INFORMATION PACKET
RELATING TO
RCr 11.42

Revised December 2019

INFORMATION RELATING TO RCr 11.42

This packet of information has been put together to assist you in preparing a *pro se* RCr 11.42 motion to vacate, set aside, or correct a state court conviction.

To file an RCr 11.42 motion correctly, make sure that this post conviction remedy is appropriate for the case.

The following items play a major role in your ability to file an RCr 11.42 motion:

1. RCr 11.42 is a Rule of Criminal Procedure that allows, "A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released…to collateral[ly] attack… [their conviction] directly by motion in the court that imposed the sentence." Therefore, you must be **in custody or on probation or parole on the conviction you are attacking**.

2. An RCr 11.42 motion is not the correct remedy when the only sentence was a fine.

3. **TIME DEADLINES**: The rule states that any motion filed under RCr 11.42 must be filed within **three (3) years after the judgment becomes final**. Your judgment becomes final when the final judgment is entered into the record by the circuit court clerk or when the appellate process on your direct appeal is complete. Your direct appeal becomes final once the appellate court has ruled on your appeal or when the time to file a motion for reconsideration or discretionary review with the Kentucky Supreme Court has expired, whichever occurs later.

   NOTE: If you do not get RCr 11.42 relief in the Kentucky State Courts and want to take your RCr 11.42 issues to the federal level you need to file your RCr 11.42 motion within one (1) year of entry of final judgment or direct appeal becoming final. There is a one (1) year time limit for filing a Federal Habeas Corpus Petition that starts to run when your state sentence becomes final. This time is placed on hold upon the filing of your RCr 11.42 motion in state court before the one (1) year deadline expires. (Possible exceptions to this rule are discussed later.) (For more information on this one (1) year deadline as to the Federal Habeas and RCr 11.42 filing, see the Federal Habeas Corpus Packet handout, also in your law library.)

   Exceptions to the 3-year deadline rule:

   a. If the facts upon which the claim is made were unknown to you and you could not have learned of them sooner; or
   b. The fundamental constitutional right asserted was not present earlier and it has been held to apply retroactively.

   If either of these exceptions do apply, you must file your motion within three (3) years of the event placing you within the exception. You should try to avoid relying on these exceptions and timely file your RCr 11.42 motion within the specified time.

WHAT YOU NEED TO KNOW

1 RCr 11.42 provides a way for you to raise certain issues that were not or could not have been raised on direct appeal. See Schooley v. Commonwealth, 481 S.W.2d 666 (Ky. 1972).

2. All grounds must be filed with the motion and are waived if not filed. Crick v. Commonwealth, 550 S. W. 2d 534 (Ky. 1977). In other words, you can only file one (1) RCr 11.42. So, raise every proper ground you want to put in the RCr 11.42. The court will dismiss any successive RCr 11.42, even if you have great grounds for relief, unless the issue raised in the successive pleading meets one of the previously discussed exceptions.

3. As a general rule, you should not file an RCr 11.42 motion if your case is on direct appeal until such time as the direct appeal is concluded. This is because all the record is not available as it is at the appellate court, or if you win the direct appeal then RCr 11.42 is not necessary. Furthermore, on occasion the appellate court decision/opinion may indicate possible RCr 11.42 issues.

4. You are not entitled to a free transcript or copies of your court record in preparing your motion to vacate, even if you are indigent. Gilliam v. Commonwealth, 655 S.W.2d 487 (Ky. 1983). However, you are entitled to copies if you pay. In order to get copies, you can contact the circuit court clerk and request the records you want. The clerk will advise you of the cost. Then you arrange to pay the cost from your inmate account. Once the clerk receives payment, they will forward your records to you.

5. Be sure to cite and apply the standard for ineffective assistance of counsel as set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

- Standard--Whether the attorney's particular conduct was deficient as measured by the objective standard of reasonableness under "prevailing professional norms," and, if so, whether counsel's error resulted in a reasonable probability that the outcome would have been different. Strickland v. Washington, 466 U.S. 688 (1984); Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1986). Hill v. Lockhart, 474 U.S. 511 (1985). (Test in guilty plea challenges).

- The standard for IAC against appellate counsel is set out on Hollon v. Commonwealth, 334 S.W.3d 431 (Ky. 2010). You must meet a two-prong test: 1) If direct appeal counsel failed to raise a particular issue on direct appeal, you must establish that counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy, and 2) you must establish that you were prejudiced by the deficient performance, showing that absent counsel's deficient performance, there is a reasonable probability that the appeal would have succeeded.

- You must prove **both** that your counsel erred (was deficient) and that counsel's deficiency prejudiced your case.

6. **EVIDENTIARY HEARINGS**:
   a. When allegations made in the 11.42 motion can be directly contradicted by the record, you are not entitled to a hearing (example: you claim that counsel failed to object but the court record shows that s/he did object).

   b. When the allegations made in the 11.42 motion raise material questions of fact (such as lack of preparation, failure to investigate, etc.) that are not refuted by the record and if shown to be true would entitle you to relief under RCr 11.42, then the court should hold a hearing. Fraser v. Commonwealth, 59 S.W.3d 448, 455 (Ky. 2001). You must show the court that your RCr 11.42 motion presents material questions of fact that cannot be disputed, contradicted, or refuted by the record presently before the court.

   c. In order to get court-appointed counsel to represent you at the hearing, you must request appointment of counsel **in writing**. Additionally, you must attach a sworn Affidavit of Indigency to show you are unable to afford counsel. If counsel is appointed, he/she will usually be given the opportunity to supplement your 11.42 and will represent you at an evidentiary hearing if one is held.

7. In writing your RCr 11.42 motion you must insure that:
   a. You raise all possible issues;
   b. You are **SPECIFIC** in your discussion of the errors you are alleging and fully support the errors you raise with relevant facts. Show how the issues and your attorney's performance meet the Strickland standard.
   c. Your motion is signed and **"verified**" (means sworn to under penalty of perjury in writing in the presence of a notary public commissioned in Kentucky) by you as being a true and accurate account of what happened in your case and of the legal errors that are present that entitle you to relief. It must be verified, even if filing *pro se*.

Failure to do these things can cause your motion to be dismissed and/or permanently stop you from ever raising the issues at a later date.

8. **Please refer to the sources mentioned in this handout for additional important information!!**

WHAT YOU NEED TO DO

After reading all the information that is available and deciding an 11.42 motion is your appropriate

remedy, there are certain things you need to do to proceed.

The first suggestion is to make a list of all the possible issues in your case. These issues may include items that you felt were not handled correctly in your case. They cannot include court errors that were raised in your direct appeal. However, if you believe that you received ineffective assistance of appellate counsel on appeal, you can bring those issues in an 11.42 if they meet the requirements under Hollon v. Commonwealth, 334 S.W.3d 431 (Ky. 2010).

After completing your list, if you are unsure if an item on your list is indeed an "issue" then you may request assistance of a legal aid. A legal aid can go over your list with you and give you possible leads to case law or statutes, etc. Your law library should have workers who could also point you in the right direction for finding case law that applies to the issues on your list.

You may also want to obtain a copy of the court record, if financially able to do so. This may be done by writing a letter to the clerk's office requesting the amount of your transcript and record or by having someone (a relative, spouse, etc.) on the outside obtain the record for you. Your records may be sent in to you, but check with your caseworker for the institutional policy. It is helpful but not absolutely necessary to have your records.

You should not initially file a Motion to Proceed *In Forma Pauperis* and ask for free records from the court. If the court denies you free copies, then you are stuck with that decision. Instead, in the early stages of gathering information you should write to the clerk and request a copy of your docket sheet/case history and your indictment. Most clerks will not charge for this information and will mail it to you. After you receive your case history, then you may find other documents that you may want to write to the clerk to obtain. Obtaining records does not require a court order.

Once the research is complete, you will need to begin drafting your RCr 11.42 motion. A sample is attached to assist you with the format.

Along with the motion you should include:

1. Memorandum of facts and law
2. Motion for appointment of counsel with an attached order granting appointment
3. Affidavit of indigency
4. Motion for evidentiary hearing (if one is wanted)

Samples of these items are attached to this packet for use in drafting your own motion, etc. Be sure to include constitutional rights for appellate purposes.

After filing the motion and attachments with your sentencing court, the clerk of that court shall notify the Attorney General and Commonwealth's Attorney in writing that your motion has been filed. RCr 11.42 (4). (If possible, it is strongly recommended that you send a copy of your motion to the Commonwealth's Attorney, however, or that you send a letter with your motion to the clerk asking they forward a copy to the Commonwealth Attorney pursuant to RCR 11.42(4)).

The Commonwealth's Attorney will have 20 days from the date the clerk mails notice to file a response. If a response from the Commonwealth Attorney is not filed within 20 days, however, you do not automatically win. Kentucky law does not currently treat that as a default judgment.

The case will proceed without their response. If a month or two goes by and the Commonwealth has not responded, you may file a motion to the court requesting the case be submitted or that an evidentiary hearing be held and that the Commonwealth not be allowed to respond. Please note that the Court will often give the Commonwealth an extension in which to file his/her response.

Sometime after the 20 days (or any continuance period that may be requested by the Commonwealth), the judge can grant or deny a hearing and / or enter an order granting or overruling your motion for relief. There is no set time limit for the judge to rule on your motion.

If an evidentiary hearing is granted and after such hearing your motion is denied, then you are entitled to request findings of fact and conclusions of law as set out in RCr 11.42 (6). This must be filed within 10 days of the motion being denied.

