INFORMATION PACKET RELATING TO MOTIONS FOR DISCRETIONARY REVIEW

REVISED May 2011

MOTIONS FOR DISCRETIONARY REVIEW

I. A motion for discretionary review has two purposes:

A. Obtaining review of a Court of Appeals' decision or review of a judgment of a circuit court in a case appealed to it from the district court. Review may be sought for a decision or judgment that is unfavorable or that fails to give all of the relief requested. When you are asking for review of a Court of Appeals' decision, you file the Motion in the Kentucky Supreme Court, and when you are seeking review of a circuit court opinion of a district court judgment, the Motion is filed in the Kentucky Court of Appeals.

B. Exhausting state remedies. You must file a motion for discretionary review before you file a petition for federal habeas corpus. Silverburg v. Evitts, 993 F.2d 124 (6th Cir. 1993). The failure to do so may result in the dismissal of your federal habeas petition.

The time limits for filing are set out in Civil Rule (CR) 76.20(2):

A. A motion for discretionary review by the Court of Appeals of a decision of the circuit court must be filed within 30 days from date of entry of the circuit court judgment.

B. A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals must be filed within 30 days from the date of the Court of Appeals decision or final order.

C. Extensions of time should only be requested in the most extreme circumstances. It is very risky to ask for any additional time.

III. The proper form for the motion is specified in CR 76.20(3):

1. Citations to the record are not made.
2. The parties are designated as "movant" and "respondent."
3. Motions in the Supreme Court must state that the movant does not have a Petition for Rehearing or Motion for Reconsideration pending in the Court of Appeals.
4. Copies of the final judgment and opinion of the lower court must be attached.
5. A copy of the motion must be served on the clerk of the court whose decision is sought to be reviewed as well as on the opposing party. A certificate of service is required.

IV. CR 76.20(3) requires that the motion not exceed 15 pages in length.

V. The number of copies to be filed is specified in CR 76.20(6):
Ten copies must be filed if the motion is to the Supreme Court.

Five copies must be filed if the motion is to the Court of Appeals.

VI. Below are some tips for writing a successful motion:

A. Do not "rehash" your brief.

1. A rehashing may signal to the court that you lack confidence in your case and consequently have made no special effort.
2. The Supreme Court has at times implied that motions that merely rehash the brief may be subject to dismissal.

B. Pick your issues.

1. State law issues – when choosing state law issues to include in your motion, focus on your best issues. If an issue lacks merit it probably should be omitted. However, keep in mind that some issues, which seem weak standing alone, may nevertheless be important to the overall motion by demonstrating the context in which other issues show prejudicial.

2. Federal issues – raising federal issues, including "context issues" which may eventually be presented in a federal habeas action, is necessary to exhaustion.

C. Review the lower court's decision.

1. How does the decision to be reviewed fit within the framework of controlling caselaw?

    a. Is it a case of first impression? This means it is an issue the Court has not confronted previously. If you are correct that your issue is one of first impression, your odds of getting review granted go up.

    b. Does present law provide adequate standards?

    c. Does the decision misinterpret the law?

2. Does the decision to be reviewed create a conflict in the caselaw or between panels of the Court of Appeals?

3. In deciding federal constitutional issues did the court apply the appropriate constitutional standard?

4. Did the court make questionable determinations of mixed questions of law and fact?

5. Emphasize that the importance of the issue or issues presented requires that they be resolved by Kentucky's highest court.

VII. What happens when review is granted:

1. If the motion is in the Supreme Court.

   a. The times prescribed in CR 76.12(2) for the filing of briefs shall be computed from the date of entry of the order granting the motion.
   b. The movant is regarded as the appellant and the respondent as the appellee.

2. If the motion is in the Court of Appeals the appeal is perfected in the same manner as a matter of right appeal, with the time for designating and certifying the record computed from the date of the order granting the motion.

VIII. What happens when review is denied:

1. The decision of the lower court stands affirmed.
2. Denial of the motion is not subject to reconsideration.

Disclaimer and Notice

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

Kentucky Rules of Civil Procedure (CR) Rule 76.20

Baldwin's Kentucky Revised Statutes Annotated Currentness
Rules of Civil Procedure
IX Appeals
Cr 76. Practice and Procedure in Court of Appeals and Supreme Court (Refs & Annos)
CR 76.20 Motion for discretionary review

(1) General.

