# The Advocate

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## HB 463 Savings

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Three years after passage of House Bill 463, the law continues to make a significant impact on corrections spending, drug treatment, and most importantly, public safety in Kentucky.

But to fully grasp the relevance of this groundbreaking legislation, one needs to have a realistic understanding of what HB 463 actually set out to do, versus the urban legend that people have come to believe it did.

HB 463 did not reform the penal code.

It did, however, address significant reentry issues, particularly those exemplified by the very successful Mandatory Reentry Supervision (MRS), and updated several provisions in our drug laws contained in Chapter 218A.

While the number of state inmates is fluid, rising and falling with the uncontrollable fluctuation of offenders entering the system, there is ample evidence that our concerted efforts are paying off.

For example, as a result of HB 463:

- We've dramatically changed the trajectory of our felon population. According to a 2008 forecast by Dr. James Austin, Kentucky's felon population had been projected to total about 25,000 by fiscal year 2012. After statutory changes in 2008 and 2009 aimed at reversing that trend, the forecast had dropped to nearly 23,000 by June 2012. And while today's actual prison population – hovering around 21,500 – is higher than it was forecasted to be after the implementation of HB 463, the evidence strongly suggests that the population would have been much higher without the initiatives in this law;
- Arrests have dropped by more than 40,000 since 2011, while the public safety rate – the percentage of those not charged with a new crime while on pretrial release – has remained high, at 91%;
- Kentucky added metrics to our drug laws for the first time, differentiating between casual possessors and traffickers;
- Kentucky's crime rates have continued to drop. Since 2005, cases have declined by more than 34,000, with DUI cases dropping by more than 10,000;
- MRS (Mandatory Reentry Supervision) has realized almost $37 million in savings, with nearly 9,300 offenders released. And more than 77% of those released under this provision have been successful during their period of supervision;
- The number of SAP (Substance Abuse Program) beds have increased to 5,677, and the PUC (Parole Upon Completion) waiting list has been eliminated; and
- The Local Corrections Assistance Fund, created under HB 463 to reinvest a portion of the savings realized from these initiatives, increased by more than $2 million over the past fiscal year, to $4,637,600.

For all the legislative and policy changes implemented over the past few years, more still needs to be done to reign in our felon population and corrections spending. House Bill 463 made headway, although it did little to impart real penal code reform necessary to combine evidence-based strategies with criminal justice responsibilities.

With this solid foundation set, we need to now turn our review to the penal code – the Chapter 500 series – including a thorough review of Kentucky's parole system; discussion about widening the band of offenses that qualify for 50% parole eligibility; and looking at how we handle parole board cases that are now eligible to be determined by file review.

In addition, the time is ripe to revisit Kentucky's felony classification system, and determine if the four classifications that have been used for the past 40 years adequately correspond to modern crime trends and practical applications.

My hope is that as we continue to monitor the impacts of HB 463, we also develop new initiatives to build on the foundation of the law.

## It Ain't Over Till It's Over: Litigating The Non-Capital Sentencing Hearing At Trial

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Kentucky is one of only a handful of states to utilize jury sentencing in all criminal trials. Consequently, the criminal defense practitioner will eventually find himself facing twelve very angry citizens who just convicted the defendant and prepared to pass sentence armed with the defendant's entire criminal history and just enough information about parole eligibility to affirm that a little knowledge is indeed a dangerous thing. The non-capital sentencing hearing is one of the most daunting proceedings defense counsel will navigate. It rears its head immediately after the guilty verdict, at the very point where client and counsel find themselves at their lowest, yet it demands a high level of attention and deft practice. In order to meet these challenges counsel must be fully aware of all statutory provisions relating to the sentencing hearing and must have engaged in exhaustive pretrial preparation relating to discovery, investigation and motion practice. He must then be prepared to meet a variety of challenges in the hearing itself.

**Applicable Statutes**

Three statutes, in conjunction with one another, constitute the basis for the non-capital sentencing proceeding in Kentucky: the Truth-In-Sentencing statute (KRS 532.055), the Persistent Felony Offender statute (KRS 532.080) and the parole and Violent Offender statutes (KRS 439.340 and KRS 439.34011). The first of these, the Truth-In-Sentencing (TIS) Statute, KRS 532.055, states:

> Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively. KRS 532.055(2)

It further provides:

> Upon conclusion of the proof, the court shall instruct the jury on the range of punishment and counsel for the defendant may present arguments followed by the counsel for the Commonwealth. The jury shall then retire and recommend a sentence for the defendant. KRS 532.055(2)(b)

In establishing admissible evidence at the sentencing hearing, KRS 532.055(2)(a) allows for admission of a wide range of evidence during the TIS hearing, including:

- Minimum parole eligibility
- Prior convictions (both felony and misdemeanor)
- Nature of prior offenses
- Date of commission, sentencing and date of release from confinement or supervision from all prior offenses
- Maximum expiration of sentences for all current and prior offenses
- Defendant's status on probation, parole, postincarceration supervision, conditional discharge, or any other form of legal release
- Juvenile felony adjudications of guilt
- Victim impact evidence, including physical, psychological, or financial harm
- The defendant may introduce evidence in mitigation or in support of leniency.