If your motion is denied, you have the right to appeal. This is done by filing a Notice of Appeal, along with a filing fee, or Motion and Affidavit to Proceed *In Forma Pauperis*. This must be filed within thirty (30) days of entry of the order denying the RCr 11.42 motion. It is filed with the clerk of the court denying your motion. According to RCr 11.42(5), when 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 recommended that you file the Notice of Appeal as early as possible, however, to avoid missing the due date. A post-conviction appeals packet is available to assist you in this process.

SOME THINGS TO CONSIDER BEFORE YOU FILE YOUR RCr 11.42

Most people think that if they win an RCr 11.42 then they are going to be better off or possibly be able to get out of prison. In some cases, this is correct. In other cases, however, nothing could be further from the truth. There is the possibility that you could receive more time (e.g.,. You plead guilty to TBUT and receive 3 years and a PFO I is dismissed. If you are successful in setting aside your conviction under RCr 11.42, you go back to the original indictment for TBUT and PFO I and face 10-20 years).

I. <u>If You Entered a Guilty Plea</u>

If your case involves a guilty plea in which you pled guilty pursuant to a plea bargain with the Commonwealth, then you need to understand a few things before you file your RCr 11.42. First, the burden is on you to prove your claim for 11.42 relief. The prosecutor does not have to negotiate with you. If you win the RCr 11.42, the deal you pled to is gone. There is no right to another deal. You are placed back where you were before you pled guilty. This includes reinstating any charges or PFO counts that were dismissed against you as a result of the plea bargain. If you have no other convictions you are serving time on, you can ask to be remanded back to the trial court to set a bond. If you cannot make this bond, then you will remain in the county jail until your trial or another guilty plea is entered. Depending on what happens then, of course, you may remain in jail or not.

You should also be aware that unless you received the maximum sentence, which is usually not the case in plea bargains, that you could be found guilty at trial and possibly receive more time from a jury than you got the first time around. Therefore, you need to be very careful - especially

if you are dealing with a case in which the Commonwealth has a very strong or very convincing case against you. You have to think and decide whether it is worth going back and taking the risk at trial. If you think there is a good chance you would get more time if you went to trial, or there is a good chance that you will be punished more harshly, then you need to factor that into your decision on whether to file an RCr 11.42. There have been cases where an inmate won his RCr 11.42, but ended up receiving more time than he did the first time around..

Finally, a guilty plea waives all defenses. In order to succeed on a RCr 11.42 involving a guilty plea, you must show your guilty plea was based on the deficient performance of your attorney and was not knowing or voluntary given (e.g., you took a guilty plea because your attorney said you were PFO eligible when you were not) and that but for that deficient information, you would have elected to stand trial. See Hill v. Lockhart, 474 U.S. 511 (1985).

II. If You Went to Trial

If your case went to trial and you are seeking RCr 11.42 relief, you need to determine whether you want to go through another trial. If you received the maximum sentence under which you were charged, then the risk is not as great as the person who pled guilty to lesser time or the person who received the minimum at trial. However, you should also be aware that in litigating your counsel's ineffectiveness, the Commonwealth will get a better idea of your case and how you think it should have been tried. This usually gives the Commonwealth an advantage if you do get a second trial. Of course, if you do win the RCr 11.42, the Commonwealth can choose, if it wants, to plea bargain. Again, you need to consider the sentence you received versus the sentence *you could have* received. If the jury gave you the minimum, or close to it, you would have to receive a not guilty verdict to come out ahead. In that case, you will need to be sure that you think counsel was so ineffective he caused you a conviction when you should have been found not guilty, or guilty of a lesser offense.

There are some types of issues that there is very little to lose in the trial situation. A good example is where the PFO was not done properly. For example, where a conviction was used and the defendant was 17 years old or younger when he committed the felony offense, there is nothing to chance. The felony was not suitable to use for PFO purposes.

III. Other Considerations

Every case is different. However, **in every case where there is an allegation of ineffective assistance of counsel, please note that the attorney/client privilege is waived, at least** as it relates to the claimed error/deficiency. If the individual has admitted his guilt to his attorney, the attorney in turn could use this as evidence that his advice to plead guilty was based upon sound judgment including the fact the defendant told him he was guilty. Of course, the Commonwealth again gets the benefit of seeing what went on in putting the defendant's case together and if you have an RCr 11.42 evidentiary hearing, the prosecutor has a record in which s/he can utilize for purposes of a retrial.

Whether you pled or went to trial, the time you have spent in custody will count toward any future sentence you might get on the charge involved in the RCr 11.42 you file. KRS 532.120(4).

Finally, be aware that if you testify at an RCr 11.42 evidentiary hearing, you are giving up the right

not to incriminate yourself. In some cases, this could pose problems.

IV. Conclusion

In short, RCr 11.42 offers a remedy to those who have been deprived of constitutional rights, who have been unlawfully subjected to the court's jurisdiction, or who have been convicted in violation of a statute to such a degree that it renders the judgment void. Generally speaking, RCr 11.42 does not deal with judge errors but rather with errors of counsel or other serious flaws that the courts determine make it either grossly unfair or illegal to continue imprisoning the inmate serving the sentence. Also remember that an RCr 11.42 is not the same as an appeal, a CR 60.02 motion, or a state habeas. If RCr 11.42 is not for you, one or more of these may be. It is usually recommended to not file a joint RCr 11.42/CR 60.02 motion. These are not the same and are not interchangeable.

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.

RCr 11.42

I. THE THRESHOLD REQUIREMENTS

A. Standing

1. Movant must be "in custody under sentence" or on "probation, parole or conditional discharge." RCr 11.42(1); Howard v. Ingram, 452 S.W.2d 410 (Ky. 1970).

a. Judgment must be entered. Dawson v. Commonwealth, 498 S.W.2d 128 (Ky. 1973).

- Can file even if case is currently on appeal. (But not advisable – See p. 2 of this packet).
- Trial court may consider merits of RCr 11.42 even though direct appeal is pending. James v. James, 313 S.W.3d 17, 21 (Ky. 2010).

b. Not in custody if sentence has expired or prisoner has been conditionally released. Wilson v. Commonwealth, 403 S.W.2d 710 (Ky. 1966); Ray v. Commonwealth, 633 S.W.2d 71 (Ky. App. 1982).

- Can use a CR 60.02 under limited circumstances. Stoker v. Commonwealth, 289 S.W.3d 592, 596 (Ky. App. 2009).

c. Presumably, "in custody" includes a person incarcerated in another state, but with a detainer requiring future service of the Kentucky sentence.

- There is no Kentucky case law on point, but Kentucky courts will most likely follow the federal habeas definition of "custody." See Estelle v. Dorrough, 420 U.S. 534 (1975); Nolan v. Cowan, 501 S.W.2d 586 (Ky. 1973); Balsley v. Commonwealth, 428 S.W.2d 614 (Ky., 1967); and Braden v. 30th Judicial District of Kentucky, 110 U.S. 484 (Ky., 1973).

d. If only sentenced to pay a fine, RCr 11.42 is unavailable. Lewallen v. Commonwealth, 584 S.W.2d 748 (Ky. App. 1979).

B. **Procedural Traps**

1. Motion must be in writing and signed and **verified** by the movant. RCr 11.42(2); Cleaver v. Commonwealth, 569 S.W.2d 166 (Ky. 1978). May be typed or neatly printed.

   a. Failure to do so results in a summary dismissal. RCr 11.42(2).

2. Motion must "state specifically the grounds on which the sentence is being challenged" and the facts upon which relief is sought. RCr 11.42(2).

   a. Allegations must be both detailed and factual. General conclusory allegations are insufficient and will result in summary dismissal. RCr 11.42(2); Bartley v. Commonwealth, 463 S.W.2d 321 (Ky. 1971); Cf. Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1983).

   b. Counsel may supplement motion with additional and/or expanded grounds. Commonwealth v. Ivey, 599 S.W.2d 456 (Ky. 1980); Bowling v. Commonwealth, 926 S.W.2d 667 (Ky. 1996). However, if counsel is raising new grounds in the supplement, they must be raised within three (3) years of when the case became final. See Roach v. Commonwealth, 384 S.W.3d 131, 135 (Ky. 2012).

   - It is a good idea to file both a motion and a detailed memorandum containing a

statement of facts and arguments of law.

3. As a general rule, **only one** 11.42 motion is permitted. RCr 11.42(3). McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997).

   a. Motion must contain all grounds of which movant has knowledge and which could have "reasonably been presented in the same proceeding." RCr 11.42(3).

      i. Courts will not consider successive RCr 11.42s stating grounds that have or should have been presented earlier. The issue is waived. Stoker v. Commonwealth, 289 S.W.3d 592, 596 (Ky. App. 2009).

      ii. Exception: A second motion is permitted upon a ground that was not known or reasonably discoverable at time initial motion was made. RCr 11.42(3); Gilliam v. Commonwealth, 652 S.W.2d 856 (Ky. 1983).

         (a) A material change in the case law would support a second motion.

         (b) Commonwealth can waive this if it fails to object to the successive motion before appeal. Burch v. Commonwealth, 555 S.W.2d 954 (Ky. 1977).

4. Cannot use RCr 11.42 to relitigate appealed or direct appealable grounds. Commonwealth v. Pelfrey, 998 S.W.2d 460, 462 (Ky. 1999).

II. PROCEDURAL PROGRESSION AND MOVANT'S RIGHTS

A. What to File

1. RCr 11.42 is a procedural remedy designed to give a convicted prisoner a direct right to attack the conviction under which he is being held and is supplemental to the right to habeas corpus. Wilson v. Commonwealth, 403 S.W.2d 710 (Ky. 1966); Commonwealth v. Marcum, 873 S.W.2d 207 (Ky. 1994).

