short description of each event should also be included if there may be any doubt. *The clerk will not spontaneously just "copy everything."* Also, remember to include designations of any relevant district or juvenile court proceedings. This is especially important when district court testimony was used to cross-examine a witness or when representing a youthful offender who was transferred to circuit court. (See sample forms.)

Failure to designate the record properly can lead to dismissal of the appeal or the refusal of the appellate court to review issues pertaining to the missing part of the record. *Commonwealth v. Black*, 329 S.W.2d 192 (Ky.1959). All absences in the record on appeal are presumed to favor the trial court.

A certificate as to transcript is also required in any *non-video* appeal, must be attached to the designation of record, and must be signed by both trial counsel and the court reporter. CR 75.01(2). (See sample.)

Lastly, send a notification to DPA (see sample):

Appeals Branch Manager
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

Do not file the notification to DPA in the appeal. It is not a legal document. It is just designed to help the appeals people get started on the case.

Practice Tip: Exhibits. Not all exhibits are automatically transferred to the appellate court. CR 75.07(3) provides: "Except for (a) documents, (b) maps and charts, and (c) other papers reasonably capable of being enclosed in envelopes, exhibits shall be retained by the clerk and shall not be transmitted to the appellate court unless specifically directed by the appellate court on motion of a party or upon its own motion." Photograph any large exhibits which will not go to the appellate court and the clerk can send up the photographs with the record. Include copies of any power point presentations and the original copies of any documents that have been enlarged. Finally, check the record sheet with the clerk to make sure it includes all the exhibits and also indicates which were introduced into evidence and what was just marked for identification.

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:

2. Name, address and phone number of defense attorney:

3. Name, address and phone number of Court Reporter:

4. Name and phone number of Circuit Clerk:

5. County:

6. Judge:

7. Indictment No(s):

8. Date jury returned verdict(s):

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

10. Date Motion for New Trial and/or for Judgment N.O.V. Overruled:

11. Date Final Judgment was entered by Judge (Please attach copy):

12. Charges convicted of and sentence(s) imposed:
If more than one sentence, how were they run?
Consecutively _____ Concurrently _____

13. Date Notice of Appeal filed (Please attach copy):

14. Date Designation of Record and Certificate as to Transcript filed (Please attach copy):

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

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

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

GUIDE TO KENTUCKY SENTENCING LAW

NOTES

AGGREGATING SENTENCES

Multiple misdemeanor convictions cannot be aggregated for more than one year. KRS 532.110(1)(b). The exception is misdemeanors committed while on misdemeanor probation, which can run either concurrent or consecutive. KRS 533.040(3), *Walker v. Commonwealth*, 10 S.W.3d 492 (Ky.App.1999).

Multiple simultaneous convictions for Class C and D felonies cannot be aggregated for more than 20 years. KRS 532.110(1)(c). This does not apply to convictions for new felonies committed while already on felony probation or parole. In those cases, the consecutive sentences can exceed 20 years. *Devore v. Commonwealth*, 662 S.W.2d 829 (Ky.1984).

The limit of simultaneous aggregated consecutive felonies of any class is 70 years. KRS 532.110(1)(c).

No sentence of a term years, received at the same time as a life sentence, can run consecutively to that life sentence. *Bedell v. Commonwealth*, 870 S.W.2d 779 (Ky.1993). This does not apply when the defendant was already on probation or parole at the time of the offense. *See Stewart v. Commonwealth*, 153 S.W.3d 789 (Ky.2005), in which the defendant had to serve-out a prior sentence before he could start his life sentence.

CONSECUTIVE VS. CONCURRENT

A later-imposed concurrent sentence is deemed to have commenced at the beginning of the original sentence. *Lienhart v. Commonwealth*, 953 S.W.2d 70 (Ky.1997), KRS 197.035(2).

Generally, a definite (misdemeanor) term of imprisonment must run concurrently with an indefinite (felony) term of imprisonment, and serving-out the indefinite term will satisfy both sentences. KRS 532.110(1)(a). This applies even when the sentences are imposed by different courts. *Powell v. Payton*, 544 S.W.2d 1 (Ky.1976).

However, although the general rule is that misdemeanor sentences must run concurrent to felony sentences, and that consecutive misdemeanor sentences cannot exceed one year, sentences for new felonies or misdemeanors committed while on probation can run consecutively to revoked felony or misdemeanor sentences.

Generally, when a new offense is committed while a defendant is still on probation:

A sentence for a felony committed while on felony probation *must run consecutively* to the probated felony sentence. KRS 533.060(2), *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky.1996). Although KRS 533.040(3) seems to require that the probation first be revoked before it can run consecutively, KRS 533.060(2) controls over KRS 533.040(3), so the sentences have to run consecutively regardless of whether the probation has been revoked.

Furthermore, although KRS 532.110(2) allows sentences to be run concurrently if the judgment does not specify how they are to run, in the case of felonies committed while on felony probation, the Department of Corrections will run those sentences consecutively, whether the judgment is silent on the matter or not. *Riley v. Parke*, 740 S.W.2d 934 (Ky.1987).

A sentence for a felony committed while on misdemeanor probation can run consecutively to the probated misdemeanor sentence, but does not have to. KRS 533.040(3), *Warren v. Commonwealth*, 981 S.W.2d 134 (Ky.App.1998). KRS 532.110(1) requires the misdemeanor time to run concurrently with the felony time. On the other hand, KRS 533.040(3) says that a *revoked* sentence of probation can be run consecutively. Since the statutes conflict, the court can do either.

A sentence for a misdemeanor committed while on felony probation can run consecutively to the probated felony sentence, but does not have to. KRS 533.040(3), *Snow v. Commonwealth*, 927 S.W.2d 841 (Ky.App.1996). This is the same conflict between the same two statutes as above, with the same result: the court can run the sentences either concurrently or consecutively.

