INFORMATION PACKET FOR POST-CONVICTION APPEALS

REVISED FEBRUARY 2020

A HELP GUIDE TO APPEAL ORDERS
DENYING POST-CONVICTION RELIEF

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

A. NOTICE OF APPEAL – STARTING YOUR APPEAL.

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

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

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

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

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

1. THE MOTION

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

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

If the circuit court denies your request for proceed *in forma pauperis*, you will "have 30 days to pay any required fees or costs or to appeal the decision." RCr 5.05(4). (If you decide not to appeal the order denying your *in forma pauperis* status, you would be required to pay a $150

filing fee to the Circuit Court Clerk within that 10 day period. CR 73.02(1)(b) and CR 76.42(a)(i).

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

Upon the filing of the Notice of Appeal from the order of the trial court, the clerk of the circuit court shall prepare and certify a copy the entire court record. The certified record shall be prepared and filed with the clerk of the court of appeals by the circuit court clerk. The appellant shall not be required to pay any fees or costs incident to the preparation and filing of this record.

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

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

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

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

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

Normally, the Court of Appeals will not immediately rule on your motion for appointment of counsel until DPA has had an opportunity to review the pleadings in your case. If DPA reports back to the Court that your appeal is not an action that a person with reasonable means would be willing to take, then the Court will not grant you the appointment of counsel. It will then give you time to file your initial brief, (the Brief of

Appellant). On the other hand, if DPA reports to the Court that there indeed may be some merit to your appeal, then the Court will probably appoint DPA to represent you.

4. HEARINGS

If an evidentiary hearing was held, you must file a Designation of Record, and you should specify the dates of the proceedings you want. The Designation of Record must state the proceedings you want to have included. It is suggested that you designate the entire court record, both paper and video.

5. WHEN DOES THE RECORD HAVE TO BE COMPLETED?

The record on appeal must be completed (certified) by the circuit court clerk within thirty (30) days after the filing of the notice of appeal. CR 73.08

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

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

A. WHAT YOU MUST DO FIRST

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

B. WHAT IF YOU CANNOT GET THE BRIEF FINISHED BY THE DEADLINE?

If you need an extension of time to file the Brief For Appellant, you must file a **MOTION FOR EXTENSION OF TIME** before your time runs out for filing the brief.

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

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

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

C. HOW LONG CAN A BRIEF FOR APPELLANT BE?

The brief can be no longer than 25 pages excluding the introduction, the statement of points and authorities, exhibits and appendices. CR 76.12(4)(b)(i).

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

The rules require that you file **FIVE (5) COPIES** of the brief. However, if you are indigent, you may file a **MOTION FOR LEAVE TO FILE ONLY ONE BRIEF** when you file the Brief for Appellant.

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

E. WHAT NEEDS TO BE IN THE BRIEF FOR APPELLANT?

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

1. INTRODUCTION

The Introduction, **which should not exceed two simple sentences,** is the first part and it should communicate why you are filing a brief. For example, "This is a post-conviction appeal involving the important question of whether Appellant was denied effective assistance of counsel by trial counsel's failure to investigate and present a meaningful defense."

2. STATEMENT OF POINTS AND AUTHORITIES

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

3. THE STATEMENT OF THE CASE

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

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

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

Although the clerk will not let you check out the record to do your brief, you may be able to obtain portions or all of the record for your own use. CR 3.02(2) requires the circuit court to provide a copy of all the documents in your case at .25 a page. Copies of tapes/disks are $25. (Being allowed to proceed *in forma pauperis* does not mean that the clerk will waive these costs for copies for your use during the appeal).

4. ARGUMENT

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

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

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

5. CONCLUSION

The next subsection of the brief is the conclusion. It is simply a way to communicate to the court exactly what relief you are seeking. For

example, you can state, "For the foregoing reasons, Appellant respectfully requests that the Court reverse the denial of the post-conviction motion and send the case back to the circuit court for the purpose of retrial."

6. **APPENDIX**
The next subsection of the brief is the appendix. The first item in the appendix must be an index or list of all documents in the appendix. You must place in the appendix a copy of the order entered by the court below overruling your post-conviction motion and this should be the first item following the index. Additionally, if you filed a Motion for Alter or Amend the circuit court's judgment and that motion was denied, you need to include a copy of that order as well. You can place in there anything else (not things outside the record) that may be helpful to the appellate judges reviewing your case.