2. RCr 11.42 is the exclusive remedy in those situations in which a prisoner collaterally attacks his judgment of conviction unless showing is made that the remedy of such rule is inadequate. Howard v. Ingram, 452 S.W.2d 410 (Ky. 1970). Commonwealth v. Marcum, 873 S.W.2d 207 (Ky. 1994).

3. RCr 11.42 supplements and does not replace CR 60.02 rule regarding relief from judgment by motion on grounds of mistake or newly discovered evidence. Perkins v. Commonwealth, 382 S.W.2d 393 (Ky. 1964); But see Gross v. Commonwealth, 648 S.W.2d 854 (Ky. 1983).

4. Newly discovered evidence is properly raised by RCr 10.06 motion for new trial and not by motion for post-conviction relief. Polsgrove v. Commonwealth, 439 S.W.2d 776 (Ky. 1969).

B. Where to File

1. RCr 11.42 motion must be filed in the court that imposed the sentence. RCr 11.42(3).

C. When to File

1. Rule requires that the motion must be filed "within three years after the judgment becomes final." RCr 11.42(10). See Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987), where the U.S. Supreme Court defined "final" as a "case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for petition of certiorari elapsed or a petition for certiorari finally denied."

   a. The rule allows motions to be filed after 3 years if it is proved in the pleadings either that:

      i. The facts upon which the claim is predicated were unknown and unascertainable through due diligence; or,

      ii. That a fundamental constitutional right has been held retroactive and that it was not established in the 3-year period.

D. Commonwealth's Response

1. Circuit clerk has an obligation to notify, in writing, the Attorney General and the Commonwealth's Attorney that a motion to vacate has been received. RCr 11.42(4).

   - It is recommended that you send a copy of your motion to the Commonwealth's Attorney, if possible, or that you include a letter to the clerk with your motion asking that he/she forward a copy of the motion to the Commonwealth's Attorney.

2. The Commonwealth has twenty days to respond to the motion after the mailing of the clerk's notice. RCr 11.42(4).

   a. A response is not a prerequisite to further action by the court. Polsgrove v. Commonwealth, 439 S.W.2d 776 (Ky. 1969).

      - If a response from the Commonwealth Attorney is not filed within 20 days, however, you do not automatically win. Kentucky law does not currently treat that as a default judgment.

   b. Movant need not reply to the Commonwealth's answer since affirmative allegations contained in the answer are considered as controverted. RCr 11.42(5). Movant is not precluded from filing a reply.

E. Burden of Proof

1. The party moving to vacate "undertakes a heavy burden to overcome the regularity of conviction." Wahl v. Commonwealth, 396 S.W.2d 774 (Ky. 1965).

F. Movant's Rights

Movant must receive "fundamental rights" pursuant to the motion. Coles v. Commonwealth, 386 S.W.2d 465 (Ky. 1965).

1. Right to a Hearing

   a. RCr 11.42(5) requires the court to hold an evidentiary hearing if "the answer raises a material issue of fact" that cannot be determined on the face of the record. RCr 11.42(5); Fraser v. Commonwealth, 59 S.W.3d 448, 455 (Ky. 2001). Example: Effect of Drugs on Defendant: Movant who alleged he could not assist counsel because of the effect of drugs was entitled to a hearing. Barnes v. Commonwealth, 454 S.W.2d 352 (Ky. 1970).

   b. Evidentiary hearing is not required where allegations presented in pleadings may be "fully considered by resort to court record." Newsome v. Commonwealth, 456 S.W.2d 686 (Ky. 1970).

   c. Conclusory allegations are insufficient to warrant a hearing. Specific facts must be alleged. Wedding v. Commonwealth, 468 S.W.2d 273 (Ky. 1993); Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993).

   d. Movant is entitled to a "prompt" hearing and disposition on the action. Commonwealth v. Stamps, 672 S.W.2d 336 (Ky. 1984); Coles v. Commonwealth, 386 S.W.2d 465 (Ky. 1965). Expedited Proceeding: Disposition of motion to vacate sentence should be expedited, and if a hearing is required, it should be prompt, four month delay without reason entitled movant to writ of mandamus. Helton v. Stivers, 385 S.W.2d 172 (Ky. 1964). See also Wahl v. Simpson, 385 S.W.2d 171 (Ky. 1964) and Collier v. Conley, 386 S.W.2d 270 (Ky. 1965).

   e. Movant has a right to be present at the hearing. Nickell v. Commonwealth, 451 S.W.2d 651 (Ky. 1970).

2. Right to Counsel

   a. The movant may be entitled to representation on the motion if specifically requested and if an *in forma pauperis* motion has been granted. Commonwealth v. Ivey, 599 S.W.2d 456 (Ky. 1980). But see Commonwealth v. Stamps, 672 S.W.2d 336 (Ky. 1984).

   b. "Hearings and appointments are not necessary when the record in the case refutes the movant's allegations." Hopewell v. Commonwealth, 687 S.W.2d 153 (Ky. App. 1985) (citing Newsome v. Commonwealth, 456 S.W.2d 686 (Ky. 1970)).

   c. The request for appointment of counsel must be contained in the body of the 11.42 pleading but must be clear and explicit. Beecham v. Commonwealth, 657 S.W.2d 234 (Ky. 1983).

d. RCr 11.42(5) requires the appointment of counsel even without request if a hearing is to be held.

e. There is no constitutional right to counsel at state post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987).

f. ***PRO SE* PLEADINGS**: *Pro se* pleadings are to be liberally construed. Case v. Commonwealth, 467 S.W.2d 367 (Ky. 1971).

3. Right to a Finding by the Court

a. RCr 11.42(6) requires that the court "make findings determinative of the material issues of fact and enter a final order accordingly."

i. Failure to make findings is not reversible error. Lynch v. Commonwealth, 610 S.W.2d 902 (Ky. App. 1980).

ii. Failure of movant to request a factual and legal determination may waive the finding requirement. Blankenship v. Commonwealth, 554 S.W.2d 898 (Ky. App. 1977).

iii. An unsuccessful movant for relief under RCr 11.42 is not required to request additional findings of fact in order to preserve his right to appeal a summary denial of his motion unless he is asking the Court of Appeals to reverse or remand a final order because the trial court failed to make a finding of fact on an issue essential to the order. RCr 11.42(6); Cawl v. Commonwealth, 423 S.W.3d 214 (Ky. 2014).

b. The Court must make a prompt determination of the merits of the motion. A ruling may be compelled by mandamus. Flatt v. Wilson, 385 S.W.2d 172 (Ky. 1964) (directing the court to rule on an RCr 11.42 motion filed four months previously). However, there is no set period in which the court must issue a ruling.

c. If the court finds that the movant is entitled to relief it must "vacate the judgment and discharge, resentence or grant him a new trial, or correct the sentence as may be appropriate." RCr 11.42(6).

4. Right to Transcript

An indigent movant, who did not appeal his conviction, is not entitled to a free transcript prior to filing a motion under RCr 11.42. Gilliam v. Commonwealth, 652 S.W.2d 856 (Ky. 1983). A movant is entitled to a transcript on a motion for post-conviction relief if the motion states grounds that, if true, would furnish a basis for relief. Gregory v. Knuckles, 471 S.W.2d 306 (Ky. 1971). Apparently, movants only have the right to those portions of the trial transcript, which are necessary for a proper adjudication of the complaints found

in the RCr 11.42 motion. Sullivan v. Commonwealth, 655 S.W.2d 487 (Ky. 1983); and Gilliam v. Commonwealth, 652 S.W.2d 856 (Ky. 1983). If a direct appeal did not take place then no transcript was prepared. You may pay for the videotape(s) of the trial and various court appearances.

5. Right to Appeal

Either side may appeal from the judgment or final order. The party has 30 days after the entry of the judgment to appeal. RCr 11.42(7).

III. GROUNDS

A. In General

1. Movant must show that there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack. Lay v. Commonwealth, 506 S.W.2d 507 (Ky. 1974).

2. Error which could have been raised on direct appeal may not be raised on RCr 11.42 unless so fundamental as to deny "basic due process of law." Schooley v. Commonwealth, 556 S.W.2d 912 (Ky. App. 1977).

B. Specific Grounds (Examples)

1. Ineffective Assistance of Counsel

   a. Standard--Whether the attorney's particular conduct was deficient as measured by the objective standard of reasonableness under "prevailing professional norms," and, if so, whether counsel's error resulted in a reasonable probability that the outcome would have been different. Strickland v. Washington, 466 U.S. 688 (1984); Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1986); Hill v. Lockhart, 474 U.S. 511 (1985). (Test in guilty plea challenges).

2. Lack of Jurisdiction. McMurray v. Commonwealth, 682 S.W.2d 794 (Ky. App. 1985). Commonwealth v. Marcum, 873 S.W.2d 207 (Ky. 1994).

3. Violation of a Statute. See Tipton v. Commonwealth, 376 S.W.2d 290 (Ky. 1964).

4. Lack of counsel at a critical stage of proceeding. See Tipton v. Commonwealth, 376 S.W.2d 290 (Ky. 1964); U.S. v. Chronic, 466 U.S. 648 (1984).

5. Jury improperly instructed. Kotas v. Commonwealth, 565 S.W.2d 445 (Ky. 1978). However, claimed errors in instructions are not reviewable upon motion to vacate judgment. Boles v. Commonwealth, 406 S.W.2d 853 (Ky. 1966). What this means is that you can only claim ineffective assistance of counsel for failing to object to faulty jury instructions and/or failing to supply sufficient instructions to the Court. If your attorney

did these things and the Court simply did not agree, that is a court error that can only be brought on direct appeal.

C. Inapplicable Grounds (Examples)

1. Attack on credibility of witnesses. Admissibility and sufficiency of the evidence. Illegal arrest. Johnson v. Commonwealth, 473 S.W.2d 823 (Ky. 1971).