A sentence for a misdemeanor committed while on misdemeanor probation can run consecutively to the probated misdemeanor sentence, but does not have to. KRS 533.040(3), *Walker v. Commonwealth*, 10 S.W.3d 492 (Ky.App.1999). Although KRS 532.110(1)(b) prohibits aggregated misdemeanors to exceed 1 year, KRS 533.040(3) allows the sentences to be run consecutively when, *and only if*, the probated sentence has already been revoked.

KRS 533.040(3) also requires that, when a defendant is serving a sentence and has an outstanding probated sentence which has not yet been revoked, that the probated sentence has to run concurrently to the time the defendant is serving unless the probated sentence is revoked, either (1) prior to the defendant's parole or (2) within 90 days that the grounds for revocation come to the attention of the Department of Corrections, which ever comes first. This statute was designed to prohibit prosecutors from waiting till a defendant serves out, and then revoking him on the probation and sending him right back to prison. *See the commentary. Kiser v. Commonwealth*, 829 S.W.2d 432 (Ky.App.1992).

SPECIAL SITUATIONS IN WHICH SENTENCES MUST RUN CONSECUTIVELY

Sex Crimes - Sentences for two or more sex crimes involving two or more victims must run consecutively. KRS 110(1)(d). The exact meaning and application of this statute has not yet been litigated.

Ammunition - When sentenced for the use of armor-piercing or flanged ammunition and sentenced for committing the underlying crime, those sentences must run consecutively. KRS 527.080(3).

Escape – Sentences imposed for the crime of escape must run consecutively to any other sentence the defendant must serve, even if the Commonwealth waits more than 90 days to revoke the prior probations. KRS 532110(3) controls over KRS 533.040(3). *Wilson v. Commonwealth*, 78 S.W.3d 137 (Ky.App.2001).

Awaiting Trial – When a defendant has been held to answer charges in District Court, has been released on bond, and commits a new offense after being indicted by the grand jury, the defendant is "awaiting trial" for the purposes of KRS 533.060(3) even if he has not yet been formally arraigned in Circuit Court and even if he does not know he was indicted. The sentences had to be run consecutively. *Moore v. Commonwealth*, 990 S.W.2d 618 (Ky.1999).

When a defendant has pled guilty and commits a new offense while awaiting sentencing, he is "awaiting trial" for the purposes of KRS 533.060(3) even if no trial was scheduled. *Cosby v. Commonwealth*, 147 S.W.3d 56 (Ky.2004).

KRS 533.060(3) controls over KRS 532.110(1), so that if a felony is committed while awaiting trial for even just a misdemeanor, the two sentences have to run consecutively. *Handley v. Commonwealth*, 653 S.W.2d 165 (Ky.App.1983).

A person shock-probated on a felony sentence may still be required to serve a concurrent misdemeanor sentence which was not also shock-probated. *Romans v. Brooks*, 637 S.W.2d 662 (Ky.App.1982).

NOTES

PROBATION ELIGIBILITY

If a defendant is statutorily eligible for probation, KRS 533.010(2) requires that the court "shall consider" probation, and that probation "shall be granted" unless imprisonment is necessary for the protection of the public. A blanket refusal to consider probation is reversible sentencing error. *Patterson v. Commonwealth*, 555 S.W.2d (Ky.App.1977).

KRS 533.060(2) generally prohibits probation for felonies committed while on felony probation. However, KRS 533.030(6) explicitly says that that prohibition does not apply to Class D felonies. Therefore, even if the sentence for the new offense must run consecutively to the sentence for the old one, the sentence for the new offense can still be probated if it is a Class D felony. *Adams v. Commonwealth*, 46 S.W.3d 572 (Ky.App.2000).

Note also that KRS 533.030(6) also allows probation for a number of Class D Felonies for which probation is prohibited in KRS 532.045. (But does not cover those charges which cannot be probated under KRS 439.265 or 439.3401.)

The prohibition against probating sentences for crimes involving the use of a projectile weapon requires the actual "use" of the weapon. Mere possession of it at the time of the crime is not enough. *Haymon v. Commonwealth*, 657 S.W.2d 239 (Ky.1983).

A defendant convicted of PFO based on prior convictions of only Class D felonies, is eligible for probation if none of the crimes involved violence or a sex crime. KRS 532.080(7).

INELIGIBLE FOR PROBATION

Violent Offenders - Violent offenders as defined by KRS 439.3401 (see also KRS 532.047 and 533.010(2)), unless it is ordered as allowed by 439.3401, which denies probation until 85% of the sentence is carried out. No shock probation at all. (KRS 439.265)

Sex Offenders - Anyone convicted of Rape 2nd degree, Sodomy 2nd degree, Incest, Unlawful Transaction with a Minor 1st degree (involving sexual activity), Use of a Minor in a Sexual Performance, or attempt to commit these offenses. (KRS 439.265). Note that in 2007 a good number of crimes involving human trafficking were also added to the violent offender statute. Inasmuch as some of those crimes were Class C and D felonies, their status as "violent offenses" is unclear, as well as the appropriate parole eligibility.

Anyone convicted of Rape 2nd degree, Sodomy 2nd degree, Promoting Prostitution 1st, 2nd, or 3rd degree, Permitting Prostitution, Incest, Use of a Minor in a Sexual Performance, Promoting a Sexual Performance by a Minor, Using Minors to Distribute Material Portraying a Sexual Performance by a Minor, or attempt to commit these offenses

AND WHO EITHER

uses force, causes bodily injury, befriends the child as a stranger solely for purposes of committing one of these offenses, uses a dangerous instrument or deadly weapon, has a prior conviction for one of these offenses, kidnapped the minor for the purpose of committing one of these offenses, committed one of these offenses on more than one minor at the same time, engaged in substantial sexual conduct with a minor under 14 while committing one of these offenses, or occupied a position of special trust and engaged in substantial sexual conduct while committing one of these offenses. (KRS 532.045, but see KRS 533.030(6).)