7. **CERTIFICATE OF SERVICE ON THE COVER PAGE**
A copy of all briefs must be served on the circuit court judge, the Attorney General, and the Commonwealth's Attorney. To insure that, each brief must have a **CERTIFICATE OF SERVICE** on the cover page indicating that you have served a copy of each brief on the above-mentioned individuals.

F. WHEN TO FILE A REPLY BRIEF

You will have fifteen (15) days after the Appellee's brief (Commonwealth's brief) has been filed in which to file a reply brief. (The Commonwealth's brief is usually filed 60 days after your brief is filed, but note that it is not uncommon for the Commonwealth to ask for an extension of time to file its brief).

Five (5) copies must be filed unless you ask to file only one. You are limited to five (5) pages.

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

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

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

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

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

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

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

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

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

You must file your motion within thirty (30) days from the date the Court of Appeals has rendered an opinion in your case. CR 76.20. If you have filed a timely Petition for Rehearing, that 30 days does not start to run until the Court of Appeals has overruled your Petition for Rehearing.

C. HOW MANY PAGES IN AN MDR?

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

D. WHAT NEEDS TO BE IN AN MDR?

1. PRELIMINARY MATTERS

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

It must also contain the date that your appeal was finally decided by the Court of Appeals (be it either the date of the opinion or of the order denying Petition for Rehearing). It must further contain a statement

that you are not out on bail and that neither you nor the Commonwealth has a Petition for Rehearing pending in the Court of Appeals.

2. **STATEMENT OF MATERIAL FACTS**
The first important aspect of an MDR is the statement of material facts. You must detail all the facts from the record that you think support your claim for relief. This is your last opportunity to convince the courts in Kentucky that your conviction is just not fair.

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

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

4. **SPECIFIC REASONS WHY THE JUDGMENT SHOULD BE REVIEWED**
In this important portion of the MDR, you should set out why you have been treated so unfairly. Again, the facts of your case will ultimately be the reason that you will be granted relief. Argue them strong and hard.

E. RECORD ON MOTION

You must attach to your MDR a copy of the order entered by the circuit court overruling your post-conviction motion. You must also attach a copy of the opinion rendered by the Court of Appeals in your case. If you have filed a Petition for Rehearing, you also must attach a copy of the order denying that petition.

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

F. WHAT HAPPENS IF THE MDR IS GRANTED?

If the Supreme Court of Kentucky grants your MDR, then you will basically be given another chance to brief your case. The order granting

the MDR will direct the Clerk of the Supreme Court to call up the record from the Court of Appeals. You will then be given a briefing schedule.

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

G. CAUTIONARY NOTES

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

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

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

V. CONCLUSION

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

DISCLAIMER: Be sure to read this again and familiarize yourself with the contents. Please also understand that case law, statutes, and rules 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 own motion.

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
INDICTMENT NO. 19–CR–00123

JOE JONES MOVANT

v.

COMMONWEALTH OF KENTUCKY RESPONDENT

NOTICE OF APPEAL

Comes now Joe Jones, *pro se,* gives notice that he appeals the Order Overruling his RCr 11.42 motion entered in the above styled case on September 27, 2019.

On appeal the Appellant will be Joe Jones and the Appellee will be the Commonwealth of Kentucky.

Respectfully submitted,

_____

Name
Address

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been served by U.S. mail, postage prepaid, on this, the ___ day of _____. 20__, to:

Circuit Judge

Commonwealth Attorney

Circuit Court Clerk

COMMONWEALTH OF KENTUCKY
_____CIRCUIT COURT
____-CR-____

JOE JONES MOVANT

V. **MOTION TO PROCEED IN FORMA PAUPERIS AND APPOINT COUNSEL ON APPEAL**

COMMONWEALTH OF KENTUCKY RESPONDENT

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

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

Respectfully Submitted,

_____.
Name
Address

COMMONWEALTH OF KENTUCKY
_____CIRCUIT COURT
____-CR-____

JOE JONES MOVANT

V. **ORDER GRANTING IN FORMA PAUPERIS AND APPOINTING DPA ON APPEAL**

COMMONWEALTH OF KENTUCKY RESPONDENT

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

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

Under my hand this _____ day of _____, 20___.