In addition to that evidence referenced in the statute, various appellate decisions also allow introduction during the TIS sentencing hearing of evidence beyond that referenced in the statute, almost all of which work to the detriment of the defendant. This includes evidence of parole violations. *Garrison v. Com., 338 S.W.3d 257 (Ky. 2011)*; statutory good time. *Com. v. Higgs*, 59 S.W.3d 886 (Ky.2001); and credit for time served. *Cornelison v. Com., 990 S.W.2d 609 (Ky. 1999)*. Given the expansive view of the appellate courts in effectuating legislative intent to provide jurors with broad information concerning sentencing, introduction of probation violations, educational credits and street credit, while not yet addressed in appellate opinions, must also be anticipated. Such evidence invariably implies the probability of early release on parole, good time credits, etc. These decisions, in the aggregate, create the perception in the jury that any sentence actually served will likely be less than what they impose. Conversely, courts have denied defendants the right to introduce parole statistics to rebut such inferences by establishing the defendant's poor likelihood of early release. *Young v. Com., 129 S.W.3d 343 (Ky. 2004)*.

Kentucky's recidivist statute, KRS 532.080, known as the Persistent Felony Offender (PFO) statute, is a key feature of any jury sentencing proceeding where the defendant has a prior felony record. The PFO hearing is combined with the Truth-In-Sentencing (TIS) hearing. This combined TIS/PFO hearing is typically referred to simply as the TIS hearing or proceeding. While PFO is a status, not a separate offense, each element must still be proven by the Commonwealth beyond a reasonable doubt.

While the particulars of the PFO statute and the plethora of cases arising therefrom, are beyond the scope of this article, the statute generally allows for conviction as a Persistent Felony Offender in the Second Degree if a defendant is presently over twenty-one and, in the last five years, completed service of a felony sentence, was on probation, parole, etc. at the time of the new offense, was discharged from probation, parole, etc. within the last five years, or was in custody or an escapee at the time of the new offense. The defendant qualifies as a Persistent Felony Offender in the First Degree if, in addition to the PFO Second Degree requirements, he also has at least one additional felony at any time in his past. Conviction as a Persistent Felony Offender affects the length of sentence, probation eligibility and parole eligibility. It will often effectively double the length of sentence imposed and may, in the instance of PFO First Degree, impose a minimum ten-year parole eligibility.

KRS 439.340 and KRS 439.3401, the latter known as the Violent Offender statute, generally establish parole eligibilities in Kentucky. KRS 439.340 establishes a fifteen percent parole eligibility for Class D felons while KRS 439.3401 establishes an eighty-five percent parole eligibility for those convicted of Violent Offenses which typically relate to offenses involving death and serious physical injury, certain sexual offenses and certain robbery and burglary offenses. Interestingly, the twenty percent parole eligibility with which so many Kentucky criminal practitioners are familiar, is actually a creature of the Kentucky Administrative Regulations and is not found in a statute. As previously stated, in the combined TIS/PFO hearing, the jury will be advised of minimum parole eligibilities associated with each felony offense for which a defendant has been convicted.

**Mitigation**

That portion of the Truth-In-Sentencing statute by which "the defendant may introduce evidence in mitigation or in support of leniency" is the central component of any defense case at a TIS hearing. Obviously, this language could hardly be broader and it carries with it an obligation for counsel to appropriately investigate potential mitigation evidence in anticipation of its introduction during the TIS hearing. This obligation involves an ethical component. Under the ABA Criminal Justice Standards: Defense Function 4.1, "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

While a broad ranging investigation into the defendant's background and life history in a non-capital sentencing may at first seem foreign to counsel, similar provisions in the Kentucky death penalty statute (KRS 532.025), where the sentencing jury must consider "any

mitigating circumstances," provides a useful template for counsel. Indeed, there is no reason to conclude that mitigation evidence contemplated in a non-capital TIS proceeding under KRS 532.055 should be construed any narrower than the kind of mitigation evidence investigated and presented for decades in capital cases under KRS 532.025.