PFO's - Anyone convicted of PFO 2nd, unless all of the convictions are for Class D felonies and none of them involved acts of violence. (KRS 532.080) Anyone convicted of PFO 1st, unless all of the convictions are for Class D felonies and none of them involved acts of violence or the commission of a sex crime. (KRS 532.080)

NOTES

Projectile Weapon - Anyone convicted of a Class A, B, or C felony which involved *use* of a projectile weapon. (KRS 533.060), *Haymon v. Commonwealth*, 657 S.W.2d 239 (Ky.1983).

New Offense while on Parole or Probation – KRS 533.060(2), but see KRS 533.030(6). See the discussion above.

Armed and Wearing Body Armor - Anyone guilty of any felony offense under KRS 218A, 507, 508, 509, 511, or 513, or guilty of possession of a destructive device, unauthorized use of a motor vehicle, riot 1st degree or 2nd, possession of a firearm by convicted felon, unlawful possession of a weapon on school property, possession of a handgun by a minor, or theft of a motor vehicle under KRS 514.030 *AND* wearing body armor and armed with a deadly weapon. (KRS 533.065)

PROBATION REVOCATION

Generally – When a defendant is probated, he is supposed to be given a written statement explicitly listing the terms and conditions of his probation. KRS 533.030(5). (See the standard probation contract.) Nevertheless, the law presumes that anyone on probation knows that breaking the law may have an effect on his probation. *Tiitsman v. Commonwealth*, 509 S.W.2d 275 (Ky.App.1974).

Due Process – Although there is no constitutional right to probation or parole, a defendant still has a constitutional right to due process in revocation proceedings. This is because the defendant has a liberty interest at stake under the 14th Amendment. The minimum due process requirements of a revocation were first applied to parole revocations in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and extended to probation revocations in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). They are: (1) written notice of the alleged violations, (2) disclosure of the evidence against the defendant, (3) opportunity to be heard in person and to present witnesses and documentary evidence, (4) the right to confront and cross-examine adverse witnesses, (5) a "neutral and detached" hearing body or court, and (6) written findings of fact as to the evidence relied on and the reasons for revocation. These requirements were adopted in Kentucky in *Murphy v. Commonwealth*, 551 S.W.2d 838 (Ky.App.1977).

So, for example:

Requirement (1) was violated in *Radson v. Commonwealth*, 701 S.W.2d 716 (Ky.App.1986), in which the defendant was given notice of one ground of revocation, but was actually revoked on the basis of another ground to which he had not been given notice. *See also Baumgardner v. Commonwealth*, 687 S.W.2d 560 (Ky.App.1985), in which the court ordered a revocation hearing *sua sponte* after the defendant's trial and acquittal for receiving stolen property.

Requirements (3) and (4) were violated in *U.S. v. Dodson*, 25 F.3d 385 (6th Cir.1994), in which the defendant was not allowed to testify in his own behalf or present evidence. The court ruled that, even at revocation hearings, "[i]n order to ensure a constitutionally sufficient opportunity to contest the allegations and provide *evidence in mitigation, a defendant must also be afforded as a matter of due process the opportunity to be heard in person and to present witnesses and documentary evidence.*" (At 338, emphasis original.)

Requirement (5) was violated in *Baumgardner v. Commonwealth*, 687 S.W.2d 560 (Ky.App.1985), in which the judge who presided over the defendant's trial and acquittal *sua sponte* ordered a revocation hearing and presided over that as well.

Requirement (6) was violated in *Keith v. Commonwealth*, 689 S.W.2d 613 (Ky.App.1985), in which the defendant was ordered to admit himself to Eastern State Hospital, but the hospital said he did not need inpatient care and enrolled him in an outpatient program instead. After

NOTES

finding that the defendant "made every reasonable effort to comply with the conditions imposed upon him," (at 615) the Court of Appeals vacated the revocation and said that "when there is no evidence to support the court's decision to revoke, the revocation of that probation is totally arbitrary." (At 625.) *See also Baumgardner v. Commonwealth*, 687 S.W.2d 560 (Ky.App.1985), in which there were no findings of fact, and the only evidence presented at the hearing was that the defendant had been acquitted of the charges for which he was being revoked.

Remember, too, that a court cannot revoke a probated sentence if the defendant did not have an attorney when the sentence was imposed and probated. *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002). *See also Stone v. Commonwealth*, 217 S.W.3d 233 (Ky.2007).

Nevertheless, the case law also reflects the fact that the due process rights of a defendant at a revocation hearing are not equivalent to those of a defendant in a criminal trial. (*See, e.g., Robinson v. Commonwealth*, 86 S.W.3d 54 (Ky.App.2002), for the proposition that a revocation hearing is not a second criminal prosecution.) For instance:

Appointment of Counsel – Appointment of counsel at a revocation hearing should be determined on a case-by-case basis and is not an absolute right, especially "if the grounds for revocation are not in dispute, as in the case of a conviction for a new offense." *Dunson v. Commonwealth*, 57 S.W.3d 847, 849 (Ky.App.2001), quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Nevertheless, remember that *KRS 533.050(2) requires that counsel be appointed.*

Standard of Proof – The standard of proof is not beyond a reasonable doubt, but rather preponderance of the evidence. *Murphy v. Commonwealth*, 551 S.W.2d 838 (Ky.App.1977), *Radson v. Commonwealth*, 701 S.W.2d 716 (Ky.App.1986). For this reason, it is not necessary for a defendant to be convicted on a new charge in order to be revoked on an old one. *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky.App.1986).

Discovery – RCr 7.24 does not apply to revocation hearings, and the defendant was not entitled to the tests used, the lab standards, and the amount of marijuana found in the defendant's system. The defendant's revocation was proper in as much as the defendant had in fact tested positive for marijuana. *Robinson v. Commonwealth*, 86 S.W.3d 54 (Ky.App.2002).