_____
JUDGE

Distribution:

- Commonwealth Attorney and Address
- DPA Post-Conviction Branch Manager, 5 Mill Creek Park, Suite 101 Frankfort, KY 40601
- Inmate Name and Address

AOC-350 Doc. Code: AI & OI
Rev. 5-16
Page 1 of 3

Commonwealth of Kentucky
Court of Justice *www.courts.ky.gov*

KRS Chapter 31

FINANCIAL STATEMENT, AFFIDAVIT OF INDIGENCY, REQUEST FOR COUNSEL AND ORDER (CRIMINAL CASES)

Case No. _____
Court _____
County _____
Division _____

Name: _____ Age: _____

Address: _____

Telephone: ( ) _____

Charges: _____

_____

FINANCIAL STATEMENT:

1. Income:

Employed? ☐ Yes ☐ No

If Yes: ☐ Full-time ☐ Part-time ☐ Temporary/Seasonal Length of Employment: _____

Income from Employment:

☐ monthly ☐ biweekly ☐ hourly $_____

If No, date last employed: _____

Married? ☐ Yes ☐ No If Yes, Spouse Employed? ☐ Yes ☐ No

If Yes, Spouse's Income from Employment: ☐ monthly ☐ biweekly ☐ hourly $_____

Total Income from ALL other source(s) and amount received per month:

☐ Welfare: $_____ ☐ Food Stamps:$ _____ ☐ Social Security/Disability:$_____

☐ Worker's Comp: $_____ ☐ Unemployment:$_____ ☐ Retirement:$_____

☐ Child Support/Maintenance: $_____ ☐ Stocks, Trusts, Bonds:$_____

☐ Child Care Assistance: $_____ ☐ Other : _____

Total Income from ALL other source(s): $ _____

TOTAL MONTHLY INCOME: $ _____

2. Property:

Own Real Estate? ☐ Yes ☐ No

If Yes, Value of Real Estate: $_____ Amount owed : $_____

Own Mobile Home? ☐ Yes ☐ No

If Yes, Value of Mobile Home: $_____ Amount owed : $_____

Own Personal Property:

Motor Vehicles in Operable Condition (including motor cycles, riding lawn mowers, ATVs, etc.):

Make/Model Year:_____ Value: $_____ Amount Owed:$_____

Make/Model Year:_____ Value: $_____ Amount Owed:$_____

Make/Model Year:_____ Value: $_____ Amount Owed:$_____

Bank Accounts: ☐ Yes ☐ No

If Yes, total balance of all accounts: $_____

Other Asset(s) (i.e., boat, jewelry, cash)

Asset type: _____ Value: $ _____ Amount owed: $_____

Asset type: _____ Value: $ _____ Amount owed: $_____

3. Dependents: ☐ Yes ☐ No

If Yes, Number of Dependent(s) (including children, elderly, or disabled): _____

Relationship of dependent(s):_____ Age(s) of Dependent(s)_____

4. Monthly Expenditures:

Mortgage payment/ Rent: ☐ Yes ☐ No

If Yes, amount of payment: $_____

Child support obligation: ☐ Yes ☐ No

If Yes, amount of payment: $_____

Other out-of-pocket monthly bills (FOR HOUSEHOLD):

☐ utilities: $_____ ☐ water: $ _____ ☐ telephone service (land or cell): $ _____

☐ internet service: $_____ ☐ cable/satellite: $_____ ☐ car payment: $_____

☐ credit card payments: $_____ ☐ car / health/home owners/ renters insurance payments: $_____

☐ unreimbursed childcare: $_____ ☐ tuition: $_____ ☐ medical debts: $_____

☐ student loan payments: $_____ ☐ Other Financial Obligations: $ _____

Total of other out-of-pocket monthly bills:$_____

TOTAL MONTHLY EXPENDITURES: $_____

5. Cash bond posted: ☐ Yes ☐ No

If Yes, amount of bond: $_____

Posted by (Name of Surety): _____

Request for Appointment of Counsel: I state to the Court that:

(1) I am not now represented by an attorney and

(2) I am without sufficient financial means or assets to afford a private attorney; or

(3) I have retained or intend to retain private counsel. _____

Name of Counsel

PERJURY WARNING: I understand that making a false statement in the Financial Statement, Affidavit of Indigency, Request for Counsel and Order may subject me to the penalties for perjury as contained in KRS Chapter 523. **The maximum sentence for perjury is five (5) years imprisonment.** I declare under the penalty of perjury that I have read or have had read to me the information contained on this form and that the statements provided here are true, complete and accurate to the best of my personal knowledge.