A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals, and a motion for such review by the Court of Appeals of a judgment of the circuit court in a case appealed to it from the district court, shall be prosecuted as provided by this Rule 76.20 and in accordance with the Rules generally applicable to other motions. Such review is a matter of judicial discretion and will be granted only when there are special reasons for it.

(2) Time for Motion.

(a) A motion for discretionary review by the Court of Appeals of a circuit court judgment in a case appealed from the district court shall be filed within 30 days after the date on which the judgment of the circuit court was entered, subject to the provisions of Rule 77.04(2) and Criminal Rule 12.06(2).

(b) A motion for discretionary review by the Supreme Court of a Court of Appeals decision shall be filed within 30 days after the date of the order or opinion sought to be reviewed unless (i) a timely petition under Rule 76.32 or (ii) a timely motion for reconsideration under Rule 76.38(2) has been filed or an extension of time has been granted for that purpose, in which event a motion for discretionary review shall be filed within 30 days after the date of the order denying the petition or motion for reconsideration or, if it was granted, within 30 days after the date of the opinion or order finally disposing of the case in the Court of Appeals.

(c) The failure of a party to file a Motion for Discretionary Review within the time specified in this Rule, or as extended by a previous order, shall result in a dismissal of the Motion for Discretionary Review.

(3) The Motion.

The motion shall designate the parties as Movant(s) and Respondent(s), shall not exceed fifteen (15) pages in length, unless otherwise authorized by the Court, and shall contain the following:

(a) The name of each movant and each respondent and the names and addresses of their counsel,

(b) The date of entry of the judgment sought to be reviewed, or the date of final disposition by the Court of Appeals, as the case may be,

(c) A statement of whether a supersedeas bond, or bail on appeal, has been executed,

(d) A clear and concise statement of (i) the material facts, (ii) the questions of law involved, and (iii) the specific reason or reasons why the judgment should be reviewed; and

(e) If the motion is addressed to the Supreme Court, a statement that the movant does not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals,

(f) A statement showing whether any other party to the proceeding has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

(4) Record on Motion.

There shall be filed with each motion photocopies of the final order or judgment, any findings of fact, conclusions of law and opinion of the trial court, and any opinion or final order of the appellate court, including any decision on any petition for rehearing or motion for reconsideration. In administrative agency cases, copies of the findings of fact, conclusions of law and award or order of the administrative agency shall be filed. No other record on the motion shall be required unless the court to which the motion is addressed so orders.

(5) Response to Motion.

Each respondent may file a response to the motion within 30 days after the motion is filed. Said response shall not exceed fifteen (15) pages in length, unless otherwise authorized by the Court. No reply to a response shall be filed unless requested by the Court.

(6) Form, Signing, and Number of Copies Required.

The motion and the response shall be either printed or reproduced by an acceptable duplicating process, and shall be signed by each party or his counsel in his individual name, which signature shall constitute a certification that the statements of fact therein are true. Ten copies shall be filed for a motion in the Supreme Court, and five in the Court of Appeals.
(7) Service of Motion and Response.

Before filing, the motion and the response shall be served on the other parties and on the clerk of the court whose decision is sought to be reviewed, and such service shall be shown as provided in Rules 5.02 and 5.03.

(8) Submission.

The motion shall be submitted to the court for consideration when the response is filed or when the time for filing such response has expired, whichever is sooner.

(9) Disposition of Motion.

(a) If the motion is denied the decision shall stand affirmed, and if a supersedeas bond has been executed, damages for delay shall be recoverable pursuant to KRS Chapter 26A. The denial of a

motion for discretionary review does not indicate approval of the opinion or order sought to be reviewed and shall not be cited as connoting such approval.

(b) If the motion is in the Supreme Court and is granted, the times prescribed in Rule 76.12(2) for the filing of briefs shall be computed from the date of the entry of the order granting the motion, the movant being regarded as the appellant and the respondent as the appellee.