Borrowing from forty years of practice in the capital context, counsel should investigate all aspects of a defendant's life history for potential presentation in a TIS hearing. This includes his mental health history, intellectual functioning, childhood poverty or abuse, academic history and testing, lack of education, being raised in a single-parent household, substance abuse history relating to the defendant or his family and any other aspect of the defendant's background that reasonably helps explain to a jury who he is as a person and how he arrived at his present station in life.

In addition to interviewing such witnesses, counsel must also obtain corresponding documentation relative to all of the above such as medical, educational, counseling and social service records. Use of subpoenas and court orders to obtain these documents should be avoided, if at all possible, particularly where it is unknown if the records actually contain damaging evidence. Use of judicial processes may put the Commonwealth on notice of damaging records. Many of these documents can be obtained through the use of appropriate release forms executed by the client or his family which enables counsel to assess their usefulness without the Commonwealth being apprised of their existence.

In addition to documenting the challenges in a defendant's life, counsel must also investigate those aspects of his background which demonstrate positive attributes and potential. This would include lack of prior criminal record, a good academic record, including participation in extra-curricular activities such as sports and clubs, broad family and community support, a good employment history, a good military record and particularly a combat history, etc. Where appropriate, counsel should not hesitate to establish a good institutional record for those clients with such a history.

Many clients were raised in very challenging circumstances and are now burdened with less than flattering histories. Counsel must nonetheless be prepared to impress upon the jury that every person, including the defendant, is the accumulation of a lifetime of experiences and relationships. The sentencing hearing becomes an exercise in humanization and context. Accordingly, counsel should never underestimate the power of small stories and anecdotes with the potential to emotionally move a juror. Perhaps only a single juror is moved by a coach remembering a skinny ninth-grader, not big enough to make the team but who always tried hard or the vacation bible school teacher, recalling from twenty years ago, a four year-old child whose drunken mother picked him up two hours late every day. That juror may be the one who insists that fifteen years is too much and that maybe five would be appropriate.

Again, borrowing from capital sentencing practice, counsel may consider attempting to introduce evidence of prison conditions, lack of educational and vocational training, and lack of mental health facilities in prison during the sentencing hearing. Arguably, a defendant convicted of a Class D or C felony could introduce evidence of the much harsher conditions of the county jails in which he may serve his sentence. Although admission of these kinds of evidence, even in the capital context, has been spotty, at best, its attempted introduction can still create an appellate issue. Any evidence that emphasizes unpleasant living conditions may encourage a jury to lessen the sentence out of a sense of mercy or compassion. There is seldom a downside to the presentation of such evidence.

Counsel must also recall that the Rules of Evidence still apply during the defense portion of a TIS hearing. Although some prosecutors and judges may be more lax about evidence rules in sentencing hearings, this cannot be assumed. Reciprocal discovery obligations must always be considered. Appropriate custodians of records may be necessary. Counsel should anticipate hearsay and relevancy objections.

Obviously, a defendant's own testimony may present mitigation. There may be some consideration of putting the defendant on the stand at the sentencing hearing. While typically a defendant does not testify at his TIS sentencing hearing, he is certainly entitled to do so and, just as at trial, it is a decision reserved for the client. Counsel should carefully review with the client why he may or may not wish to testify at the sentencing hearing.

Many of the same considerations which drove the defendant's decision to testify or not at the guilt phase will also apply in a sentencing hearing. There are, however, additional considerations. To the extent that a client chose to not testify during the guilt phase of his trial in order to prevent the jury from learning he is a convicted felon, this rationale no longer applies. The jury will have heard, during the Commonwealth's proof at the sentencing hearing, the defendant's entire criminal history. Aside from the Commonwealth having to prove, beyond a reasonable doubt, the elements of the PFO statute, the defendant is no longer cloaked in the presumption of innocence. Indeed, he has been convicted of the substantive offense. Anything the defendant may say on the stand is clearly subject to cross-examination. If the defense denied involvement in the crime during the guilt phase, particularly if the defendant testified to that effect, it may be fundamentally inconsistent for him to now say he is sorry. Such testimony could even undo otherwise preserved appellate issues from the guilt phase. The defendant could also open the door to matters otherwise inadmissible during the guilt phase. For example, his drug use may have earlier been excluded but if he discusses his lifelong struggles with addiction during the sentencing hearing, he may have to answer some very damaging questions. On the other hand, it may be helpful, in the right case, to humanize the defendant and allow, where appropriate, the jury to hear expressions of remorse. In any event, while testimony by the defendant during the TIS hearing cannot be reflexively eliminated from consideration, it is a path fraught with peril.