Confrontation – The 6th Amendment right to confront is not absolute in informal procedures such as probation revocations. Affidavits, depositions, documents, and other reliable substitutions for live witnesses are allowable when witnesses are unavailable or great hardship would be involved in producing them. *Marshall v. Commonwealth*, 638 S.W.2d 288 (Ky.App.1982).

Evidence – The rules of evidence do not apply to revocation hearings. KRE 1101(d)(5). Hearsay is admissible. *Marshall v. Commonwealth*, 638 S.W.2d 288 (Ky.App.1982). Illegally seized evidence is admissible. *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky.App.1986). Statements made in violation of *Miranda* are admissible. *Childers v. Commonwealth*, 593 S.W.2d 80 (Ky.App.1980).

PAROLE ELIGIBILITY

The date set by the Department of Corrections as the date of a state prisoner's parole eligibility is a fixed date. It is not brought closer by any kind of good-time, work-time, or educational achievement credit.

KRS 439.3401(2) says, "Violent offenders may have a greater minimum parole eligibility date than other offenders who receive longer sentences, including a sentence of life imprisonment." This seems plain enough, but *it is not the law*. For any sentence over 23 years and 6 months, the parole eligibility is 20 years. No sentence can have a longer parole eligibility than a life sentence. *Hughes v. Commonwealth*, 87 S.W.3d 850 (Ky.2002).

NOTES

WARNING!! KRS 439.3401(1), which lists the offenses which can qualify a person as a violent offender, includes offenses which are Class C or D felonies, or even misdemeanors. For example, subsection (1)(d) says a person is a violent offender if convicted of or has pled to, "The commission or attempted commission of a felony sexual offense described in KRS Chapter 510." Sexual Abuse 1st Degree is a Class C or D felony. KRS 510.110. *Attempted* Sexual Abuse 1st Degree is a Class A Misdemeanor. KRS 506.010(4)(d). Although subsection (4) seems to limit 85% parole eligibility to Class A and B felonies, nevertheless, *the Department of Corrections has applied it to ALL felony sexual offenses in the past.* DPA Appeals Branch had to do a Declaratory Judgment action. So, have the judge make a finding of parole eligibility at the sentencing hearing and get an agreed order.

NOTES

CREDIT FOR TIME SERVED

A defendant must be given credit for time served prior to sentencing when the time was served on the charge which resulted in that sentence. KRS 532.120(3). Time served for a charge of which the defendant is acquitted shall be credited toward any sentence on any other charge which was lodged against the defendant while in custody, by warrant or detainer. KRS 532.120(4).

Time spent on home incarceration is credited to time served when the sentence has been imposed and the court has ruled that part of the sentence can be served on home incarceration. KRS 532.210(4), 533.030(6). However, time spent on home incarceration as a condition of pretrial release is not credited toward time served. *Buford v. Commonwealth*, 58 S.W.3d 490 (Ky.App.2003).

SERVING TIME

Kinds of Time – Felony sentences are indeterminate, *i.e.*, they are subject to the kinds of statutory credit described below and, as such, may result in shorter time to serve than the term actually imposed. KRS 532.060. A sentence for a misdemeanor, however, is a definite term. KRS 532.090. In other words, if you get sentenced to six months on a misdemeanor, you serve six months (barring shock probation, etc.).

Placement – Those persons who receive a sentence of five (5) years or less "shall serve that term in a county jail in a county in which the fiscal court has agreed to house state prisoners." Class C and D felons who receive sentences over five years may also serve their time in a regional detention facility rather than in a state institution. KRS 532.100(4)(a)&(b). State prisoners who cannot be housed in county jails or regional detention facilities must be transferred to a state institution within 45 days of final sentencing. KRS 532.100(7).

Modification of Sentence – When a defendant is sentenced to one year of indeterminate time, the court may convert that sentence to a definite term of one year or less if it believes the felony sentence to be unduly harsh. KRS 532.070(2). This statute only applies to sentences imposed by juries, however, and not to plea bargains. *Bailey v. Commonwealth*, 70 S.W.3d 414 (Ky.2002).

Calculation of - One often hears that a "state year" is 7 months, 21 days, or that it is around 8 months. This is an old wives' tale. The truth is there is no single answer to what constitutes a state year. It depends entirely on what kind of statutory credit the prisoner receives during each year. There are three kinds of statutory credit:

Statutory Good Time, KRS 197.045(1) – A prisoner can get 10 days of good time per month. This is probably the source of the rumor that a state year is around eight months. People multiply 10 days per month by 12 months and assume that means that 120 days (4 months) will come off the time, leaving only 8 months to serve out of every state year. It does not work that way. In actuality, the time is being taken off the end of the year as the year progresses, so the prisoner never "serves" 12 months. For instance, after the first three months, at 10 days credit per month, the last month of the year falls off:

1 2 3 4 5 6 7 8 9 10 11 ~~12~~

In another 3 months, the next-to-last month falls off:

1 2 3 4 5 6 7 8 9 10 ~~11~~ ~~12~~

Leaving, in this case, a "state year" of 9 months:

1 2 3 4 5 6 7 8 9 ~~10~~ ~~11~~ ~~12~~

Good time can be suspended for misconduct. Violent offenders do not get good time. KRS 439.3401(4). Sexual offenders earn good time but do not get it applied to their sentences until completion of the Sexual Offender Treatment Program. KRS 197.045(4).

Meritorious Good Time, KRS 197.045(1) – This is credit for performing duties and work while incarcerated, and is usually handed out liberally. A prisoner can get an extra 5 days of credit per month with this. So, if the prisoner is getting meritorious work time on top of good time, the 9th month of his state year will also fall off of his sentence after 6 months. This would reduce his "state year," that year, to only 8 months.