(c) If the motion is in the Court of Appeals and is granted, the appeal shall be perfected in the same time and manner as if it were an appeal as a matter of right, unless otherwise directed by the court. Evidence designated under Rule 75.01 must be transcribed. The time prescribed by Rule 73.08 for preparation and certification of the record, and by Rule 75.01 for designation of the evidence or other proceedings requiring transcription, shall be computed from the date of the order granting the motion.

(d) A motion for discretionary review in the Supreme Court will not be ruled upon during the pendency of a petition for rehearing or motion for reconsideration in the Court of Appeals. If a party files a timely petition for rehearing or motion for reconsideration in the Court of Appeals after another party has filed a motion for discretionary review in the Supreme Court, the clerk shall withhold submission of the latter pending final disposition of the case in the Court of Appeals.

(e) A ruling by the Court of Appeals granting or denying a motion for discretionary review will not be reconsidered by the Court of Appeals. A ruling by the Supreme Court granting or denying a motion for discretionary review will not be reconsidered by the Supreme Court. A motion for reconsideration, however styled, shall not be accepted for filing by the clerk of the Supreme Court or Court of Appeals.

(f) Copies of the order shall be sent forthwith by the clerk of the appellate court to counsel for each party and to the clerk of the court whose decision is sought to be reviewed.

(10) Costs.

Payment of the filing fee specified in Rule 76.42(2)(a) shall be required with the motion.

CREDIT(S)

HISTORY: Amended by Order 2000-2, eff. 2-1-01; prior amendments eff. 2-1-01 (Order 2000-1), 1-1-99 (Order 98-2), 9-1-93 (Order 93-1), 8-1-92, 8-28-89, 1-1-89, 1-1-85, 1-1-84, 7-1-81, 5-1-80, 7-1-79, 3-1-78; adopted eff. 1-1-78

**** SEE SAMPLE ATTACHED ****

SUPREME COURT OF KENTUCKY
FILE NO. _____

Court of Appeals File
No. ____-CA-_____-MR

_____ **MOVANT**

V. **MOTION FOR DISCRETIONARY REVIEW**
OF A DECISION OF THE COURT OF APPEALS

COMMONWEALTH OF KENTUCKY **RESPONDENT**

* * * * * * * * * * * * * * * * *

Comes now Movant, by counsel, and pursuant to CR 76.20 requests this Court to grant discretionary review of the decision of the Kentucky Court of Appeals in _____ v. Commonwealth, File No. ____-CA-_____-MR, decided by the Court on _____ __, 200_. The opinion of the Court of Appeals is attached.

JURISDICTIONAL FACTS

1. Movant's name is _____. He is proceeding *pro* se and is located at ____, ____, Kentucky 40601.

2. The Respondent is the Commonwealth of Kentucky. Counsel for the Respondent is _____, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

3. The final disposition of the Movant's case was by the opinion of the Court of Appeals affirming Movant's case on _____ ___, 200__.

4. Neither Movant nor Respondent has a Petition for Rehearing or a Motion for Reconsideration pending in the Court of Appeals.

5. No supersedeas bond, nor bail on appeal, has been executed.

MATERIAL FACTS

On November 11, 2001, the _____ County Grand Jury indicted _____ _____ on one count of Rape first degree, one count of Burglary first degree, and two counts of Robbery first degree. The Court appointed Honorable _____ _____ to represent Movant, and set the case for trial.

One week before the trial was to begin, Movant filed a *pro se* Motion to Continue the trial and a *pro se* Motion for the Appointment of New Counsel. Movant asserted that his appointed attorney had not provided him with effective assistance of counsel. Specifically, Movant stated that counsel had advised him that he could not get a fair trial in the county but refused to file a motion for a change of venue. Movant further urged that counsel's only efforts in the case were aimed at convincing him to plead guilty.

On the day the trial was to begin, the court discussed the motions Movant had filed. The court noted that it too was concerned about whether a jury could be seated in _____ County to hear the case with such charges and therefore, had called a large number of jurors for the jury pool. The Judge asked the Movant if he was satisfied with his lawyer but, without waiting for an answer, he told Movant that the lawyer was the *only* Public Advocate available. After this conversation and faced with no other choice, Movant entered a motion to enter a guilty plea on all four charges. The Commonwealth made no recommendation on a sentence and stated that it would oppose concurrent sentences.