**Is it A Prior Conviction?**

There are numerous issues which are often confronted during the TIS hearing. One of the primary considerations relating to the defendant's criminal history is whether the Commonwealth is eliciting proof relative to an actual conviction. There must be a final judgment for it to qualify as a conviction. Accordingly, the "conviction" may not be pending on appeal and, if a notice of appeal has not been filed, the time to perfect the appeal must have run. Additionally, dismissed or merged charges are not convictions. *Robinson v. Com., 926 S.W.2d 853 (Ky.1996)*; nor, if a charge has been amended, is the original charge admissible. *Blane v. Com., 364 S.W.3d 140 (Ky. 2012)*; *Chavies v. Com., 354 S.W.3d 103 (Ky.2011)*. Cases which have been diverted, EPO's/DVO's and CPS findings are not criminal convictions and are not admissible at TIS hearings.

A conviction is, nevertheless, admissible if it is under collateral attack (i.e., an RCr 11.42 or CR 60.02 motion) at the time of its admission at the TIS hearing. *Melson v. Com. 772 S.W.2d 631 (Ky. 1989)*. Counsel should nonetheless consider a collateral attack on a conviction, even if that litigation cannot be completed by the time of the TIS hearing. While Melson does not render a conviction inadmissible by virtue of a pending collateral attack, should the it ultimately prove successful, even if after the TIS hearing, it may serve as the basis for subsequent reversal of the sentence on appeal, a situation not considered in *Melson*, supra.

Additionally, a particular conviction must be a "prior" conviction before admission at a TIS hearing. This issue arises when a conviction actually occurred subsequent to commission of the offense presently being tried. In that instance, the conviction may be used for TIS purposes so long as both the prior offense and the prior conviction occurred before the trial of the present offense. *Logan v. Com., 785 S.W. 2d 497 (Ky.App. 1989)*. Additionally, if the prior conviction was pending on appeal and, while not then a final conviction, was erroneously introduced during the TIS hearing, it has been held harmless error if that conviction was later affirmed on appeal. *Melson*, supra.

Finally, counsel must recall that in a TIS hearing, there are no limitations on the age of any convictions to be introduced. If a client was convicted of an offense in the nineteen-forties, it is still admissible at the TIS hearing so long as the Commonwealth can produce a valid judgment.

**Discovery Issues**

Counsel should assert that any documents the Commonwealth seeks to introduce or rely upon during the TIS hearing are discoverable under RCr 7.24. The Commonwealth may take the position that because court documents are public record they are as available to the defense as the Commonwealth and that it is, therefore, under no obligation to produce them in discovery. It may also assert that the defendant is aware of his own criminal record and is consequently already on notice of his prior convictions. Both approaches are simply wrong. *In Baumia v. Com., 402 S.W.3d 530, 544-45 (Ky. 2013)*, the Supreme Court stated:

> Pursuant to the trial court's order, Appellant was entitled to production of the theft by deception conviction before her trial began. We reject the Commonwealth's assertion that no error occurred because Appellant was aware of her prior conviction. We have stated that the premise underlying RCr 7.24 is not only to inform the defendant of her prior convictions (of which she should be aware), but to inform her that the Commonwealth has knowledge thereof.

This is not to say, however, that counsel should not engage in motion practice specifically tailored to discovery in the TIS hearing. Professor Les Abramson suggests specific wording for such a motion:

> That in the event that defendant is convicted of the charges alleged here, pursuant to KRS 532.055, defendant be entitled to inspect and copy all documents which would be used to establish any prior conviction to be introduced under KRS 532.055. In addition, defendant is entitled to evidence which the Commonwealth intends to introduce regarding minimum parole eligibility, the nature of prior offenses for which defendant was convicted, the court, docket number and date of any prior conviction, the date of the commission, date of sentencing, and date of release from confinement or supervision from all prior offenses, the maximum expiration of sentence as determined by the Commonwealth for all such current and prior offenses, and defendant's statutes if on probation, parole, conditional discharge, or any other form of legal release. Because KRS 532.055 gives the defendant the right to introduce evidence in mitigation, defendant also moves for any exculpatory evidence, including whether the charges for which the defendant has been previously convicted differ in any way from the crimes originally charged, all evidence of an exculpatory nature in relation to the original charges, all evidence of any specific treatment received by defendant during prior incarceration concerning mental or emotional problems, and any indication that any prior pleas of guilty were entered without counsel or full advisement of all constitutional rights.
>
> *8 Ky. Prac. Crim. Prac. & Proc. § 21:45 (5th ed.)*

Should the Commonwealth fail to produce discoverable records relevant to the TIS proceedings, counsel still has available the traditional panoply of motions otherwise available in discovery disputes. Consideration should be given to Motions To Compel Discovery and, in instances where the Commonwealth provides TIS materials, but fails to do so in a timely fashion, Motions In Limine and Motions To Exclude under RCr 7.24(6).