Educational Good Time, KRS 197.045(3) – This is the only mandatory credit, and the only credit a violent offender can receive. KRS 439.3401(4). It is awarded upon the completion of a G.E.D. or the earning of a high school diploma, and upon the earning of a 2- and 4-year degree. This is a 60-day credit. So, if it is added to the credit our hypothetical prisoner already has for this year, his "state year" can be as short as 6 months.

See Brenn O. Combs, "Understanding Sentence Calculation and Application," *The Advocate*, vol. 25, no. 5, September, 2003, pp. 30-36.

Sex Offenders – If a person convicted of a Class D sex offense receives a sentence of 2 years or more, he must serve that sentence in a state institution. KRS 532.100(4)(a). State prisoners who cannot be housed in county jails or regional detention facilities must be transferred to a state institution within 45 days of final sentencing. KRS 532.100(7).

Be aware that, since KRS 439.340 requires completion of the Sexual Offender Treatment Program before a prisoner is eligible for parole, and since the program takes at least 2 years to complete, if your client receives a sentence of two years he will simply have to serve it all out. Good time will also not be credited until completion of the treatment program. KRS 197.045(4).

NOTES

Rev. 06/20/05

Commonwealth **of Kentucky- Division of Probation and Parole**
Conditions of Supervision

Name: _____ Number:

I understand that a Court and/or Parole Authority has placed me under the supervision of the Kentucky Division of Probation and Parole, and I agree to abide by the following conditions:

I will report as directed at intervals and places as directed by my Probation and Parole Officer.
My level of supervision is:
☐ **High Risk** – (Minimum requirement of two face-to-face contacts per month between officer and offender. One contact shall be at a location outside the office. One face-to-face contact at the offender's residence shall occur at least once every three months)
☐ **Moderate Risk** – (Minimum requirement of one face-to-face contact per month between officer and offender. One face-to-face contact at the offender's residence shall occur at least once every six months)
☐ **Low Risk** – (Minimum requirement of one face-to-face contact every three months between officer and offender. The offender shall mail in reports during the months when the offender does not report in person.)
☐ **Administrative Supervision** – (The offender shall mail in reports once every three months with accompanying verification of employment and compliance with financial obligations.)

I agree to abide by the following special conditions as ordered by the Court and/or Parole Authority:
1.
2.
3.
4.
☐ I shall make restitution to _____ at the rate of $_____per month for a total of $_____.
☐ I shall pay a supervision fee to _____ Circuit Court Clerk at the rate of $_____ per month for a total of $_____.
☐ I shall pay fines and court costs of $_____ by _____.
☐ I shall complete _____ hours of community service work by _____.
☐ I shall complete any treatment program as directed by the Court, Paroling Authority or my officer.
☐ I shall pay child support to _____ at the rate of $_____ per month.
☐ I understand I am under a curfew and must be inside my residence from 10:00 p.m. to 6:00 a.m. seven days per week.

General Conditions
1. I understand that I shall be subject to search and seizure without a warrant if my officer has reasonable suspicion that I may have illegal drugs, alcohol or other contraband on my person or property.
2. I understand that I shall not use or possess any alcoholic beverages (or enter any place where they are sold as the primary commodity, ie. Bars, Nightclubs, Liquor Stores, etc.) or narcotics/controlled substances that are not currently prescribed to my by a licensed physician.
3. I understand that I shall avoid associating with any convicted felon and shall not visit residents of jails or prisons unless permission is obtained from my officer and institutional or jail authority.
4. I understand that I shall submit to alcohol and/or drug testing and shall pay for said testing if directed by my officer.
5. I understand that my Probation and Parole Officer may visit my residence and place of employment at any time. I understand that I will maintain only one residence and shall not change my residence without approval of my officer.
6. I shall work regularly and support my legal dependants. I will immediately report to my officer any change or loss of employment. If unemployed I will make every attempt to obtain bona fide employment.
7. My designated area of supervision is _____ and I will not leave this area without my officer's permission. I also understand that I do hereby agree to waive extradition to the State of Kentucky and also agree that I will not contest any effort by any other state to return me to the State of Kentucky. Failure to comply with the above will be deemed to be a violation of the terms and conditions of my release.
8. I shall not violate any law or ordinance of this state, any other state or the United States. If I am arrested, cited, or served with a Criminal Summons/Emergency Protective Order/Domestic Violence Order or if I am questioned by any law enforcement official I will report this within 72 hours to my Probation and Parole Officer. I understand that I cannot serve as an informant or special agent for any law enforcement agency without written permission of the Court .
9. I shall not harass or threaten any employee of the Kentucky Department of Corrections and agree to cooperate fully with any Probation and Parole Officer *or* any Peace Officer acting at the direction of a Probation and Parole Officer, during the course of my supervision. I shall not falsify any written or oral report to any employee of the Kentucky Department of Corrections.
10. I understand that as a convicted felon that I shall not be permitted to purchase, own or have in my possession or control a firearm, ammunition, dangerous instrument or deadly weapon. I understand that I have lost the right to vote and hold public office. When I become eligible I may apply for Restoration of Civil Rights at any Probation and Parole Office. Restoration of Civil Rights does not give a convicted felon the right to purchase, own or possess a firearm.
11. I understand that I have five (5) days from the date of an incident to file a written grievance with my officer.

I have read, or had read to me the above conditions of my release that I must fully observe while under active supervision. I fully understand and accept the above conditions and realize that any violation shall be reported and failure to abide by these conditions can be grounds for revocation of my release. I have been given a copy of these Conditions of Supervision.

Date:_____ OFFENDER:_____

Date:_____ Probation and Parole Officer:_____

Parole Eligibility Chart

20% Eligibility (applies to non-violent offenses committed after December 3, 1980)
(Deduct credit for time served prior to sentencing.)