Six days before the set sentencing date, Hon. _____ appeared and asked the Court to postpone sentencing until mid-to-late June so that an alternative sentencing plan could be prepared and presented to the Court. The Commonwealth opposed the request, arguing the heinous nature of the crimes and the need of the victim for closure. On inquiry by the Court concerning the nature of the proposed plan, counsel stated that he *assumed* background information relevant to the length of sentence would be presented but noted that he had not yet met with the person who would prepare the plan. After stating that Movant would be going to prison and the only question was for how long, the Judge pushed back the sentencing approximately two weeks.

The trial court later denied counsel's renewed motion for a continuance to draft the sentencing plan and before sentencing Movant, asked Movant's counsel whether he or anyone else at the hearing wished to make a mitigation statement on Movant's behalf. Unaware that they were going to be given this opportunity and thus unprepared, no one from the Movant's family elected to speak. Surprisingly, the *only* mitigation information that Movant's counsel provided to the Court was that of Movant's juvenile record. The Commonwealth requested that the judge impose the maximum sentence on each charge and that the sentences run consecutively. A victim's impact statement was read to the Court, also requesting the maximum penalty.

Ultimately, the Court granted the Commonwealth's request and imposed the maximum sentence of 20 years on each count. The Judge ordered three of the 20-year sentences run consecutively but ran one 20-year sentence for one count of Robbery concurrently to the other sentences, expressing some concern about the two robbery charges being filed as a potential double jeopardy violation. In his final remarks, the Judge told the Movant that he would have gotten the death penalty for this crime not too many years ago.

This Court affirmed Movant's case on direct appeal in an opinion rendered on September 26, 2002 and subsequently denied Movant's Petition for Rehearing.

On April 7, 2005, Movant, through counsel, filed a Motion to Vacate or Set Aside Judgment Pursuant to RCr 11.42. Movant included three main arguments in his motion: 1) that counsel's lack of preparation of a defense and mitigating evidence, his lack of interaction with his client, and his failure to have Movant evaluated for competency denied Movant effective assistance of counsel (hereinafter "IAC") and led to Movant entering an unknowing and involuntary plea; 2) that counsel's misadvise regarding sentencing and parole eligibility denied Movant effective assistance and led to Movant entering an unknowing and involuntary plea; and 3) that counsel's failure to investigate and provide readily available mitigation testimony at the penalty phase denied Movant effective assistance and due process. Movant attached to his motion and memorandum of law notarized affidavits from Movant describing the misadvise given to him by his trial counsel, and from Movant's mother and aunt, describing the mitigation that counsel could have provided to the trial court had he spoken with the family prior to sentencing. Based on

Movant's claim that he relied upon the misadvise counsel provided him when entering an open plea of guilt, and other issues that were not conclusively refuted by the record, Movant requested an evidentiary hearing in his motion.

Without notifying undersigned counsel, the clerk set the case on the docket. Without Movant's counsel being present and it being clear that the Judge had not yet read the filed motion, the Judge called the case, and the Commonwealth reminded him of the underlying facts of Movant's conviction. After the Commonwealth gave the Judge the following one-sentence statement regarding his interpretation of the contents of the thirty-seven page RCr 11.42 motion, "…now they're coming back and saying Mr. _____didn't do a good enough job 'cause he got him sixty (60) years," and determining that Movant had requested an evidentiary hearing, the Judge made a rather curious ruling. The Judge stated he was going to overrule the RCr 11.42 motion but then noted that he would have to set an evidentiary hearing in the case. After the Commonwealth noted that he would like a chance to respond to the motion before the Judge set the hearing, the Judge passed the case to the next criminal docket at which time the response was due. The Judge then signed and entered an Order overruling the Motion to Vacate Judgment, an order counsel never received.

Once post-conviction counsel learned of the proceedings above, counsel called both the Commonwealth and the clerk. Both informed counsel that the case was continued to the next docket simply for the Commonwealth to file its response and that no oral arguments would be made.