**Admissibility**

Beyond discovery issues, questions invariably arise in the TIS hearing itself regarding which the admissibility of particular records. Counsel should always assert that only fully certified court records are admissible. Courtnet records are not official records and are not admissible. *Finnell v. Com., 295 S.W.3d 829 (Ky. 2009)*. Indeed, at the top of the computer screen in Courtnet, there is a notice that the information contained therein is not for official use. Documents that are actually court records but are not certified are likewise inadmissible. *Robinson v. Com., 926 S.W.2d 853 (Ky. 1996)*.

Particular care should be taken in reviewing out-of-state court records for certification. Such records are subject to additional certification requirements beyond those necessary for domestic court records. They must be appropriately certified by both the clerk and judge of the out-of-state court from where they originate.

KRS 422.040 states:

> The records and judicial proceedings of any court of any state, attested by the clerk thereof in due form, with the seal of the court annexed if there be a seal, and certified by the judge, chief justice or presiding magistrate of the court, shall have the same faith and credit given to them in this state as they would at the place from which the records come….

Appropriate certification is, however, only a threshold issue. Counsel must additionally be prepared to argue against documents from court files that are irrelevant, unfairly prejudicial, have the potential to

confuse the jury or which contain hearsay. Motions In Limine should be made regarding exclusion of dismissed charges, original charges amended to what are now prior convictions, diverted charges, etc. Documents containing matters outside the conviction itself such as plea sheets, discovery documents and motions are all inadmissible and should be excluded. There are instances of the Commonwealth introducing the entire court file as a "conviction" where the file contained Discovery materials that revealed the particulars of the investigation, including extremely prejudicial hearsay such a victim statements, police reports, suppression motions, etc.

Even where particular documents relate to the conviction itself, care must be taken to insure that such documents, and testimony derived therefrom, such as the judgment, shock probation orders, and revocation documents do not contain prejudicial or otherwise inadmissible material. For instance, a jury may be able to receive that portion of a judgment that contains a finding of guilt, the sentence, the date of sentence, etc. It should not receive particular findings seen in standard language in judgments such as how probation would depreciate the seriousness of the offense or that the defendant is in need of services that can best be provided by the Corrections Department. Similarly, the jury may be entitled to hear, for PFO purposes, that a defendant had his probation revoked on a certain date. It is not entitled to be informed of the grounds for the revocation. Appropriate Motions In Limine and redactions should be made to insure the jury is not made aware of this irrelevant and prejudicial material.

**Scope of the Hearing**

Because the TIS hearing is limited to certain issues, counsel should insure that no evidence is introduced, either by documents or through testimony relying on those documents, that is not otherwise clearly relevant to the PFO statute (KRS 532.080), the TIS statute (KRS 532.055) and the statutes relating to parole eligibility and Violent Offenders (KRS 439.340 and KRS 439.3401). If there is no clear basis under any of those statutes or directly applicable caselaw, it should be presumed that proffered TIS/PFO evidence is inadmissible. A brief checklist should be developed, derived narrowly from the statutes and clearly applicable caselaw, to include:

From the PFO statute:

- Defendant's age
- Length of prior terms
- Dates of prior convictions; release from prison, probation, etc.
- Status of defendant at time of commission of new offense (i.e., on probation, parole, conditional discharge, an escapee, etc.)

From the TIS/parole eligibility/Violent Offender statutes:

- Minimum parole eligibility
- Prior convictions (felony and misdemeanor)
- Nature of prior offenses (elements only)
- Date of commission of prior offenses
- Date of sentencing of prior offenses
- Date of release from confinement or supervision from prior offenses
- Maximum expiration of sentences (current and priors)
- Defendant's status if on probation, parole, etc.
- Adjudications of guilt for felonies in juvenile court

A document (or testimony derived from it) should be presumed inadmissible unless it proves a statutory element on the checklist and only proves a statutory element on the checklist.