_____, 2_____ _____

Date Affiant's Signature

_____, 2_____ _____

Date Signature/Title of Officer Administering Oath

Commonwealth of Kentucky
Court of Justice *www.courts.ky.gov*

KRS Chapter 31

FINANCIAL STATEMENT; AFFIDAVIT OF INDIGENCY; REQUEST FOR COUNSEL; AND ORDER (CRIMINAL CASES)

Case No. _____
Court _____
County _____
Division _____

ORDER

Based upon the above attested statements, IT IS HEREBY ORDERED:

1. The Affiant, _____,

   ❑ is NOT indigent pursuant to KRS Chapter 31 and the Request for Appointment of Counsel is DENIED.

   ❑ is indigent pursuant to KRS Chapter 31 and the Request for Appointment of Counsel is GRANTED. The Court appoints the Department of Public Advocacy to represent the Defendant in the above-styled case.

2. A partial fee for representation

   ❑ is NOT assessed.

   ❑ is assessed in the amount of $ _____ to be paid in full no later than the _____ day of _____, 2_____.

   ❑ may be reserved for a later date.

_____, 2_____
Date

_____
JUDGE

_____
District/Circuit (*Circle one*) Division _____

COMMONWEALTH OF KENTUCKY
_____CIRCUIT COURT
_____-CR-_____

JOE JONES MOVANT

V. **DESIGNATION OF RECORD**

COMMONWEALTH OF KENTUCKY RESPONDENT

Comes now the Movant, _____, *pro se*, and for his designation of record, hereby designates the entire record of the proceedings, both paper and 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, the Commonwealth's Attorney, _____, on the circuit court clerk, _____County Courthouse, _____; on this _____ day of _____, 20___.

Respectfully Submitted,

_____

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
FILE NO. _____

_____ APPELLANT

V. APPEAL FROM _____ CIRCUIT COURT
CASE NO. _____

COMMONWEALTH OF KENTUCKY APPELLEE

MOTION FOR EXTENSION OF TIME

Comes now the Appellant, *pro se*, and moves this Court to grant an extension of time of sixty (60) days in which to file the Brief for Appellant and perfect this appeal. In support thereof, Appellant states the following:

1. _____ was convicted, after a guilty plea/trial, of _____and was sentenced to _____on _____.

2. On _____, the _____Circuit Court entered an order overruling Appellant's motion to vacate his judgment (See attached copy of the order).

3. On _____, Appellant filed a Notice of Appeal from the circuit court's order.

4. On _____, the Clerk of the _____ Circuit Court certified the record as being complete.

5. Appellant is proceeding *pro se* in this action. And despite his due diligence, he has been unable to complete the research necessary to present an adequate brief to this Court. Appellant has not sought any other extensions of time in this case.

6. Appellant moves for an extension of time of sixty (60) days in which to file the Brief perfect this appeal. Appellant will need such time to assure adequate development of his claims. This motion is not being filed for hindrance or delay, but to assure that all issues are properly presented on this appeal.

WHEREFORE, for the foregoing reasons, Appellant moves for an extension of time of sixty (60) days in which to file the Brief and perfect this appeal.

Respectfully Submitted,

_____
Appellant

NOTICE

Please take notice that the foregoing response will be filed with the Office of the Clerk of the Kentucky Court of Appeals on this day _____.

_____
Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing response has been sent via regular U.S. mail this day _____, to Hon. Daniel Cameron, Kentucky Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601.

_____
Appellant

COMMONWEALTH OF KENTUCKY
KENTUCKY COURT OF APPEALS
FILE NO. [redacted]-CA-[redacted]

[redacted] **APPELLANT**

APPEAL FROM [redacted] CIRCUIT COURT
V. HON. [redacted], JUDGE

NO. [redacted]-CR-00[redacted]

COMMONWEALTH OF KENTUCKY **APPELLEE**

BRIEF FOR APPELLANT

Submitted by:

Appellant's name
Appellant's address
Pro Se

Certificate required by CR 76.12(b)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail, postage prepaid, on July ____, 2014: Hon. [redacted], Judge, [redacted] Circuit Court, address; Hon. [redacted], Commonwealth's Attorney, address; and to Hon. [redacted], Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

Name

INTRODUCTION

Appellant, [redacted], appeals from the denial of his RCr 11.42 motion seeking to vacate his sentence of twenty (20) years for Wanton Murder and Kidnapping, which was imposed by the [redacted] Circuit Court. The trial court erred when it denied Appellant's RCr 11.42 motion, after remand from the Court of Appeals, by erroneously holding that trial counsel's advice to [redacted] was not deficient.