When the Judge called Movant's case during the next docket, however, the Commonwealth handed the Judge his response and then went on to again explain the facts of the underlying conviction. The Commonwealth told the Judge that Movant had filed an 11.42 motion claiming that trial counsel had not given him "adequate assistance of counsel." Illustrating again that the Judge had not yet read Movant's RCr 11.42 motion and memorandum and misstating the arguments contained therein, the Judge stated "he's probably saying he didn't give him any advice about whether I was going to run them consecutive or concurrent but I would assume he did because everyone that knows me knows that…" The Commonwealth then explained that an

assistant with his office had spoken with Mr. _____ and had prepared an affidavit for him to sign but that he had yet to sign it. No discussion was had regarding what the affidavit said, except a general statement regarding the fact that trial counsel had spoken with the defendant and his family. Relying solely upon the Commonwealth one-to-two minute explanation of the underlying facts of the case and with no discussion whatsoever regarding the actual arguments contained within Movant's motion, other that the fact that Movant was claiming IAC against his trial attorney, the Judge asked the Commonwealth to send the affidavit to him and to prepare an order so that he could "go ahead and tender it." The Judge clearly made his decision to enter the order overruling the 11.42 (again) without ever reading the Movant's motion or the Commonwealth's response and without having any knowledge of the actual arguments contained therein. Unlike the month before, however, absolutely no discussion was held regarding the need for an evidentiary hearing.

Despite the fact that Movant raised issues in his RCr 11.42 that were not conclusively refuted by the record, the trail court entered an order prepared by the Commonwealth denying RCr 11.42 relief and the request for an evidentiary hearing. Movant filed a timely notice of appeal and on June 7, 2005, the Judge entered an Order allowing Movant to proceed *In Forma Pauperis.* On June 22, 2005, over a month after the Court made its decision and entered the written order overruling Movant's 11.42 and some three weeks after Movant filed him Notice of Appeal and Designation of Record, Hon. _____ finally signed the affidavit that had been originally entered into the record with the Commonwealth's Response on May 13, 2005, altering the record.

Thereafter, Movant filed a timely appeal to the Court of Appeals raising the argument that the trial court erred to Movant's substantial prejudice and denied him due process by overruling his RCr 11.42 motion without first having read the motion and without first holding an evidentiary hearing in order to resolve the issues of the trial court in an unpublished opinion dated February 16, 2007. The Court also denied Movant's Petition for Rehearing in an Order dated April 13, 2007. Movant now requests discretionary review of that opinion.

QUESTIONS OF LAW

I. Did the Court of Appeals Make Questionable Determinations of Mixed Questions of Fact and Law and Err In Holding That The Trial Court Properly Denied Movant's Request For Relief Based Upon Ineffective Assistance Of Counsel, Denying Movant His Constitutional Right To Due Process?

II. Did The Court of Appeals Err In Holding That No Evidentiary Hearing Was Required Pursuant To Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001) When The Were Material Issues of Fact That Could Not Be Refuted By Review of The Face of The Record?

SPECIFIC REASONS FOR GRANTING DISCRETIONARY REVIEW

I. The Court of Appeals Erred In Upholding The Trial Court's Ruling That Movant Did Not Receive Ineffective Assistance of Counsel and Denied Movant Due Process.

II. The Court Below Erred In Finding That The Movant's Allegations Did Not Entitle Him To An Evidentiary Hearing, Which Is In Direct Conflict With This Court's Decision In Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

ARGUMENT I

The Court of Appeals Erred In Upholding The Trial Court's Ruling That Movant Did Not Receive Ineffective Assistance of Counsel And Denied Movant His Sixth Amendment Right To Due Process.

A. The Court of Appeals Misconceived the Establshed IAC Standard

Review of this issue considers the lower court's misapplication of the IAC standard as set forth by the United States Supreme Court in Strickland v. Washington, 104 S.Ct. 2052 (1984). The Court below misconceived Strickland's application to the scope of review and adversarial testing necessary for post conviction and appellate review.