Among the most commonly proffered inadmissible evidence the Commonwealth may seek to introduce during a TIS hearing is evidence of the underlying facts of the prior conviction. For example, with a Burglary in the First Degree conviction, it will attempt to introduce not merely the nature of the prior conviction but that it involved underlying facts where the defendant beat up an eighty-five year old victim in the case or in a prior Manslaughter in the First Degree conviction, the defendant was driving a car with a blood alcohol content of .35 and killed a two-year old.

KRS 532.055(2)(a)(2) states that, "The nature of prior offenses for which [the defendant] was convicted" is admissible. *Mullikan v. Commonwealth, 341 S.W.3d 99 (Ky.2011)* interpreted this to mean that, "The nature of a prior conviction is closely akin, if not identical to, the definition of prior conviction." The Court went on to state, "[E]vidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed." The Court suggested that, "… this be done either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself," and further stated:

> "[R]ecitation [of the elements] for the jury's benefit... is best left to the judge. The description of the elements of the prior offense may need to be customized to fit the particulars of the crime, i.e., the burglary was of a building as opposed to a dwelling. The trial court should avoid identifiers, such as naming of victims, which might trigger memories of jurors who may – especially in rural areas – have prior knowledge about the crimes."

In *Webb v. Com., 387 S.W.3d 319 (Ky. 2012)* the Court further elaborated on the procedure for introducing the "nature of the prior conviction" by noting as follows:

> "[T]he first and preferred method of introducing this evidence is for the judge to recite the elements of the prior crimes to the jury. The concern in allowing the prosecutor to read the judgments into the record is that the roles of advocate and witness become blurred."

Based on these cases, it is again suggested that counsel consider appropriate Motions In Limine to prevent the Commonwealth from attempting to describe any underlying facts associated with a conviction and to insure that the trial court itself, not the prosecutor, recites only the elements of the prior crimes to the jury. As suggested in the above cases, care should be given to insure that the jury is not advised of the names of victims, their status (i.e., school teacher, minister, police officer, child, etc.), particular types of weapons used, particulars of injuries received, etc. Note also, that the same level of attention must be directed to misdemeanor convictions where the only charging document is often the arrest slip. This is also an area ripe for testimony concerning charges that were actually amended. If a defendant was only convicted for Burglary in the Third Degree where the original charge of Burglary First Degree involved use of a weapon or serious injury to a homeowner, the Court should only advise the jury of the elements of the amended charge of Burglary in the Third

Degree and make no reference to the original charge and, particularly, the role of any weapon or that injury was caused to anyone. The latter are simply not elements of Burglary in the Third Degree, which is the only crime for which the defendant was actually convicted.

**Victim Impact Testimony**

One of the most challenging aspects of the TIS hearing is victim impact testimony. KRS 532.055(2)(a)(7) provides for introduction of, "[t]he impact of a crime upon the victim or victims, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim or victims" KRS 421.500(1), in turn, defines "victim" in the following manner:

> "[V]ictim" means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime classified as stalking, unlawful imprisonment, use of a minor in a sexual performance, unlawful transaction with a minor in the first degree, terroristic threatening, menacing, harassing communications, intimidating a witness, criminal homicide, robbery, rape, assault, sodomy, kidnapping, burglary in the first or second degree, sexual abuse, wanton endangerment, criminal abuse, human trafficking, or incest. If the victim is a minor or legally incapacitated, "victim" means a parent, guardian, custodian or court-appointed special advocate.

While these statutes allow victims in a wide range of cases to testify as to the impact of the crime upon themselves or their child, ward, etc., counsel should also be aware that the statute can actually exclude evidence in wider circumstances than may be immediately apparent.

First, there are limited circumstances under which a third-party can testify in lieu of the literal victim. These circumstances arise where the victim is a minor or otherwise lacks capacity or if the victim is deceased. If the victim is a minor or legally incapacitated, a "parent, guardian, custodian or court-appointed special advocate" can testify on his behalf. Note that other relatives or interested parties such as grandparents, aunts and uncles, teachers, counselors, etc. cannot testify for a minor or incapacitated victim. Second, consider that the disjunctive "or" is used in the statute which arguably limits this kind of third-party victim impact testimony to a single one of those listed in the statute, not several, such as both a parent and a legal guardian.

If the victim is deceased, KRS 421.500(1)(b) (1-5) defines those persons designated as "victim" for purposes of victim impact testimony under KRS 532.055(2)(a)(7). They are "1. a spouse, 2. an adult child, 3. parent, 4. sibling and 5. grandparent." Note that the conjunctive "and" implies that perhaps more than one of the persons listed could offer victim impact testimony in the case of a deceased victim. The list is, nonetheless, very specific. In the event of a deceased victim, this would exclude other relatives, friends, employers, fiancées, teachers, etc. from providing victim impact testimony. In *McGuire v. Com., 368 S.W.3d 100 (Ky. 2012)*, testimony from the friend of a victim was found to be error, albeit, harmless.