2. Unlawful search and seizure. Carter v. Commonwealth, 450 S.W.2d 217 (Ky. 1970).

3. Denials of motion for separate trial. Polsgrove v. Commonwealth, 439 S.W.2d 776 (Ky. 1969).

4. Confession. Darton v. Commonwealth, 433 S.W.2d 117 (Ky. 1968).

5. Equity and fairness. Nicholson v. Judicial Retirement and Removal Committee, 573 S.W.2d 642 (Ky. 1978).

6. Perjured Testimony: Perjured testimony is not grounds for relief in a RCr 11.42 motion. Fields v. Commonwealth, 408 S.W.2d 639 (Ky. 1966); Hendrickson v. Commonwealth, 450 S.W.2d 231 (Ky. 1970). Movant for post-conviction relief must be truthful or he subjects himself/herself to prosecution for perjury. Case v. Commonwealth, 467 S.W.2d 367 (Ky. 1971).

7. Defects in Indictment: Defects in Indictment will not support RCr 11.42 motion. Warner v. Commonwealth, 385 S.W.2d 77 (Ky. 1964).

8. Newly Discovered Evidence: Not a ground for vacating pursuant to RCr 11.42. Fields v. Commonwealth, 408 S.W.2d 638 (Ky. 1966); Polsgrove v. Commonwealth, 439 S.W.2d 776 (Ky. 1969).

9. Failure to perfect appeal: Failure of counsel to perfect appeal is not ground for RCr 11.42. Tipton v. Commonwealth, 398 S.W.2d 493 (Ky. 1966).

IV. MISCELLANEOUS

A. A lower standard is used to judge the sufficiency of a *pro se* petition. Case v. Commonwealth, 467 S.W.2d 367 (Ky. 1971); Bartley v. Commonwealth, 463 S.W.2d 321 (Ky. 1971).

B. By alleging ineffective assistance of counsel, the movant waives the attorney/client privilege to the issues raised in the RCr 11.42. Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1968).

C. Polygraph results are admissible. Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985). But see Gibbs v. Commonwealth, 723 S.W.2d 87 (Ky. App. 1987).

D. Movant is not entitled to invoke privilege against self-incrimination in RCr 11.42 hearing

where conviction has already been upheld on appeal. See Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985); McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1987).

E. Out of State Witness Statute allowing compulsory process applies only to criminal prosecutions not post-conviction proceedings. KRS 421.250; Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985); McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1987).

F. If a felony conviction has been subsequently used to obtain an enhanced sentence under the PFO law, it may not be subject to collateral attack. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983); Ray v. Commonwealth, 633 S.W.2d 73 (Ky. App. 1982). But see Webb v. Commonwealth, 904 S.W.2d 226, 229 (Ky. 1995) where the Supreme Court of Kentucky ruled that defendants would no longer be able to attack prior convictions during PFO trials (except on the grounds of lack of counsel at the prior). However, that Court held that the "appropriate remedy to challenge...[Prior] guilty pleas is through an RCr 11.42 proceeding and then [if successful]...apply for reopening of any...sentence thus enhanced." Id. (citing McQuire v. Commonwealth, 885 S.W.2d 931, 937, n.1 (Ky. 1994)).

G. Filing a Notice of Intent to File an RCr 11.42 motion does not give a circuit court jurisdiction to grant a stay of execution in a capital post-conviction action. Bowling v. Commonwealth, 926 S.W.2d 667, 669-70 (Ky. 1996).

H. Alibi defenses: A plea of guilty destroys the right of a defendant to claim an alibi defense in a post-conviction proceeding. McKinney v. Commonwealth, 445 S.W.2d 874 (Ky. 1969). A guilty plea waives all defenses.

	RCr 11.42	CR 60.02	State Habeas Corpus
Where filed	Sentencing Court	Sentencing Court	Circuit Court of County where incarcerated
Speed	Must file within 3 years of conviction becoming final (within 1 year if you wish to proceed with federal habeas in the future); State has 20 days to respond; no time limit for court to rule	Must be filed within reasonable time No time limit for court to rule	Heard immediately; no time limit for court to rule
When used	Exclusive remedy to attack judgment when in custody – not a substitute for direct appeal	Must show RCr 11.42 inadequate	Must show RCr 11.42 inadequate
Number of times can be filed	One	Unlimited	Unlimited
Appeal deadline	Appeal 30 days	Appeal 30 days	Appeal 30 days

(THE TWO-PRONG TEST)

BY: DARRELL SCOTT
SKYTOWER MAGAZINE - WINTER 1990

The Sixth and 14th Amendments to the United States Constitution guarantee a person accused of a crime the right to the assistance of counsel in preparing and presenting a defense. The courts have interpreted this to mean that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759 (1970); see also Powell v. Alabama, 287 U.S. 45 (1932). Under this interpretation it has often been said, with logic, that the Constitution keeps the promise of vigilant and vigorous representation to the ear of the accused. Too often, however, the promise is broken to his hope. This, in turn, has caused the spin-off of countless post-conviction (RCr 11.42) litigation placing defense counsel upon the throne of attack for what the accused perceives as a denial of effective representation on counsel's part in defending the accused at trial.

However, upon launching an attack on your counsel's performance at trial, in order to obtain post-conviction relief under the argument of ineffective assistance of counsel, you must first overcome the stringent "two-prong" test established by the United States Supreme Court under the principles set forth in Strickland v. Washington, 244 U.S. 668 (1984). As such, under this two-prong test you must first show that your counsel's performance was deficient. This requires showing that your counsel was not functioning as the "counsel" guaranteed a defendant by the Sixth Amendment. Second, you must show that the deficient performance prejudiced the defense. This requires showing that defense counsel's errors were so serious as to deprive you of a fair trial. Unless you make both of these showings, you cannot obtain relief under the argument of ineffective assistance of counsel.

****

Kentucky is also bound by the principles established in Strickland v. Washington. In the case of Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1986), the defendant was convicted, by jury, of murder and sentenced to death. Thereafter, he filed an RCr 11.42 motion back in the trial counsel along with a request for an evidentiary hearing. The trial court granted Gall's motion for an evidentiary hearing upon the merits of his RCr 11.42 motion and, shortly thereafter, denied his 11.42 motion. Gall

appealed. On appeal, Gall advanced the argument of ineffective assistance of counsel, among other things. He asserted that the two public defenders who represented him rendered such ineffective assistance to him so as to deprive him of his right to counsel under the Sixth and 14th Amendments to the U.S. Constitution, and Section 11 under the Constitution of Kentucky. Gall contended that his public defenders, in deciding to introduce a limited defense in a reasonable manner. Specifically, Gall cited his lawyers' failure to produce records and testimony of his history of mental illness, as inadequate investigation of his insanity defense. The Supreme Court of Kentucky determined that Gall had failed to prove either prong of the test in Strickland. However, before the court reached its conclusion that Gall had failed to establish his ineffectiveness claim, the Court emphasized:

> "This Court is bound by the principles established by the Supreme Court of the United States in the case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in the context of analyzing ineffective assistance of counsel claims under the Sixth and 14th Amendments."

Moreover, the Supreme Court of Kentucky in McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1987), noted:

> "The twin standard for such review is the proper measure of attorney performance or simply reasonable under prevailing professional norms and whether the alleged errors of the attorney resulted in prejudice to the accused."

The Court in McQueen went on to emphasize that the defendant must demonstrate that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the trial would have been different. See McQueen v. Commonwealth, 721 S.W.2d at 697.

In summary, before initiating an attack upon your trial counsel make sure you can clearly show that your counsel's unprofessional performance prejudiced your defense and that absent counsel's deficient performance, the outcome of your trial would have been different.

STRATEGIES FOR RCr 11.42

I. GOALS OF POST-CONVICTION ACTION

A. Are you just trying to exhaust for federal court?

B. Do you want a hearing in state court? In federal Court?

C. Do you want a ruling on the merits?

II. REQUIREMENTS FOR SUCCESSFUL MOTION

A. Total familiarity with the trial record/guilty plea record/Pre-trial suppression hearings, etc.

B. Independent factual investigation

1. Was information concealed by the prosecutor?

2. Were witnesses missing?

3. Any false testimony?

4. Did trial attorney conduct an adequate investigation? (i.e., a reasoned and informed study of the law and facts relevant to the case and the defense?

5. Is there noncompliance or violation of a statute?

III. NEW FACTUAL INVESTIGATION OF THE CASE

A. Investigate the facts of the crime

1. Did your client commit the crime?

2. Did your client commit the crime with the requisite mental state? (i.e., intentional or wanton or reckless)

B. Investigate the facts of the police or state's investigation

1. Did the police properly gather sufficient evidence to convict?

a. Physical evidence properly analyzed by experts.

b. Did prosecution exert undue influence on any witness?

c. Was the arrest and/or any search conducted legal?

d. Did prosecutor withhold exculpatory evidence or fail to reveal any information to which the defense was entitled?

C. Investigate client's life history (Was there any mitigation evidence the jury/judge never heard that might result in guilt but with lesser punishment?)

D. Investigate defense counsel's pre-trial investigation and conduct of the trial.

1. Did attorney provide effective representation?

2. Was the defense preparation or presentation impeded by the state?

E. Sources of information

1. Client, family, community, significant people in your client's life, newspapers, records, victim or the family, police, trial counsel, trial counsel's file, Kentucky Open Records Act, jurors, and the evidence itself.

IV. HOW TO LITIGATE AN INEFFECTIVE CLAIM

A. Need to show attorney's performance was deficient and prejudicial. Strickland v. Washington.

1. Must prove there was a "reasonable probability" of a change in the outcome of the case. If only the attorney had developed the issue, a reasonable doubt would have been established.