Strickland provides a two-prong test in evaluating an IAC claim and in determining whether counsel's performance was so ineffective as to warrant a new trial. First, the defendant must display that his counsel's performance was deficient and second, must show these deficiencies prejudiced the defense. Strickland at 687. The United States Supreme Court held in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), that the two-part standard adopted in Strickland applies to guilty plea challenges based on IAC. Therefore, when a Movant challenges a guilty plea based on IAC, he must display that his counsel made errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771 (1970), and that the deficient performance so seriously affected the outcome of the plea processs that, but for the errors of counsel, there is a reasonable probability that the defendant would not have plead guilty, but would have insisted on going to trial. Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

In the case at hand, the Court below misapplied the standards set out in Strickland and Hill. Specifically, the appellate court held that "a court must be 'highly deferential in scrutinizing counsel's performance' in determining whether counsel rendered ineffective assistance." Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998). While the court "must be highly deferential" to counsel's performance, the "deferential" judicial scrutiny does not prevent the judge from determining that the strategy chosen "was outside the range of professional competence." Strickland, at 2065-2066. Giving deference does not set a ceiling so high that it is impossible for a court to find counsel ineffective.

Secondly, to establish prejudice, the defendant does not have to show that he would have been acquitted. Norton v. Commonwealth, 63 S.W.3d 175, 177 (Ky. 2002). "A reasonable probability of being found guilty of a lesser charge, or a *shorter sentence*, satisfies the second prong of Strickland." Brimmer v. State, 29 S.W.3d 497, 509 (Tenn.Crim.App. 1998)(emphasis added).

Additionally, the United States Supreme Court clearly stated that Strickland is **not** an outcome determinative test. Strickland at 2067-2068. (emphasis added). The appellate court below, by requiring Spears to prove that "counsel was so thoroughly ineffective that 'defeat was snatched from the hands of probable victory'" expressly, and incorrectly, applied an outcome determination standard. *Citing* Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001).

Finally, the appellate court cannot close its eyes when counsel's failure to act as an advocate makes the guilt and punishment determinations unreliable, happened in the instant case. "The purpose of the Sixth Amendment guarantee of counsel is to insure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Strickland, at 687.

B. Movant Received IAC in the Instant Case

Movant received IAC in the case at hand in that counsel did not act as an advocate as guaranteed by the Sixth Amendment. Instead, trial counsel advised his teenage client, with whom he had had very limited contact, to enter into an open plea to very serious charges and presented absolutely no mitigation evidence in Movant's favor. Further, counsel did absolutely nothing to prepare for trial, including failing to request a change of venue in a highly publicized case. Additionally, counsel failed to inform Movant of the fact that he could present mitigating evidence at trial in support of a lesser sentence and also misadvised his client as to the potential sentence he was facing and his parole eligibility. Because of counsel's deficiencies, Movant felt as if he had no choice but to enter into a guilty

plea; otherwise, he would have elected to go to trial and appeal to the jury through readily available mitigation evidence for a lesser sentence. As such, Movant received IAC. The Court of Appeals misapplied the controlling case law on the issue of IAC when rendering its opinion in the case. Therefore, the case must be heard by this Court and reevaluated under the proper standard.

C. The Court Below Based its Opinion on Inaccurate Facts and Overlooked Material Facts in the Record

The Court of Appeals based its decision in the instant case on facts that were inaccurate and otherwise overlooked material facts in the record. Specifically, in reaching its decision that Movant did not receive IAC, the Court stated that "[a]fter consideration of the record, argument, and evidence before the trial court, including an affidavit from Movant's trial counsel directly refuting the majority of Movant's claims, the trial court denied the motion." The statement is wholly inaccurate for many reasons.

First, the trial judge had **not** considered any of the items listed above the first two times he orally overruled Movant's RCr 11.42 motion. A review of the record indicates that the trial judge had **not** read nor even looked at the Movant's RCr 11.42 motion, did **not** hear any "arguments" by counsel before overruling the motion. The fact that the court had not read the motion, and thus did not base its ruling on the arguments contained therein, is apparent in the conversation noted above where the Judge "guessed" that the issue Movant raised was that trial counsel had not explained that the Judge could run the sentences consecutively. A review of the RCr 11.42, however, reveals that it did not contain any such argument. Thus, it is quite clear the trial court had not even bothered to take the time to read the motion.