Further, the applicable statutes limit victim impact testimony only to certain offenses. KRS 532.055(2)(a)(7) refers back to KRS 421.500 for the definition of "victim" and that statute then defines "victim" as only those suffering "direct or threatened physical, financial, or emotional harm" as the result of a specific list of crimes. Those listed crimes are "stalking, unlawful imprisonment, use of a minor in a sexual performance, unlawful transaction with a minor in the first degree, terroristic threatening, menacing, harassing communications, intimidating a witness, criminal homicide, robbery, rape, assault, sodomy, kidnapping, burglary in the first or second degree, sexual abuse, wanton endangerment, criminal abuse, human trafficking, or incest." It, therefore, seems clear that for any person to testify as to victim impact testimony in a TIS hearing, he must be a victim of one of the listed offenses.

The list of offenses for which a person has been victimized and cannot testify regarding victim impact evidence is substantial and would include criminal possession of a forged instrument, theft, receiving stolen property, burglary in the third degree, witness tampering, bribery, perjury, and many others. Also, counsel should be aware that, in the instance of felony and misdemeanor convictions arising out of one trial, victim impact testimony relating to the misdemeanors should be barred and, once again, appropriate Motions In Limine should be filed.

Counsel should be aware of *Brand v. Com., 939 S.W.2d 358 (Ky. App. 1997)* where the Court of Appeals held that victim impact evidence relative to a Burglary in the Third Degree was allowed into evidence at sentencing. The Commonwealth may try to argue from this case that victim impact evidence is not limited to the listed offenses. That case, however, is inapplicable to a TIS hearing as it was a traditional sentencing in front of only the court after a guilty plea. KRS 532.055 was not even mentioned in the opinion.

Accepting that, on many offenses, victim impact evidence is inevitable, counsel should still consider Motions In Limine to restrict testimony that is unfairly prejudicial. This would include opinion testimony, particularly the victim's opinion as to an appropriate length of sentence, histrionic or overly emotional displays, directly addressing the defendant from the witness stand, etc. Testimony should be limited to the direct effects of the crime, not indirect effects or effects on others (i.e., all of his friends are devastated).

**Cross Examination Considerations**

Counsel will obviously be faced with an array of Commonwealth witnesses at the TIS hearing, many of whom will have to be cross-examined. They will be used by the Commonwealth to maximize the juror's perception of your client as a danger and your client's likelihood of early release, thus encouraging the jurors to impose as harsh a sentence as possible. The first of these is often a court clerk or Commonwealth paralegal who will offer either documents or testimony derived therefrom related to judgments, their dates, defendant's age, etc. This may include the entirety of the defendant's criminal record. This testimony will relate to both Truth-In Sentencing considerations and also Persistent Felony Offender status. Care should be taken that these witnesses offer correct data and information to the jury and, in the event of an error, it should typically be addressed by timely objection. There will seldom be any opportunity to establish anything through these witnesses other than very specific details on a narrow range of issues related to specific documents.

The Commonwealth will also offer testimony from witnesses, typically Probation and Parole officers, who explain to the jury parole eligibilities and information relating to the defendant's contact with the Corrections Department. This would include when he was received in the institution, when he was released and whether release was on parole, a serve out, etc. They will also typically explain to a jury such issues as good time credit, credit for time served, etc. They may offer an explanation as to concurrent versus consecutive sentences.

Occasionally, these witnesses make mistakes in testimony that is actually in favor of the defendant which no one else catches. If he testifies incorrectly that the parole eligibility for the present offenses is eighty-five percent when it is only twenty percent, counsel does not necessarily have to correct it to the extent it implies a longer sentence to the jury than may actually be the case.

Finally, the Commonwealth, as stated above, will often offer victim impact evidence. This can often be highly emotional and, much as counsel may try to limit it, devastating to the defendant. It is difficult to effectively cross-examine a grieving son or daughter or spouse. The default position should be to not cross examine at all and simply stand up and say, "I am sorry for your loss." On occasion, such a witness may open the door to evidence of the defendant's character such as saying their son was a good boy who would never hurt a fly when he had a history of violent convictions and thefts. It may or may not be appropriate to attempt to bring this out on cross-examination. The decision will always be case specific and a balance will have to be struck between appearing insensitive and eliciting testimony that will perhaps give the situation an added dimension.