B. Interviewing trial counsel

1. Need client to sign form releasing file or giving permission for file to be sent to him/her. (May be asked to pay for copies.)

2. If can't pay, make a motion to sentencing court showing poverty/inability to pay and need for file in order to file timely.

3. How to break the ice - if cooperative, if uncooperative.

4. What are trial counsel's feelings about the client?

5. What investigation did the attorney do or not do?

6. What does the attorney's file reveal?

7. If not interested in suing attorney or filing bar complaint, advise attorney in writing and keep copy of communication.

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
INDICTMENT NO. _____

_____ MOVANT

VS.

MOTION TO VACATE JUDGMENT
PURSUANT TO RCr 11.42

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * *

Comes now the movant, _____, pro se, and respectfully moves this Honorable Court pursuant to the provisions of RCr 11.42 to vacate his final judgment and sentence of imprisonment as entered in relation to the above reflected action on _____. As grounds therefor, movant states as follows:

1. Movant is presently incarcerated at the _____ located in _____, Kentucky upon service of a _____ sentence imposed by the _____ Circuit Court. See Attachment "A" Resident Record Card of _____, Resident No. _____.

2. Movant was originally charged within Indictment No. _____ with _____. See Attachment "B" _____ Circuit Court Indictment No. _____. Movant's sentence was imposed following a trial by jury and a finding of guilty to _____,

See Attachment "C", Judgment and Sentence, _____ sentence imposed.

3. During the course of the trial and proceedings, the movant was represented by Hon. _____.

4. Movant urges that his trial counsel on this occasion and regarding these issues failed to fully consider and discuss with him the various defenses which existed and to properly pursue or to fully pursue the most reasonable and clear defense actually available in this action. Based upon the existing facts and expected testimony in this case, the most reasonable and in fact the only clear defense was Extreme Emotional Disturbance. If counsel had pursued a clear cut defense based on Extreme Emotional Disturbance it is likely that the movant would have been convicted of a lesser offense and received a substantially reduced sentence. Further, that had his trial counsel followed through fully on the Extreme Emotional Disturbance defense, expert testimony could have been offered to explain the state of mind of the movant at the time of the offense.

5. The movant asserts that at trial defense counsel based his theory of the case upon self-defense even though based upon the facts and expected testimony self-defense was a less reasonable theory than Extreme Emotional Disturbance. The movant was convicted of the charged offenses and received for

all effective purposes the maximum actual sentence available in this action. Movant asserts that counsel's decision to follow primarily a theory of self-defense rather than Extreme Emotional Disturbance was more than a mere trial strategy decision because based upon the actual facts of the case as existed there was very little likelihood of success in that strategy whereas movant asserts that a strategy of asserting clearly the existence of Extreme Emotional Disturbance with expert testimony to explain the movant's mental state would most likely have resulted in a far more favorable outcome. Counsel for the defense in fact explained, more or less, as a secondary theory in his closing argument, the theory of the Extreme Emotional Disturbance defense. However, this was not sufficient to actually present this defense fully.

6. The record demonstrates that the confrontation that resulted in the death of _____ and serious injuries to _____ occurred during a very short period of time following an earlier confrontation in which the _____ of the deceased had pointed a shotgun at the movant. At the time of the second physical confrontation, the movant had been drinking, as had all parties involved in the episode. It appears that in the middle of this second confrontation, while fear was in high gear and while the movant was taking a horrible physical beating from the deceased, the movant was pushed to the

breaking point. At precisely the wrong moment, the co-defendant produced the gun and a tragedy occurred.

7. Movant's actions at that time were consistent with the acts of an individual under great emotional distress. Movant asserts that his culpability rose only to the level of First Degree Manslaughter and Attempted First Degree Manslaughter. Movant believes therefore, if the jury had been fully apprised of his actual mental state of suffering from an Extreme Emotional Disturbance, movant believes the jury would not, if given all the relevant and admissible facts, have recommended a Life sentence or found him guilty of Murder and Attempted Murder.

8. Movant asserts that counsel's failure to fully assert and present his full Extreme Emotional Disturbance defense at trial resulted in significantly greater punishment than would have otherwise occurred and this resulted in a violation of his substantial rights pursuant to the Sixth and 14th Amendments of the United States Constitution and Sections Seven and 11 of the Kentucky Constitution.

Movant urges that he is entitled to a new trial based upon criteria set forth in the leading case on ineffective assistance of counsel, Strickland v. Washington, 446 U.S. 668, 104 S.Ct. 2025, 80 L.Ed.2d 674 (1984).

WHEREFORE, movant respectfully requests this Court to enter its findings of fact and conclusions of law and vacate its final judgment as entered January 4, 1996. In the alternative, movant requests that this matter be set for an evidentiary hearing and further that the movant be allowed to present expert testimony regarding the Mitigation and Extreme Emotional Disturbance.

In support of this motion, the movant has attached his Memorandum of Law.

Respectfully submitted,

_____

MOVANT, PRO SE

_____

_____

_____

VERIFICATION

_____, after being duly sworn, states he has read this "Motion to Vacate Judgment Pursuant to RCr 11.42" and that the allegations and statements it contains are true and correct to the best of his knowledge and belief.

_____

MOVANT

NOTARY STATEMENT

Subscribed and sworn to before me by _____ on this _____ day of _____, 20_____.

_____
NOTARY PUBLIC
STATE AT LARGE, KENTUCKY

My Commission Expires: _____

NOTICE

Please take notice that the foregoing "Motion to Vacate Judgment Pursuant to RCr 11.42" was mailed via first-class, certified postage prepaid to the Clerk of the _____ Circuit Court, _____, _____, Kentucky _____ on this _____ day of _____, 20_____, to be filed immediately upon receipt and heard at the convenience of the court.

_____
MOVANT, PRO SE

CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing motion was mailed via first-class postage prepaid to Hon. _____, _____ County Commonwealth

Attorney, _____, _____, Kentucky _____

on this _____ day of _____, 20_____.

_____

MOVANT, PRO SE

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
INDICTMENT NO. _____

_____ MOVANT

VS.

MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO
VACATE JUDGMENT PURSUANT TO RCr 11.42

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * *

INTRODUCTION

This is a case where movant, has requested by motion pursuant to RCr 11.42 to set aside the court's final judgment of _____. Alternatively movant asks the court to set this matter down for an evidentiary hearing with request for expert testimony regarding Extreme Emotional Disturbance and the presentation of evidence and testimony of the type that upon retrial would be presented in mitigation of punishment.

Movant asks the court to view this motion with recognition of the very serious level of punishment actually imposed, a Life sentence for Murder and 20 years for Attempted Murder. When viewed with full knowledge of the facts, this case portrays a great tragedy, both in the loss of _____ (decedents) life and the subsequent loss through a Life sentence of any normal, useful or happy life for the movant. At the time

of the events in question, the movant was _____ years old with no prior felony record. The deceased was _____ years old.

There is a very old philosophical proverb that reads "He who saves a single life saves the world entire." Movant's request therefor asks this Court to grant another day in court to give movant a fair opportunity to try and save what is left of his future. The tragedy to _____ and his family cannot be undone, however, this Honorable Court has the ability to grant another chance to movant to demonstrate those relevant and material circumstances that unfortunately were not developed in the trial of this action.

STATEMENT OF THE CASE

On _____, a two-count indictment was returned in the _____ Circuit Court and charged movant, with the offenses of Murder of _____ (Count 1) and Attempted Murder of _____(Count 2). (Note Transcript of Record, hereinafter T.R., filed for previous appellate action.)

On _____, movant waived formal arraignment and entered a plea of not guilty to the indictment. TR 15; TAPE NO. 4, 2/6/95; 9:19:28.

At the trial, held _____, the prosecution, in an effort to prove the charged offenses, called ten witnesses to the stand. Their testimony, which presented the jury both

with the Commonwealth's theory as charged in the indictment, TAPE NO. 3, 8/21/95; 14:17:22, and movant's theory that he shot these individuals in self-defense, Id., 11:19:42-11:20:30, can be summarized in this fashion:

ARGUMENT

THE COURT SHOULD SET ASIDE THE JUDGMENT IN THIS ACTION AND SET THIS MATTER FOR A NEW TRIAL BECAUSE MOVANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION AND SECTION SEVEN AND 11 OF THE KENTUCKY CONSTITUTION.

The movant has explained in his motion to which this document is an attachment that it is his subjective belief and understanding based upon review that his counsel was experienced, hard working and in all manner acting in good faith as regards his defense. The movant, however, submits that counsel regardless of good faith and intentions was for this particular matter on this particular occasion ineffective in representing the movant before the jurors of Warren County. Counsel presented this action primarily as a case of self-defense. The self-defense argument based upon the plain reading of the statute KRS 503.050, did not really fit the facts as existing although movant will accept that some aspects including a subjective belief of danger of death or serious physical injury were present. (It is obvious from the facts and should have been obvious from the outset that the self-defense argument

was weak since no proof was shown or available that the deceased had a gun or weapon available at that time and within his reach.

This case presents issues of great importance and dealing with the fundamental rights of the movant. The movant urges that trial counsel should have presented a defense primarily based upon Extreme Emotional Disturbance. Movant urges that failure to rely on this line of defense went beyond a decision of mere trial tactics and fundamentally effected his ability to receive a fair trial and further that movant received a significantly greater sentence thereby.

The movant would further urge that he was entitled to the presentation of expert witness on his behalf to establish the existence of an Extreme Emotional Disturbance and to present evidence in mitigation of punishment.

Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). The U.S. Supreme Court has held that the Sixth and 14th Amendments guarantee a criminal defendant "a meaningful opportunity to present a complete defense…. [a]nd an essential component of procedural fairness is an opportunity to be heard." These fundamental principles of procedural fairness have been extended to cover the penalty phase of bifurcated trials involving capital offenses under the Fifth, Eighth and 14th Amendments. Estille v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); Presenell v. Georgia, 439 U.S. 14, 99

S.Ct. 235, 58 L.Ed.2d 207 (1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

If this court sustains the movant's request for a new trial he would then be entitled to funds for appointment for his own expert regarding these issues. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

Movant submits that the Extreme Emotional Disturbance defense or more precisely mitigating circumstance arguably grows out of a recognition by the courts and legislature early on that in the heat of the moment, when anger is high, as well as fear and in movant's case pain and diminished cognitive ability due to alcohol, the line between reasonable self-defense and unreasonable action can be subjectively blurred or the threat gravely misunderstood. This leads often, as in this case, to tragic outcomes. U.S. Army General Omar Bradley was once quoted to state: "Bravery is the capacity to perform properly even when scared to death." We submit that the very same human mechanism that creates the fight or flight flow of adrenaline when faced with danger, creates in some people (when directed properly), a hero and in others when directed improperly or when faced with unforeseen and difficult situations tragedy. On the night of the terrible tragedy from which this case arose the movant was 19-years old, scared and confused. If granted a new

trial expert testimony could be presented to explain his EED and could make a very great difference in potential sentencing.

CONCLUSION

WHEREFORE, movant respectfully requests this court to enter its findings of fact and conclusions of law and vacate its previous sentence or in the alternative set this matter for an evidentiary hearing.

Respectfully submitted,

_____

MOVANT, PRO SE

NOTICE

Please take notice that the foregoing "Memorandum of Law in Support of Motion to Vacate Judgment Pursuant to RCr 11.42" was mailed via first-class, certified postage prepaid to the Clerk of the _____ Circuit Court, _____, _____, _____, Kentucky _____ on this _____ day of _____, 20_____, to be filed immediately upon receipt and heard at the convenience of the court.

_____

MOVANT, PRO SE

CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing motion was mailed via first-class postage prepaid to Hon. _____; _____ County Commonwealth Attorney, _____, _____, Kentucky _____ on this _____day of _____, 20___.

_____
MOVANT, PRO SE

VERIFICATION

_____, after being duly sworn, states he has read this "Motion to Vacate Judgment Pursuant to RCr 11.42" and that the allegations and statements it contains are true and correct to the best of his knowledge and belief.

_____
MOVANT

NOTARY STATEMENT

Subscribed and sworn to before me by _____ on this ____ day of _____, 12____.

_____
NOTARY PUBLIC
STATE AT LARGE, KENTUCKY

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
INDICTMENT NO. _____

_____ MOVANT

VS.

MOTION TO PROCEED IN FORMA PAUPERIS
AND FOR APPOINTMENT OF COUNSEL

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * *

Comes now the movant, _____, pro se, and moves this court pursuant to KRS 453.190, KRS 31.110(2)(b), and all other applicable law, for leave to proceed on his RCr 11.42 action in forma pauperis. As grounds for this Motion to Proceed on Appeal In Forma Pauperis and for Appointment of Counsel movant states as follows:

1. That movant has filed an RCr 11.42 motion in the above-styled action in _____ Circuit Court.

2. That movant is not able to hire private counsel to assist him in perfecting his appeal. Movant is an indigent according to the provisions of KRS 31.120 and requires further

assistance of the Department of Public Advocacy in order to supplement his pro se pleadings.

3. That movant is currently incarcerated at the _____ and is not able to hire private counsel to assist him in perfecting his appeal.

Movant also respectfully requests this court, pursuant to RCr 11.42(5) requests this court to appoint counsel to represent him in his RCr 11.42 proceeding and if necessary, in his appeal. Movant is financially unable to employ counsel. (See attached Affidavit of Indigency and Six-Month Prison Account Statement.) Movant requests counsel be appointed to supplement his pro se RCr 11.42 motion.

FURTHERMORE, movant believes that in the event the Commonwealth will dispute his arguments, that it will be necessary to conduct an evidentiary hearing, including testimony from trial counsel. Movant is a lay person and not trained in the law. Under RCr 11.42, he would be entitled to appointment of counsel in such circumstances.

WHEREFORE, movant requests the Court to grant him leave to proceed in forma pauperis and pursue this action. Movant further requests the appointment of the Department of Public Advocacy to supplement his pro se RCr 11.42 pleadings pursuant to RCr 11.42(5), to grant counsel leave to supplement any and all

other issues and grounds for holding this sentence invalid of which counsel learns and which movant has failed to raise in this RCr 11.42. Such relief is warranted under the provisions of RCr 11.42(3). Movant asks for any other relief to which he may be entitled.

Respectfully submitted,

_____
_____, PRO SE
ADDRESS _____
_____,
_____

NOTICE

The foregoing motion was mailed by first class postage prepaid to the Clerk of the _____ Circuit Court, _____ County Courthouse, _____, _____, Kentucky _____ on this _____ day of _____, 20____ and is to be considered by the court at its convenience or at a date certain in the future to be set by the court.

_____
MOVANT, PRO SE

CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing motion was mailed via first-class postage prepaid to Hon. _____; _____ County Commonwealth Attorney, _____, _____, Kentucky _____ on this _____day of _____, 20___.

_____
MOVANT, PRO SE

VERIFICATION

_____, after being duly sworn, states he has read this "Motion to Proceed In Forma Pauperis and For Appointment of Counsel" and that the allegations and statements it contains are true and correct to the best of his knowledge and belief.

_____
MOVANT

NOTARY STATEMENT

Subscribed and sworn to before me by _____ on this ____ day of _____, 12____.

_____
NOTARY PUBLIC
STATE AT LARGE, KENTUCKY

AOC-350 Doc. Code: AI & OI Rev. 12-01 Commonwealth of Kentucky Court of Justice KRS 31.120	**ORDER AND AFFIDAVIT OF INDIGENCY**	Case No._____ Court_____ County_____

Address: _____ SS#: _____
Street City (Voluntary)
Telephone #: _____ DOB: ____/____/____

Affiant, _____, being first sworn to tell the truth says that he/she is not now represented by private counsel and that he/she does not have the money or assets out of which to employ private counsel; that he/she is indigent and ☐ requests the Court to appoint counsel; ☐ does not request appointment of counsel; and further states that:

1. I presently am ☐ employed ☐ unemployed, ☐ full-time ☐ part-time ☐ seasonal and/or receive ☐ welfare ☐ food stamps ☐ social security ☐ workers comp ☐ unemployment ☐ disability ☐ retirement ☐ other _____ for a total amount of $_____ ☐ weekly, ☐ semi-weekly ☐ monthly.
2. The following owe me money in the amount of: $_____.
3. I am currently ☐ single ☐ married ☐ divorced ☐ widowed ☐ separated and I support _____ children under 18 years old.
4. I presently ☐ own ☐ do not own real estate. Value of property $_____. Total amount owed $_____.
5. I presently have personal property including ☐ automobiles ☐ jewelry ☐ bank accounts ☐ cash ☐ other _____.
6. I owe the following amounts to the ☐ bank $_____ ☐ credit cards $_____ ☐ utilities $_____ ☐ court fines $_____ ☐ others $_____.
7. Bail on this charge has been posted for me by _____, in the amou of $_____.
8. My spouse is presently ☐ employed ☐ unemployed with a total weekly income of $_____.

I UNDERSTAND AND HAVE BEEN ADVISED THAT I MAY BE HELD RESPONSIBLE FOR THE PAYMENT OF 1. UP TO $52.50 PUBLIC ADVOCATE FEE AND 2. THE COST OF MY LEGAL REPRESENTATION. I ALSO UNDERSTAND THE COST OF PAYMENT FOR MY LAWYER'S REPRESENTATION IS TO BE DETERMINED BY THE JUDGE AFTER CONSIDERING MY FINANCIAL CIRCUMSTANCES, WHAT PRIVATE LAWYERS CHARGE FOR THE SAME SERVICES, HOW COMPLICATED MY CASE IS, AND THE AMOUNT OF TIME SPENT BY MY LAWYER. I FURTHER UNDERSTAND THAT BY LAW THE MOST I CAN BE ORDERED TO PAY FOR MY ATTORNEY'S SERVICE IS $1,250.00 FOR A FELONY AND $500.00 FOR A MISDEMEANOR. IF THE JUDGE DOES ORDER ME TO REPAY THE COURT FOR MY LAWYER, I UNDERSTAND THE ORDER WILL BE A JUDGMENT WHICH REMAINS VALID UNTIL PAID. **IF FILED BY A PRISONER/INMATE**, WARDEN OR JAILER MUST ATTACH A CERTIFIED COPY OF THE INMATE/PRISONER'S ACCOUNT STATEMENT FOR THE SIX (6) MONTHS IMMEDIATELY PRECEDING THE FILING OF THIS MOTION.

PERJURY WARNING

Any person making false statements in the above Affidavit shall be subject to penalties for perjury, the maximum penalty for which is five (5) years imprisonment. I declare under penalties of perjury that I have read this affidavit and it is true and complete, to the best of my knowledge and belief.

_____
Affiant

Information given to me this _____ day of _____, 2____.

_____
Signature and Title of Officer Gathering Information

ORDER

Based on the above information, sworn to before the Court, IT IS HEREBY ORDERED that the above-named affiant ☐ is ☐ is not deemed indigent under K.R.S. Chapter 31. By so qualifying, and if requested above, the affiant is qualif for services as provided by KRS Chapter 31. The issue of recoupment, if any, shall be reserved until further order of the Court. AC 205 ☐ yes ☐ no. Hon. _____ is hereby appointed as counsel for affiant.