1-23 months.....4 months
2 years.....5 months
2 years, 6 months.....6 months
3 years.....7 months
3 years, 6 months.....8 months
4 years.....10 months
4 years, 6 months.....11 months
5 years.....1 year
5 years, 6 months.....1 year, 1 month
6 years.....1 year, 2 months
7 years.....1 year, 5 months
8 years.....1 year, 7 months
9 years.....1 year, 10 months
10 years.....2 years
11 years.....2 years, 2 months
12 years.....2 years, 5 months
13 years.....2 years, 7 months
14 years.....2 years, 10 months
15 years.....3 years
16 years.....3 years, 2 months
17 years.....3 years, 5 months
18 years.....3 years, 7 months
19 years.....3 years, 10 months
20 years.....4 years
21 years.....4 years, 2 months
22 years.....4 years, 5 months
23 years.....4 years, 7 months
24 years.....4 years, 10 months
25 years.....5 years
26 years.....5 years, 2 months
27 years.....5 years, 5 months
28 years.....5 years, 7 months
29 years.....5 years, 10 months
30 years.....6 years
31 years.....6 years, 2 months
32 years.....6 years, 5 months
33 years.....6 years, 7 months
34 years.....6 years, 10 months
35 years.....7 years
36 years.....7 years, 2 months
37 years.....7 years, 5 months
38 years.....7 years, 7 months
39 years.....7 years, 10 months
more than 39 years
up to and including life.....8 years
PFO 1st ,and A,B, or C felony.....10 years

PFO 1st based only on Class D Felonies does not have to serve 10 years to be eligible for parole, but is calculated at 20% instead. The 10 years only applies if any one of the offenses is a Class C or above.

Violent Offender, 85% (applies to offenses committed after July 15, 1998)

Includes: Capital offense, Class A felonies, Class B felonies involving death or serious physical injury, felony sexual offense or attempt of it, use of minor in sexual performance, promoting sexual performance by a minor, unlawful transaction with a minor 1st degree, promoting prostitution 1st degree, criminal abuse first degree, burglary 1st degree when accompanied by assault or attempted assault, burglary 1st degree when accompanied by kidnapping or attempted kidnapping, robbery 1st degree (for offenses after July 15, 2002). *Violent offenders do not get good time credit!*

10 years.....8 years, 6 months
10 years, 6 months.....9 years
11 years.....9 years, 4 months
11 years, 6 months.....9 years, 10 months
12 years.....10 years, 2 months
12 years, 6 months.....10 years, 9 months
13 years.....11 years
13 years, 6 months.....11 years, 7 months
14 years.....11 years, 11 months
14 years, 6 months.....12 years, 5 months
15 years.....12 years, 9 months
15 years, 6 months.....13 years
16 years.....13 years, 7 months
16 years, 6 months.....14 years, 1 month
17 years.....14 years, 5 months
17 years, 6 months.....15 years
18 years.....15 years, 4 months
18 years, 6 months.....15 years, 10 months
19 years.....16 years, 2 months
19 years, 6 months.....16 years, 8 months
20 years.....17 years
20 years, 6 months.....17 years, 6 months
21 years.....17 years, 10 months
21 years, 6 months.....18 years, 4 months
22 years.....18 years, 8 months
22 years, 6 months.....19 years, 3 months
23 years.....19 years, 7 months
23 years, 6 months.....20 years

For any sentence over 23 years, 6 months, parole eligibility is 20 years. *Hughes v. Commonwealth*, 87 S.W.3d 850 (Ky.2002). There is an exception to 85% eligibility for victims of domestic violence.

Life sentence – 20 years

Ineligible for parole –
Guilty of any felony offense under KRS 218A, 507, 508, 509, 511, or 513, or guilty of possession of a destructive device, unauthorized use of an automobile, riot 1st degree or 2nd degree, possession of firearm by convicted felon, unlawful possession of weapon on school property, possession of handgun by minor, or theft of a motor vehicle under 514.030, *AND* wearing body armor and armed with a deadly weapon
or
A sexual offender who qualifies for sexual offender treatment who has not yet finished the treatment program

LAYING EVIDENTIARY FOUNDATIONS

When Necessary – "Whenever Evidence law makes proof of a fact or event a condition to the admission of an item of evidence, that fact or event is part of the foundation for the evidence's admission." *Criminal Evidentiary Foundations*, Imwinkelried & Blinka, Lexis, 1997, p. 2.

Pretrial Hearings and Motions in Limine – Some questions involving the admissibility of evidence require a judicial finding of fact before the evidence is admissible. KRE 104(a). These types of foundations involve preliminary questions of law. Some of these questions must be argued outside the presence or hearing of the jury. KRE 104(c), RCr 9.78. The court is not bound by the rules of evidence, except that it may not hear privileged information.

Laying a Foundation in Front of a Jury – In other instances, what is necessary for an item of evidence to be relevant is the establishment of another fact. KRE 104(b). This is often called "conditional relevancy." In those cases, the jury hears both the foundation fact and the primary fact and can use one to weigh the credibility of the other. Typical examples of these kinds of foundations include authenticating documents or objects, etc., under KRE Article IX, establishing that a lay witness has personal knowledge of what she is about to testify to, and reviewing an expert's credentials relevant to his expert testimony. Foundational facts must be proven with "evidence sufficient to support a finding of the fulfillment of the condition," KRE 104(b). The standard is preponderance of the evidence. *See, e.g., Bourjaily v. U.S.*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). What follows are some guides to laying foundations in those cases.

EXHIBITS, GENERAL PROCESS:

1. Mark the exhibit.
2. Show it to the prosecutor.
3. Ask the court to approach the witness.
4. Show the witness the exhibit.
5. Lay the proper foundation for the exhibit (including authentication if necessary).
6. Move that the exhibit be admitted into evidence.
7. If applicable, request permission to publish the exhibit to the jury and publish it to the jury.