STATEMENT OF ORAL ARGUMENT

Appellant does seeks oral argument in this case due to the unique facts of this case.

STATEMENT CONCERNING CITATIONS

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

TABLE OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

At the age of seventeen, [redacted] was with a group of young men who went to a house in [redacted] to make a marijuana deal. TR II, 4-5. [redacted] threatened the resident of the house with a pistol in an attempt to get him to turn over the marijuana. Id. at 6. He then left the house and got into the car. Id. at 7. Co-defendant [redacted] came outside, took the gun from [redacted] over his objections, returned to the house and killed the resident with a single gunshot to the head. Id. at 7-8.

[redacted] was represented by a Department of Public Advocacy- [redacted]. TR II, 67-68. [redacted] was charged with murder and kidnapping, and the case went to trial within six months. Id. Just before trial, the Commonwealth offered two plea alternatives: 11 years at 85% parole eligibility on a plea to Robbery First Degree or 16 years at 20% parole eligibility on a plea to Facilitation to Murder. Id. at 68. [redacted] declined both offers and proceeded to trial. A jury convicted him of wanton murder and kidnapping, sentencing him to twenty (20) years on each charge to run concurrently for a total of twenty (20) years. Id. [redacted] is ineligible for parole until he serves 85% of his sentence. Having served all of his adult life in prison, he will be thirty-four (34) years old the first time he sees the parole board, three years before he would be released for serving his entire sentence.

In November 2011, [redacted] filed a motion under RCr 11.42, alleging, among other things, that his attorney was ineffective for failing to properly advise him regarding the benefits of taking a plea offer versus the serious risks of proceeding to trial. TR II, 66-76. As a result, [redacted] alleged, he declined the plea offers and went to trial on the advice of counsel that he could not be convicted of murder based on the evidence. The trial court failed to hold an evidentiary hearing on [redacted]'s motion, and in March 2012, denied the

motion. TR II, 83-85. [redacted] appealed to this Court, which remanded the case for a hearing on a single issue: whether [redacted] was properly advised about whether to take a plea agreement or go to trial. TR III, 7-13.

On September 30, 2013, the [redacted] Circuit Court held a hearing on that issue. TR III, 3. The court heard from trial attorney [redacted] and from [redacted]. Post-hearing briefing followed, after which the court entered its order denying [redacted]'s RCr 11.42 motion once again. TR III, 38-39. It is from that order that [redacted] now appeals.

STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL

A trial court's findings of fact are reviewed by the appellate court under the clearly erroneous standard. CR 52.01. While the trial court's factual findings pertaining to determining ineffective assistance of counsel are subject to review only for clear error, the ultimate decision on the existence of deficient performance and actual prejudice is subject to *de novo* review on appeal. Groseclose v. Bell, 130 F.3d. 1161, 1164 (6th Cir. 1997); Sayre v. Anderson, 238 F.3d 631, 634-35 (5th Cir. 2001).

A court considers two components in determining whether trial counsel's performance was so ineffective as to warrant a new trial. First, the defendant must highlight his counsel's deficient performance. Second, the defendant must show that these deficiencies prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985).

A. Deficient Performance

In assessing whether counsel's conduct was deficient, a court must determine "what happened" and "why it happened." Martin v. Commonwealth, 207 S.W.3d 1, 5 (Ky. 2006).

If the "why" is counsel's conduct, then counsel's performance may have been deficient. To determine this, a court "must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" Wiggins v. Smith, 539 U.S. 510, 523 (2003) (quoting Strickland, 466 U.S. at 688). This review requires courts to look to the "well-defined norms" of practice as reflected in the American Bar Association (ABA) Standards. See Rompilla v. Beard, 125 S.Ct. 2456, 2466 (2005); Wiggins, 539 U.S. at 524; Williams v. Taylor, 529 U.S. 362 (2000); Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003). "The [ABA] standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent, counsel," for "they are the same type of longstanding norms referred to in Strickland in 1984 as 'prevailing professional norms' as 'guided' by 'American Bar Association Standards and the like.'" Hamblin v. Mitchell, 354 F.3d at 486.

In sum, the deficient performance prong requires this Court to determine whether counsel's performance in this case was in line with prevailing professional standards.