Counsel may seek to achieve a number of objectives in cross-examining these witnesses. Your central purpose should be to draw from the witnesses anything positive about your client. Secondarily, you will seek to give the jury reason to believe that any sentence they impose will likely be harsh and that the defendant will likely serve a substantial amount of time even if they jury assesses a sentence at the low end of the available range.

Counsel, for example, should elicit that parole eligibility is only an opportunity for consideration for release, not a guarantee or even likelihood of release. It should be emphasized that parole may not be granted at all and, the more serious the conviction, the less the probability of early release. The jury should be informed that if the defendant is paroled, it will only be upon developing a good institutional record, getting counseling, etc. If your client has been convicted of an offense with an eighty-five percent parole eligibility, emphasize that that means a great deal of time before even consideration for parole.

On occasion, even clients with substantial records went long periods of time in between offenses. Emphasize that such a defendant clearly has the capacity to remain crime free or that he did well if he had supervision. Let the jury know that if he is released, he will be on supervision, subject to reporting, drug testing, etc. If the defendant, on the present offense, is ineligible for probation or shock probation, let the jury know that he has to go to prison and there is no choice in the matter. Alleviate fears of some liberal judge ignoring their sentence and immediately putting him back on the street. If the client was on probation at the time of the offense, let the jury know that the prior sentence(s) are being revoked and that they will have to run consecutive to the sentence the jury will now impose.

If the client has an extensive criminal record, counsel may be able to emphasize that the priors were only property offenses or were "victimless" crimes such as drug offenses, etc. that were brought about by drug or alcohol dependency. A history of drug offenses can give rise to emphasizing underlying addiction problems. Your client's youth at the time of prior offenses or his present youth can be emphasized. In the event of multiple convictions, either in prior cases or the present one, emphasize that all offenses arose from a single transaction (i.e., client only made one mistake, not a continuing pattern of conduct).It has to be recognized that emphasizing such things as drug addiction or youth may be mitigating to one juror and aggravating to another. Such cross examination must be carefully considered and offered in a way that is consistent with your own mitigation evidence and even your theory of the case in the guilt phase. It is inevitably challenging.

**Conclusion**

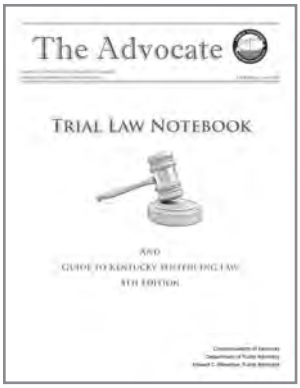
Without question, no defense attorney wants to find himself in a TIS hearing. He has just lost the trial, both he and the client are discouraged and there is a feeling that the hammer is now going to drop. Nonetheless, there is an obligation to fully apprise oneself of the law, undertake wide-ranging background investigation, engage in aggressive motion practice and step carefully and professionally through the hearing itself by knowing when and how to object and cross-examine; all the while remaining as consistent as possible with your own theory of the case. It will never be fun but it will, at some point be necessary.

## Trial Law Notebook, 4th Edition

Glenn McClister
Staff Attorney

The Department of Public Advocacy **Trial Law Notebook** is in its fourth edition this year. First published in 2008, like all DPA manuals it has been regularly updated to contain the latest changes in both the law and court opinions. The last part of the notebook contains the Guide to Kentucky Sentencing Law. This is especially valuable, since sentencing law has particularly been the subject of regular change. Practically no part of Kentucky criminal law changes as regularly as sentencing law.

The law of sentencing in Kentucky has also become increasingly intricate and opaque. Adequate advice to a client regarding the ramifications of accepting a plea deal in any case may require reference to a half dozen different statutes regarding consecutive or concurrent sentences, probation eligibility or parole dates. While the vestiges of the original penal code still straightforwardly lay out dependably generic penalty ranges, the clarity and consistency of the original code has been clouded and confused by all manner of special legislation. The result is that the applicable sentencing law may vary on a case-by-case basis.




Ineffective assistance of counsel may take place when counsel is unclear concerning sentencing law. *See, e.g., Fegley v. Commonwealth*, 337 S.W.3d 657 (Ky.App. 2011). The Guide to Sentencing Law covers the latest law and court opinions regarding aggregating sentences, consecutive versus concurrent sentences, special situations in which sentences must run consecutively, deferred prosecution, pretrial diversion, probation eligibility, probation revocation, child support, restitution, parole eligibility, credit for time served, postincarceration supervision, parole revocation, and sex offenses.

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