AUTHENTICATION, KRE 901:

Business records
The witness can identify the documents.
They were prepared in the course of regularly conducted business activity.
The documents were stored and witness has personal knowledge of the business' filing system.
She properly removed a record from this filing system.
She recognizes the exhibit as the record she removed from this system.
How does she recognize it as that record?

Computer records
The witness has personal knowledge of the business' filing system.
The business uses a computer.
The computer is reliable.
The business has a procedure for inputing records into this computer.
This procedure has specific safeguards to ensure reliability and accuracy.
The computer is properly maintained.
She used the computer to obtain certain records.
She followed proper procedures to obtain these records.
The computer was functioning properly at the time she obtained these records.
She recognizes the exhibit as these records.
How does she recognize it as the records?
If the records contain any unusual symbols, have the witness explain them.

Copies
Witness is familiar with the original.
The original was copied.
The original was lost or destroyed.
A thorough search has failed to locate the original.
She believes that the exhibit is a "true and accurate" copy of the original.

Documents, witness observed formation
When did she observe the formation?
Who was there?
How was the document formed?
Does she recognize the exhibit as this same document?
How does she recognize it?

Documents, witness familiar with author's handwriting
Does she recognize the handwriting on the writing?
How is she familiar with the author's handwriting style?
What is her familiarity based upon?

Letters, sent by witness
Witness authored/prepared a letter to another person.
She signed the original letter.
She knows the letter was properly mailed.
She recognizes the exhibit as that letter.
How does she recognize it?

Letters, received by witness in reply to earlier letter
Witness authored/prepared the first letter.
She addressed it to the author of this letter and properly mailed it.
She received a letter in reply.
The letter arrived through the mail system.
The reply letter was either responsive to her first letter or references her first letter in its own text.
The reply letter had the name of whomever wrote it.
She recognizes the exhibit as the reply letter.
How does she recognize the exhibit as the reply letter?

Photographs
The witness is familiar with the scene depicted in the photograph at the relevant time and date.
She believes that the exhibit "fairly and accurately" depicts the scene at the relevant time and date.

Taped conversations
Have you had the opportunity to hear the voice of Mr. X before?
How many times have you heard his voice?
How familiar are you with Mr. X's voice?
Have you heard the recording marked as exhibit "a" for identification?
Do you recognize the voice?
To whom does the voice belong?

Telephone conversations, witness knows the declarant
When did the phone call take place?
Where was the witness when the call occurred?
How does the witness recognize the declarant's voice?
Who was the declarant?
Who else was on the line?
Who said what to whom?

Telephone conversations, witness finds out later who the caller was
When did the phone call take place?
Where was the witness when the call occurred?
The witness did not recognize the declarant's voice at the time.
She later talked to the declarant again.
Where did she talk to the declarant again?
When did she talk to the declarant again?
What were the surrounding circumstances?
Why did she talk to the declarant again?
She now recognizes the declarant's voice from the previous phone call.
Who was the declarant?
Who else was on the line then?
Who said what to whom?

Telephone conversations, witness dialed a listed business number
When did the phone call take place?
Where was the witness when the call occurred?
How did the witness obtain the business number (telephone directory, internet, information, flyer)?
She dialed the business number.
Voice on the other end informed her that she had reached the business.
Who else was on the line then?
Who said what to whom?

Caller identification
Establish the reliability of caller identification. The judge may take judicial notice or you may have to call a telephone company representative as an expert witness (see "Scientific Evidence" litany).
The witness obtained and installed (or had installed) a caller id box to her telephone before the specific call.
The witness installed (or had installed) the caller id box properly. This may be proven by either expert testimony or circumstantial evidence (it worked for a period of time and the day of the specific call).
The specific call occurred.
When the specific call occurred, the caller id box displayed a particular telephone number. The witness may be able to testify from personal knowledge if she recalls the number or you may need to establish a foundation for the caller id box's logging capacity.
The witness knows who that number belongs to (from personal knowledge, a telephone directory, or a backwards telephone entry already entered into evidence).
The witness publishes the identity of the person to whom that phone number belongs.

Physical Evidence, unique
The exhibit can be identified through the senses and possesses some unique identifying features.
The witness recognizes the exhibit.
She knows what the exhibit looked like on the relevant date.
She recognizes the unique identifying features that distinguish it from other similar objects.
The exhibit is in the same condition now as when she saw it before.

Physical evidence, not unique-Chain of custody required
Either one witness or a series of witnesses needs to show through standard procedures or personal knowledge that the exhibit as been in the "continuous, secure, and exclusive" possession of one or several specified people.
The exhibit was specially labeled and remained in a sealed, tamper-resistant container the entire time.

DEMONSTRATIVE EVIDENCE

Models/diagrams, Verifying

Follow the **photograph litany**. If the model or diagram is not to scale, the witness should say so and you should not object to a limiting instruction.

Marking
First, you need to determine whether the judge prefers that a diagram be completely marked before being introduced into evidence or will allow witnesses to label an exhibit already in evidence. Second, you should give very specific standardized marking instructions, make sure the record reflects that the witness followed your instructions, and have a legend on the diagram to explain the markings.

Witness drawings
The witness is familiar with the relevant scene on the relevant day.
The drawing would help the witness explain her testimony.
The drawing is a reasonably accurate depiction of the scene on that day (and is not prejudicial in any way).

Witness demonstrations
The witness observed a relevant physical action.
The demonstration would help the witness explain her testimony (and is more probative than prejudicial).
The witness demonstrates the physical action.

Charts that summarize evidence
The witness (usually an expert) used exhibits and testimony already in evidence to prepare the chart.
Every fact on the chart is taken from specific witness testimony or exhibit already in evidence.

She explains any mathematical computations or other extrapolations of the evidence used to obtain a result on the chart.