B. Prejudice

Prejudice under Strickland requires a movant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. In the instant case, there is no question of prejudice to be decided, as this Court's ruling on remand concluded that prejudice had already been demonstrated. The only question left to decide is deficiency.

ARGUMENT

THE CIRCUIT COURT ERRED WHEN IT RULED THAT TRIAL COUNSEL'S PERFORMANCE IN ADVISING [redacted] WHETHER TO TAKE A PLEA BARGAIN OR PROCEED TO TRIAL WAS NOT DEFICIENT.

[redacted]'s appeal concerns a single issue: whether the [redacted] Circuit Court erred when it ruled that his trial counsel's performance was not deficient regarding the advice that he gave about whether to take a plea bargain or to proceed to trial. This issue is preserved by [redacted]'s RCr 11.42 motion, the post-hearing briefing, and the Circuit Court's Order denying relief. TR II, 66-76; TR III, 18-37; TR III, 38-39.

In the order remanding, this Court examined [redacted]'s claim that he received ineffective assistance of counsel because counsel encouraged him to reject a plea offer and proceed to trial. This Court held that because the offers extended to [redacted] were significantly less severe than the sentence he received at trial, he was "inherently prejudiced by going to trial." TR III, 11. The circuit court had denied the claim and an evidentiary hearing because letters from trial counsel demonstrated that the offers were communicated to [redacted]. TR II, 84-85. This Court noted that the question of deficient performance centered not just on the communication of the offers, but whether counsel had "advised [redacted] of the potential consequences of going to trial – not solely the effects of the plea offers – separate and apart from the ramifications of a trial." Id. at 12. This Court indicated that the inquiry should center on whether there was a "discussion of the relative consequences of going to trial rather than accepting either of the plea offers." Id.

The circuit court held an evidentiary hearing, took post-hearing briefing, and then issued its order. Its factual ruling on this issue was that:

> Mr. [redacted] advised Mr. [redacted] of the consequences of rejecting the plea offers which had been made and continuing to trial, informing Mr. [redacted] that he could be convicted but that the death penalty would not be a consequence of his conviction for murder. Mr. [redacted] informed Mr. [redacted] the penalty range he would face if convicted at trial and further informed Mr. [redacted] about his concerns regarding racial prejudice of a [redacted] County jury.
>
> For the foregoing reasons, the Court finds that Mr. [redacted] received accurate and adequate information about the potential consequences of rejecting the plea offers and continuing to trial, a trial which resulted in his conviction.

TR III, 39. The truth of trial counsel's advice is more complicated than this order would lead one to believe. Trial counsel certainly did testify that he told [redacted] about the penalty range for murder and that a [redacted] County jury might be more likely to convict him based on racial animus. VR 9/30/13; 11:17:10, 11:19:30. Trial counsel also testified that his general rule was to limit his advice to the factual results of a plea. Id. at 11:18:15. He did not recall with specificity what he told [redacted] about the risks of going to trial. Id. at 11:19:30.

Perhaps most troublingly, trial counsel testified that he was sure he didn't tell [redacted] what he thought the outcome of a trial would be, and that it is never his practice to advise his client about the probable outcome. VR 9/30/13; 11:20:43. Trial counsel testified that he doesn't advise a client whether or not to go to trial. Id. at 11:48:15. Trial counsel glibly testified that he wondered if he had advised his client to take the deal, whether he would still be sitting in a courtroom testifying about his advice to his client to take the deal. Id. at 11:43:35. He testified that it was not his place to encourage or discourage his client from going to trial or taking a plea. Id. at 11:50:25.

[redacted]'s testimony was that trial counsel did not tell him whether it was a good idea or bad idea to take a deal. VR 9/30/13, 12:00:00. He also testified that he had gotten the impression that he would be acquitted of murder. Id. at 12:00:10. This testimony was consistent with trial counsel's testimony that he did not believe that [redacted] *could* be convicted of murder based on the facts of the case. Id. at 11:06:00.

Ultimately, there is no dispute that trial counsel, at the very least, told [redacted] about the penalty range for murder. VR 9/30/13, 11:19:30. There is likewise no dispute that trial counsel mentioned that a [redacted] County jury might hold [redacted]'s race against him. Id. at 11:17:10. The issue in this case is that trial counsel offered [redacted] only bare facts—he did not provide the analysis or professional legal opinion to which his client was entitled. According to [redacted]'s testimony, he was told that he *could* be acquitted and his decision not to plead was based on that advice. Id. at 12:00:10. According to trial counsel, he did not believe that [redacted] could be convicted based on the facts. Id. at 11:06:00. Yet, he also testified that his general rule was not to give advice to his clients about the best course of action, but to simply provide them with the dry facts of the terms of a bargain versus the potential sentence if convicted at trial. Id. at 11:18:15.