Dated this _____ day of _____, 2____.

☐ DPA is appointed.

_____
Judge

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
INDICTMENT NO. _____

_____ MOVANT

VS. ORDER TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * *

The movant having moved this court for an order to proceed 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 sufficient advised;

IT IS HEREBY ORDERED that the movant is hereby granted leave to proceed on his RCr 11.42 action in forma pauperis.

IT IS FURTHER ORDERED that the Department of Public Advocacy, Post-Conviction Branch, 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky 40601 be appointed to represent movant in this proceeding.

ENTERED THIS _____ day of _____, 20_____.

_____
JUDGE, _____ CIRCUIT COURT

cc: Commonwealth Attorney
DPA, Post-Conviction Branch
Movant

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
CASE NO._____

_____ MOVANT

vs. MOTION FOR AN EVIDENTIARY HEARING

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * * * *

Comes now the Movant, _____, *pro se*, and respectfully moves this court pursuant to RCr 11.42 (5) and asks this Court to set his motion for relief under said rule for an evidentiary hearing. As grounds for this request, Movant states the following:

_____ is entitled to an evidentiary hearing unless his allegations are clearly refuted by the record. See Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001). Because Movant's allegations are not clearly refuted by the record, he requests that the Court grant his motion for an evidentiary hearing to be held in this matter.

The ABA Standards, Post-Conviction Remedies, Standard 22-4.5, recognize that the post-conviction motion itself is insufficient for the trial court to make findings. Generally, where a Movant's allegations would entitle him to relief, he is entitled to an opportunity to prove the truth of the matter asserted at an evidentiary hearing. Barnes v. Commonwealth, 454 S.W.2d 353, 354 (Ky. 1970). Such an evidentiary hearing is provided "because under our system of trial, the opportunities for confrontation and cross-examination are deemed imperative as minimal requirements for orderly process in resolving disputed issues of fact." Hall v. Commonwealth, 429 S.W.2d 359, 360 (Ky. 1968). It is only where a Movant's allegations are clearly refuted by the record that an evidentiary hearing can be dispensed with. See Sparks v. Commonwealth, 721

S.W.2d 726, 727 (Ky. App. 1985). Consequently, there are two issues that this Court is to address in determining if an evidentiary hearing should be granted in the instant case: 1) Do the allegations state grounds that, if true, would entitle the Movant to relief, and 2) Are the Movant's allegations conclusively refuted by the record? Thus, before a trial court may dismiss an RCr 11.42 motion without a hearing because it fails to state a claim for relief, the Court must accept all the factual allegations as true and then conclude the facts do not present a valid ground for relief. After accepting the facts as verified by the Movant, RCr 11.42(5) requires the Court to hold a hearing "[i]f the motion raises a material issue of fact that cannot be determined on the face of the record." Mills v. Commonwealth, 170 S.W.3d 310, 325 (Ky. 2005); Hodge v. Commonwealth, 68 S.W.3d 338, 342 (Ky. 2001); Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993). Where the record does not refute the specific claims alleged in the RCr 11.42 motion, a hearing shall be granted. Id. Where it is necessary to resort to facts extrinsic to the record to resolve material issues of fact, an evidentiary hearing is required. Skaggs v. Commonwealth, 803 S.W.2d 573, 576 (Ky. 1990).

In Stanford, 854 S.W.2d at 744, the Kentucky Supreme Court "emphasize[d] that trial courts generally should hold such hearings to determine material issues of fact presented." See also Coles v. Commonwealth, 386 S.W.2d 465, 466 (Ky. 1965), where this same principle was enunciated many years ago:

> The purpose of RCr 11.42 is to provide a method by which a prisoner's claim of constitutional infringement can be effectively settled in one proceeding for all time. In order for this to be possible, that is, in order for the resolution of the factual basis of the claim to be accepted in the federal courts as final and conclusive, it is necessary that the Appellant be given a full and fair opportunity to litigate the claim. No matter how unfounded it may be, and even though the court knows it is not true, if on its face the claim states a valid basis for relief, the bare essentials of such an opportunity are: . . . (2) a hearing. (Emphasis added).

The Kentucky Supreme Court again upheld these principles in its decision in Fraser v. Commonwealth, 59 S.W.3d 448, 452-53 (Ky. 2001). In Fraser, the Court held 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. . . . The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." Id. (internal citations omitted).

Because Movant has raised material issues of fact that cannot be conclusively disproved by the record, he is entitled to an evidentiary hearing.

WHEREFORE, Movant respectfully requests this Court to set this matter for an evidentiary hearing and to appoint counsel to represent Movant at said hearing.

Respectfully Submitted,

_____
Name, Institutional #
Address

NOTICE

Notice is hereby given that the foregoing Motion, filed by a *pro se* inmate, will be heard at the convenience of the Court.

_____
Movant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion was mailed, via first-class postage, to the Clerk of the Circuit Court, _____, _____, Kentucky _____ to be filed immediately upon receipt; and to Honorable _____, Commonwealth Attorney, _____, _____, KY _____on this the _____ day of _____, 20__.

_____
Movant

Supreme Court of the United States
Charles E. STRICKLAND, Superintendent, Florida State Prison, et al., Petitioners
v.
David Leroy WASHINGTON.

No. 82-1554.
Argued Jan. 10, 1984.
Decided May 14, 1984.
Rehearing Denied June 25, 1984.

See 467 U.S. 1267, 104 S.Ct. 3562.

Defendant, who received death penalty for murder conviction, filed petition for writ of habeas corpus. The United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, denied relief, and the Court of Appeals, 673 F.2d 879, affirmed in part and vacated in part. On rehearing en banc, 693 F.2d 1243, the Court of Appeals, Vance, Circuit Judge, reversed and remanded. On certiorari, the Supreme Court, Justice O'Connor, held that: (1) proper standard for attorney performance is that of reasonably effective assistance; (2) defense counsel's strategy at sentencing hearing was reasonable and, thus, defendant was not denied effective assistance of counsel; and (3) even assuming challenged conduct of counsel was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence.

Reversed.

Justice Brennan concurred in part and dissented in part and filed opinion.

Justice Marshall dissented and filed opinion.

West Headnotes

[1] Habeas Corpus 197 352

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)3 Partial Exhaustion
197k352 k. Dismissal. Most Cited Cases
(Formerly 197k45.3(1.20), 197k45.3(1))

Rule requiring dismissal of mixed habeas corpus petitions containing exhausted and unexhausted claims, though to be strictly enforced, is not jurisdictional.

[2] Criminal Law 110 1850

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)11 Deprivation or Allowance of Counsel
110k1850 k. In General. Most Cited Cases
(Formerly 110k641.12(1))

Government violates right to effective assistance of counsel when it interferes in certain ways with ability of counsel to make independent decisions about how to conduct defense. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1880 k. In General. Most Cited Cases
(Formerly 110k641.13(1))

Benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced a just result. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 1959

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1959 k. In General. Most Cited Cases
(Formerly 110k641.13(7))

A capital sentencing proceeding is sufficiently like a trial in its adversarial format and in existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial, which is to ensure that adversarial testing process works to produce a just result under standards governing decision. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 1166.10(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.10 Counsel for Accused
110k1166.10(1) k. In General. Most Cited Cases
(Formerly 110k1166.11(5), 110k1166.11)

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components: first, defendant must show that counsel's performance was deficient, requiring showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment and, second, defendant must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General

110k1880 k. In General. Most Cited Cases
(Formerly 110k641.13(1))

Proper standard for attorney performance is that of reasonably effective assistance. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 1780

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)6 Conflict of Interest
110k1780 k. In General. Most Cited Cases
(Formerly 110k641.5(.5), 110k641.5)

Counsel's function in representing a criminal defendant is to assist defendant, and hence counsel owes client duty of loyalty, a duty to avoid conflicts of interest. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 1873

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1872 General Qualifications of Counsel
110k1873 k. In General. Most Cited Cases
(Formerly 110k641.13(1))

From counsel's function as assistant to defendant derive the overarching duty to advocate defendant's cause and more particular duties to consult with defendant on important decisions and to keep defendant informed of important developments in course of the prosecution. U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1882 k. Deficient Representation in General. Most Cited Cases
(Formerly 110k641.13(1))

Defense counsel has duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. U.S.C.A. Const.Amend. 6.

[10] Criminal Law 110 1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1880 k. In General. Most Cited Cases
(Formerly 110k641.13(1))

Criminal Law 110 1884

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1884 k. Strategy and Tactics in General. Most Cited Cases
(Formerly 110k641.13(1))

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or of the range of legitimate decisions regarding how best to represent a criminal defendant; any set of rules would interfere with constitutionally protected independence of counsel and restrict wide latitude counsel must have in making tactical decisions, and could distract counsel from the overriding mission of vigorous advocacy of defendant's cause. U.S.C.A. Const.Amend. 6.

[11] Criminal Law 110 1144.10

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.10 k. Conduct of Trial in General. Most Cited Cases

Court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance; that is, defendant must overcome presumption that, under those circumstances, challenged action might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

[12] Criminal Law 110 1871

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1871 k. Presumptions and Burden of Proof in General. Most Cited Cases
(Formerly 110k641.13(1))

Criminal Law 110 1888

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1888 k. Determination. Most Cited Cases
(Formerly 110k641.13(1))

A convicted defendant making a claim of ineffective assistance must identify acts or omissions of counsel that are alleged not to have been result of reasonable professional judgment and, then, court must determine whether, in light of all circumstances, identified acts or omissions were outside wide range of professional competent assistance; in making that determination, court should keep in mind that counsel's function is to make adversarial testing process work in the particular case. U.S.C.A. Const.Amend. 6.