Secondly, the trial judge did not hear any "argument" from post conviction counsel. As noted above, neither the clerk nor the trial court notified post conviction counsel that the case was being placed on the docket and as such, Movant's counsel was never present to provide the court with any oral arguments. Instead, the Judge only heard the Commonwealth's brief explanation of the underlying facts of Movant's conviction and the Commonwealth's one-sentence interpretation of Movant's 37-page RCr 11.42 motion.

Further, the trial court did not read the Commonwealth's response before making its decision (once again) to overrule Movant's RCr 11.42. On the day the response was due, the Commonwealth handed it to the Judge and informed him that **an assistant** within the office had spoken with trial counsel and **had prepared** an affidavit for him to sign but that he had yet to do so. No discussion was had regarding what the affidavit said, except a general

statement regarding the fact that trail counsel had spoken with the defendant and his family. Relying solely upon the Commonwealth's one-to-two minute explanation of the underlying facts of the case and with no discussion whatsoever regarding the actual arguments contained within Movant's motion or the Commonwealth's response, the Judge requested the Commonwealth to send the affidavit to him and to **prepare an order** so that he could "go ahead and tender it." The Judge clearly made his decision to enter the order overruling the 11.42 (again) without ever reading either document and without having any knowledge of the actual arguments contained therein. Because Movant's counsel was not present and because the trial judge had not read his motion, the trial court did **not** base its decision on any arguments of Movant as the Court below held but instead, on the one-sided, vague statements of the Commonwealth.

Further, the trial court did **not** base its decision on any "evidence" before it before overruling Movant's RCr 11.42 and request for an evidentiary hearing. Both the Appellee/Respondent and the appellate court referred to an "affidavit from Movant's trial counsel directly refuting the majority of Movant's claims."[1] Because the affidavit was not signed nor sworn to by trial counsel until well **after** the court had both orally denied the motion and entered the written motion overruling Movant's motion, and well **after** Movant had filed (and the court had granted) a Notice of Appeal in the case, the affidavit cannot be considered evidence. *See* KRE 902. In fact, trial counsel did not even draft the affidavit himself. Instead, the Commonwealth noted that his assistant had prepared the affidavit and admitted that trial counsel had not yet signed it. Therefore, the court did not base its decision to overrule Movant's motion on "evidence" before it, but on a "self-serving" affidavit prepared by the Commonwealth that was neither signed nor sworn to by trial counsel until weeks after the court had entered its written order. The Court below erred in holding the fact that the affidavit was not signed nor sworn as no "impact[ing] the appropriateness of the trial court's ruling" because there was no way for the trial court to know whether its contents were accurate without hearing so from trial counsel himself. Finally, it should be noted that the written order entered by the trial court was prepared by the Commonwealth, not the judge, further illustrating that the trial court did not base its decision on any independent review of the "record, argument and evidence before" it.

The trial court did not know what Movant's claims were, and did not base its decision on any independent review of the case but instead its ruling on the one-sided, vague portrayal of the arguments contained within

[1] The Respondent/Appellee repeatedly referred to the affidavit as being a "sworn" affidavit several times in its brief, despite the fact that Movant had stated in his brief that the affidavit was not signed until after the court had entered its signed order overruling the motion.

Movant's RCr 11.42 by the Commonwealth. Therefore, the trial court nor the Court of Appeals had the information necessary to make an informed decision on whether Movant received IAC. Thus, this Court must grant this Motion so that Movant's case can be fully and finally heard.

D. Movant Specifically Pled Allegations of IAC in His RCr 11.42 Memorandum

The Movant specifically pled allegations of IAC in his RCr 11.42 memorandum and the Court below relied upon inaccuracies when it held otherwise. The Court of Appeals stated that the trial court noted in its order denying relief that "while Movant made many bald assertions about counsel's performance, he failed to plead with any specificity what he thought counsel could have or should have done differently." A review of the RCr 11.42 clearly shows differently. Movant claimed that trial counsel erred when he failed to investigate and interact with his client. To support this claim, Movant attached a sworn affidavit from Movant stating he had only 1 face-to-face meeting with his counsel, that he only spoke with counsel 3 times on the phone, that counsel did not inform or discuss with him what evidence, if any, he could present if he went to trial, that counsel did not question him about his background or social history, that he did not inform him that anyone could speak on his behalf at sentencing, and that instead, counsel only spoke to him about entering a guilty plea. Movant specifically noted that he was a juvenile who had had little contact with the court system and cited case law noting the importance of counsel meeting with and preparing a client's case. There was absolutely no "evidence" before the court refuting this.