WITNESSES:

Lay Witness
Must have personal knowledge, KRE 602, 701

Expert Testimony, KRE 703
1. Qualify the witness. The witness' qualifications include:
Advanced educational degree(s) in the area
Other specialized training in the area
License(s) to practice in the area
Experience actually practicing in the area for "a substantial amount of time"
Teaching in the area
Publishing in the area
Membership in a professional organization(s) in the area
Previous qualification and testimony as an expert in court
2. The expert explains the general theory behind her testimony (unless the theory or principle is stipulated to or judicially noticed).
3. The factual basis of the expert opinion:
Personal knowledge,
Third-party hearsay (if admissible in your jurisdiction),
Hypothetical questions:
Tell the expert the facts to assume (usually there must already be evidence on the record supporting these assumed facts).
Tell her to assume that a witness(es) testified accurately.
4. The statement of the expert opinion.
5. The explanation of the expert opinion.

REFRESHING RECOLLECTION:

Present recollection revived
The witness forgets facts that she recalled earlier on the stand.
She states that she knew the facts before but cannot remember them now.
She states that her report or another item will help her remember.
She is given the report or other item for review (it is *not* admitted into evidence).
She states that she remembers.
She continues to testify without referring further to the report or item.

Past recollection recorded
The witness doesn't recall the relevant event.
She had firsthand knowledge of the event earlier.
She made a record earlier of the event at or about the time the event occurred.
Give the witness the exhibit, her record (it does *not* have to be admitted into evidence).
She recognizes the exhibit as her record.
This record was complete and accurate when she made it.
It is in the same condition now as when she made it.
She reads or refers to the necessary parts of the record in order to recall what she witnessed earlier.

IMPEACHMENT:

Prior inconsistent statement, KRE 613
Get the witness to commit to her testimony in direct examination.
The witness made a prior statement (oral or written) at a specific place.
The witness made the statement at a specific time.
What were the surrounding circumstances?
Establish that the prior statement was made under reliable circumstances.
Read/say the prior inconsistent statement and get her to admit making it. Give her the chance to explain.
If she fights you at all, you will have to prove the first chance you have that she actually made the statement.

Untruthfulness, reputation for, KRE 608
The impeaching witness ("impeacher") is a member of the same community (residential or social) of the witness.
The impeacher has been a member for a substantial period of time.
The impeacher states that the witness has a reputation for untruthfulness in that community.
The impeacher knows the witness' reputation for untruthfulness.

Untruthfulness, opinion regarding
The impeacher knows the witness personally.
How she knows the witness. Number of years acquainted? How regularly does she see him?
The impeacher has a personal opinion of the witness' truthfulness.
In the impeacher's opinion, the witness is untruthful.

[i] *Derived from, in part,* Edward J. Imwinkelried & Daniel D. Blinka, Criminal Evidentiary Foundations, (1997 & Supp. 1999).

OBJECTIONS CHART

TO JURY SELECTION

A. **Batson issues.**
B. **Defining Reasonable Doubt.**
C. **Facts.** Arguing facts.
D. **Law.** Arguing law.
E. **Prejudice**.

TO OPENING STATEMENT

A. **Arguing the facts, law.**
B. **Inadmissible evidence.** Mentions inadmissible evidence
C. **Personal belief.**
D. **Prejudice.**
E. **Unprovable evidence/facts.** Mentions evidence or facts that are unprovable.

TO EXHIBITS

A. **Authentication**
   1. **Best evidence.**
   2. **Chain of custody.**
   3. **Condition altered.**
   4. **Inaccurate depiction or copy.**
B. **Completeness.** Out of context and misleading.
C. **Foundation.**
D. **Hearsay/Double hearsay.**
E. **Contains Inadmissible evidence.**
F. **Prejudice.**
G **Relevance.**

TO QUESTIONS

A. **Ambiguous/confusing**.
B. **Argumentative, harassing**.
C. **Asked and answered**.
D. **Assumes a fact not in evidence**.
E. **Best evidence**.
F. **Beyond the scope** of direct/cross.
G **Bolstering** witness credibility before it has been attacked.
H. **Collateral matter**. Seeking impeachment on a matter collateral to the trial.
I. **Compound question**.
J. **Conclusion**.
K. **Cumulative**
L. **Foundation**.
M. **Hearsay**.
N. **Improper characterization**.
O. **Improper hypothetical question.**
P. **Improper identification.**
Q. **Improper impeachment**.
R. **Incompetent.** Witness is not competent to answer that question.
S. **Irrelevant**.
T. **Leading**. Asking too many leading questions on direct.
U. **Misstates evidence/misquotes a witness**.
V. **Narrative**. Calls for a narrative answer.
W. **Opinion**. Calls for an opinion the witness is not qualified to give.
X. **Prejudice**.
Y. **Privilege**.
Z. **Speculative**. Calls for speculation.
AA. **Testifying**. The prosecutor is testifying.

TO ANSWERS

A. **Ambiguous/confusing**
B. **Assumes a fact not in evidence**.
C. **Authentication**.
D. **Best evidence**.
E. **Beyond the scope**.
F. **Conclusion**.
G **Hearsay**.
H. **Improper characterization**.
I. **Irrelevant**.
J. **Narrative**.
K. **No question pending.**
L. **Opinion**. Witness not qualified to give such an opinion.
M. **Prejudice**.
N. **Privilege**.
O. **Unresponsive**.

TO CLOSING ARGUMENT

A. **Appeal to local prejudice.**
B. **Arguing legal presumptions/burden shifting.**
C. **Arguing effect of a verdict.**
D. **Defining Reasonable Doubt.**
E. **Diminishing juror responsibility.**
F. **Failure of accused to testify.**
G **Golden rule.**
H. **Improper demonstration.**
I. **Matters not in evidence.**
J. **Misstating evidence**.
K. **Misstating the law**.
L. **Personal attack** on your client or yourself.
M. **Personal opinion of credibility**.
N. **Prejudice**.
O. **"Send a message**."

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