In the context of plea negotiations "[a] reasonably competent attorney will attempt to learn all of the facts of the case, make an estimate of the likely sentence, and communicate the result of that analysis before allowing the client to plead guilty." Julian v. Bartley, 495 F.3d 487, 495 (7th Cir. 2007). Trial counsel, on the other hand, did not make an estimate of the likely sentence or communicate the results of any analysis. While giving [redacted] the impression that the trial could result in an acquittal, he did not give him

an estimate of the likely sentence. There was no "analysis" to be communicated—only bare facts about the potential minimum and maximum sentences. It should go without saying that an attorney's job is more than reciting to his client dry facts learned from legal reference books. A client has a right to expect that an attorney will render *advice* in the form of reasoned legal analysis, applying legal reasoning to the facts of the case.

The prevailing professional norms envisioned by Strickland are embodied, in this case, by the National Legal Aid & Defender Association (NLADA) Performance Guidelines for Criminal Defense Representation.

> Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement.

Guideline 6.3(a). In the commentary to that guideline, the NLADA instructs that "counsel may permissibly argue strongly that the client accept a reasonable offer where investigation and research have revealed no viable defense." While the instant case is not one where there was no viable defense, the commentary is enlightening because it reveals that suggesting a reasonable course of action is part of the duty of defense attorneys. Further, the source cited by Strickland as embodying prevailing professional norms, the American Bar Association's Criminal Justice Section Standards, has this to say in Standard 4-5.1 "Advising the Accused":

> After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

In the commentary to this Standard, the committee wrote, "The decision to plead guilty can be an intelligent one **only if the defendant has been advised fully as to his or her rights**

and as to the probable outcome of alternative choices." (Emphasis added). This Court's rulings are in agreement with this professional norm. In Vaughn v. Commonwealth, 258 S.W.3d 435 (Ky. App. 2008), this Court noted that "in order to be valid, a guilty plea in a criminal case must represent a meaningful choice between the probable outcome at trial and the more certain outcome offered by the plea agreement." Absent any analysis from his attorney as to the probable outcome at trial, the client has no way to make this choice intelligently.

Based on the testimony from the evidentiary hearing, it was error for the circuit court to hold that [redacted] was properly advised. Instead, [redacted] was given the same information he could have determined for himself from a review of the applicable statutes. An attorney's duty is to do more than simply tell his client the law—he must advise and counsel him. [redacted]'s attorney failed to do that, and testified that it wasn't part of his practice to advise his clients whether it was a good idea to go to trial versus take a plea deal. VR 9/30/13; 11:18:15.

Yet despite abdicating his responsibility to be an advisor and counselor for [redacted], trial counsel's view of the facts—that they did not support [redacted]'s conviction—left [redacted] with the impression that there was no reason to take a plea because he would likely be acquitted. The circuit court erred by finding that telling [redacted] that the facts of his case supported acquittal, while not advising him about likely outcomes, was not deficient performance.

[redacted] asks this Court to hold that the circuit court was in error when it held that trial counsel was not deficient. He asks this Court to rule that his trial counsel was

ineffective for failing to provide a candid estimate of the probable outcome at trial in contrast with the offered plea bargains. He asks that this Court rule, based on the facts presented at the evidentiary hearing of this matter, that trial counsel's performance was deficient.

CONCLUSION

In deciding whether to take a plea bargain or proceed to trial, [redacted] was not represented by an advisor and counselor, but instead was given a dry reading of the legal consequences of each choice. He deserved to be given the benefit of his trial counsel's experience and training, and to participate in a "discussion of the relative consequences of going to trial rather than accepting either of the plea offers." TR III, 12. According to the testimony of both [redacted] and his trial counsel, no such discussion occurred. [redacted] was not given an analysis of the probable outcome at trial. Thus, the circuit court's ruling that [redacted] "received accurate and adequate information about the potential consequences of rejecting the plea offers and continuing to trial" was in error.

WHEREFORE, [redacted] respectfully asks this Court to enter an order overruling the circuit court and vacating his judgment and sentence.

Respectfully submitted,

_____

NAME
Pro se

APPENDIX