Further, Movant specifically argued that counsel failed to prepare for trial by not filing a change of venue motion by attaching Movant's affidavit stating his counsel told him he would not be able to get a fair trial in Fulton County and by attaching numerous newspaper articles about the crime. Movant further pointed out that the Judge himself questioned whether Movant would be able to receive a fair trial. The appellate court noted that Movant filed a *pro se* change of venue motion, "so he cannot argue that he was prejudiced by counsel's failure to do so." The Court, however, cannot excuse trial counsel's failure to do his job simply by the fact that Movant attempted to do that which his counsel should have. Further, the Court below failed to take into consideration that the court did not rule upon the motion. Movant was thus forced to enter a plea because he did not think he could get a fair trial because his counsel had not done what he should have.

Movant also specifically plead that he was given misadvice regarding this sentence and parole eligibility in the affidavits attached by Movant and Movant's mother and the accompanying case law. In ruling upon this issue, the

Court below failed to take into account that the judge himself stated that he did "not know whether or not" Movant would have to serve 85% of his sentence.

Finally, Movant specifically plead that trial counsel failed to investigate and provide readily available mitigation evidence at sentencing. Movant did so not only in his RCr 11.42 motion but also in the attached affidavits by the client, his mother and his aunt. Movant noted that had he known what mitigation evidence was, and the he could present it to the jury with the hope of getting a lesser sentence, he would have elected to go to trial instead of entering into an open plea, throwing himself at the mercy of a judge who stated he wished he could give the Movant the death penalty instead of the 60-year sentence he believed to be the maximum he could impose.

Movant received IAC in the instant case and the Court below erred when it held otherwise based upon inaccurate information. The trial court did not even know what arguments were contained in Movant's motion before overruling it. As such, the case must be reversed.

ARGUMENT II

The Lower Court Erred in Finding That The Movant's Allegations Did Not Entitle Him To An Evidentiary Hearing, Which Is In Direct Conflict With This Court's Decision In Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

Review of this issue considers the lower court's denial of evidentiary hearings in post-conviction proceedings. This Court clarified the standard for granting evidentiary hearings pursuant to RCr 11.42 motions in Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001), in which it stated that "a hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record."

A review of the instant case finds that the Court of Appeals has failed to apply this standard properly to Movant's claims. Movant's motion contained arguments that could not be refuted by an exam of the record alone, specifically that counsel did not investigate Movant's case, did not explain what mitigation evidence is and how it could be used at trial, and misadvised Movant of his potential sentence and parole eligibility. The only information provided to the contrary was an unsigned, unsworn affidavit prepared by the Commonwealth for trial counsel's signature, which cannot be considered evidence at all. As such, an evidentiary hearing is absolutely necessary in this case, and the courts below erred when they held otherwise. This case must be remanded so these issues can be resolved.

CONCLUSION

Because material information exists outside the four corners of the record in Movant's case, both the trial court and the Court of Appeals erred in not granting an evidentiary hearing on the basis of Movant's RCr 11.42. movant respectfully requests that this Court rectify the sham proceedings conducted by the trial court in this case and remand the case back for a hearing or in the alternative, to grant discretionary review in order to allow Movant's case the full consideration it truly deserves.

RESPECTFULLY SUBMITTED,

_____
Client
Address

NOTICE OF FILING

Please take notice that the foregoing Motion for Discretionary Review will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this the _____ day of _____, 20___.

_____

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Discretionary Review has been mailed via first-class mail, postage prepaid, to Hon._____, Asst. Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky, 40601, and has been delivered via messenger to Hon. Ann P. Swain, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this ____ day of _____, 20___.

_____