[13] Criminal Law 110 1891

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1891 k. Preparation for Trial. Most Cited Cases
(Formerly 110k641.13(6))

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

[14] Criminal Law 110 1888

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1888 k. Determination. Most Cited Cases
(Formerly 110k641.13(1))

Criminal Law 110 1891

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1891 k. Preparation for Trial. Most Cited Cases
(Formerly 110k641.13(6))

Inquiry into counsel's conversations with defendant may be critical to proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. U.S.C.A. Const.Amend. 6.

[15] Criminal Law 110 1166.10(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.10 Counsel for Accused
110k1166.10(1) k. In General. Most Cited Cases
(Formerly 110k1166.11(5), 110k1166.11)

An error by counsel, even if professionally unreasonable, does not warrant setting aside judgment in a criminal proceeding if the error had no effect on the judgment. U.S.C.A. Const.Amend. 6.

[16] Criminal Law 110 1163(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error

110k1163(2) k. Conduct of Trial in General. Most Cited Cases

Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. U.S.C.A. Const.Amend. 6.

[17] Criminal Law 110 1163(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error
110k1163(2) k. Conduct of Trial in General. Most Cited Cases

As relating to Sixth Amendment claims of ineffective assistance of counsel, prejudice is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. U.S.C.A. Const.Amend. 6.

[18] Criminal Law 110 1163(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error
110k1163(2) k. Conduct of Trial in General. Most Cited Cases

Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to general requirement that defendant affirmatively prove prejudice. U.S.C.A. Const.Amend. 6.

[19] Criminal Law 110 1883

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1883 k. Prejudice in General. Most Cited Cases
(Formerly 110k641.13(1))

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, defendant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

[20] Criminal Law 110 1163(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error
110k1163(2) k. Conduct of Trial in General. Most Cited Cases

In making determination whether specified errors of counsel resulted in required prejudice for a defendant to succeed on a Sixth Amendment claim, a court should presume, absent challenge to judgment on grounds of evidentiary insufficiency, that judge or jury acted according to law. U.S.C.A. Const.Amend. 6.

[21] Criminal Law 110 1959

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1959 k. In General. Most Cited Cases
(Formerly 110k641.13(7))

When a defendant challenges a death sentence on ground of ineffective assistance of counsel, question is whether there is a reasonable probability that, absent the errors, sentencer, including appellate court, to extent it independently reweighs the evidence, would have concluded that balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

[22] Criminal Law 110 1886

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1886 k. Death Penalty Cases. Most Cited Cases
(Formerly 110k641.13(1))

In determining whether defendant was denied effective assistance of counsel in death sentence case, court must consider totality of the evidence before judge or jury. U.S.C.A. Const.Amend. 6.

[23] Criminal Law 110 1888

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1888 k. Determination. Most Cited Cases
(Formerly 110k641.13(1))

A court need not determine whether counsel's performance was deficient before examining prejudice suffered by defendant as result of alleged deficiencies. U.S.C.A. Const.Amend. 6.

[24] Habeas Corpus 197 486(1)

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k482 Counsel
197k486 Adequacy and Effectiveness of Counsel
197k486(1) k. In General. Most Cited Cases
(Formerly 197k25.1(6))

Since fundamental fairness is central concern of writ of habeas corpus, no special standards ought to apply to claims of ineffective assistance of counsel made in habeas proceedings. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

[25] Criminal Law 110 1870

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1870 k. In General. Most Cited Cases
(Formerly 110k641.13(1))

Ineffectiveness of counsel is not a question of basic, primary, or historic fact but, rather, is a mixed question of law and fact. U.S.C.A. Const.Amend. 6.

[26] Criminal Law 110 1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of Investigation of Mitigating Circumstances. Most Cited Cases
(Formerly 110k641.13(7))

In capital murder case, defense counsel's strategy at sentencing hearing of not seeking out character witnesses or requesting a psychiatric examination or presentence report was reasonable and, thus, defendant was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.

[27] Criminal Law 110 1166.10(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.10 Counsel for Accused
110k1166.10(1) k. In General. Most Cited Cases
(Formerly 110k1166.11(5), 110k1166.11)

Even assuming challenged conduct of defense counsel at sentencing hearing was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence because, given overwhelming aggravating factors, there was no reasonable probability that omitted evidence would have changed conclusion that aggravating circumstances outweighed mitigating circumstances and, hence, sentence imposed. U.S.C.A. Const.Amend. 6.

Syllabus [FNa1]

FNa1. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent pleaded guilty in a Florida trial court to an indictment that included three capital murder charges. In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility." In preparing for the sentencing hearing, defense counsel spoke

with respondent about his background, but did not seek out character witnesses or request a psychiatric examination. Counsel's decision not to present evidence concerning respondent's character and emotional state reflected his judgment that it ****2055** was advisable to rely on the plea colloquy for evidence as to such matters, thus preventing the State from cross-examining respondent and from presenting psychiatric evidence of its own. Counsel did not request a presentence report because it would have included respondent's criminal history and thereby would have undermined the claim of no significant prior criminal record. Finding numerous aggravating circumstances and no mitigating circumstance, the trial judge sentenced respondent to death on each of the murder counts. The Florida Supreme Court affirmed, and respondent then sought collateral relief in state court on the ground, inter alia, that counsel had rendered ineffective assistance at the sentencing proceeding in several respects, including his failure to request a psychiatric report, to investigate and present character witnesses, and to seek a presentence report. The trial court denied relief, and the Florida Supreme Court affirmed. Respondent then filed a habeas corpus petition in Federal District Court advancing numerous grounds for relief, including the claim of ineffective assistance of counsel. After an evidentiary hearing, the District Court denied relief, concluding that although counsel made errors in judgment in failing to investigate mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. The Court of Appeals ultimately reversed, stating that the Sixth Amendment accorded criminal defendants a right ***669** to counsel rendering "reasonably effective assistance given the totality of the circumstances." After outlining standards for judging whether a defense counsel fulfilled the duty to investigate nonstatutory mitigating circumstances and whether counsel's errors were sufficiently prejudicial to justify reversal, the Court of Appeals remanded the case for application of the standards.

Held:

1. The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding-such as the one provided by Florida law-that is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial. Pp. 2063-2064.

2. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Pp. 2064-2069.

(a) The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. Pp. 2064-2067.

(b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of ****2056** the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Pp. 2067-2069.

***670** 3. A number of practical considerations are important for the application of the standards set forth above. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. The principles governing ineffectiveness claims apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. And in a federal habeas challenge to a state criminal judgment, a state court conclusion that

counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d), but is a mixed question of law and fact. Pp. 2069-2070.

4. The facts of this case make it clear that counsel's conduct at and before respondent's sentencing proceeding cannot be found unreasonable under the above standards. They also make it clear that, even assuming counsel's conduct was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence. Pp. 2070-2071.

693 F.2d 1243 (5th Cir.1982), reversed.
Carolyn M. Snurkowski, Assistant Attorney General of Florida, argued the cause for petitioners. On the briefs were *Jim Smith,* Attorney General, and *Calvin L. Fox,* Assistant Attorney General.

Richard E. Shapiro argued the cause for respondent. With him on the brief was *Joseph H. Rodriguez.**

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Edwin S. Kneedler;* for the State of Alabama et al. by *Mike Greely,* Attorney General of Montana, and *John H. Maynard,* Assistant Attorney General, *Charles A. Graddick,* Attorney General of Alabama, *Robert K. Corbin,* Attorney General of Arizona, *John Steven Clark,* Attorney General of Arkansas, *John Van de Kamp,* Attorney General of California, *Duane Woodard,* Attorney General of Colorado, *Austin J. McGuigan,* Chief State's Attorney of Connecticut, *Michael J. Bowers,* Attorney General of Georgia, *Tany S. Hong,* Attorney General of Hawaii, *Jim Jones,* Attorney General of Idaho, *Linley E. Pearson,* Attorney General of Indiana, *Robert T. Stephan,* Attorney General of Kansas, *Steven L. Beshear,* Attorney General of Kentucky, *William J. Guste, Jr.,* Attorney General of Louisiana, *James E. Tierney,* Attorney General of Maine, *Stephen H. Sachs,* Attorney General of Maryland, *Francis X. Bellotti,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *William A. Allain,* Attorney General of Mississippi, *John D. Ashcroft,* Attorney General of Missouri, *Paul L. Douglas,* Attorney General of Nebraska, *Brian McKay,* Attorney General of Nevada, *Irwin I. Kimmelman,* Attorney General of New Jersey, *Paul Bardacke,* Attorney General of New Mexico, *Rufus L. Edmisten,* Attorney General of North Carolina, *Robert Wefald,* Attorney General of North Dakota, *Anthony Celebrezze, Jr.,* Attorney General of Ohio, *Michael Turpen,* Attorney General of Oklahoma, *Dave Frohnmayer,* Attorney General of Oregon, *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Dennis J. Roberts II,* Attorney General of Rhode Island, *T. Travis Medlock,* Attorney General of South Carolina, *Mark V. Meierhenry,* Attorney General of South Dakota, *William M. Leech, Jr.,* Attorney General of Tennessee, *David L. Wilkinson,* Attorney General of Utah, *John J. Easton,* Attorney General of Vermont, *Gerald L. Baliles,* Attorney General of Virginia, *Kenneth O. Eikenberry,* Attorney General of Washington, *Chauncey H. Browning,* Attorney General of West Virginia, and *Archie G. McClintock,* Attorney General of Wyoming; and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar,* and *Nicholas E. Calio.*

Richard J. Wilson, Charles S. Sims, and *Burt Neuborne* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae* urging affirmance.

***671** Justice O'CONNOR delivered the opinion of the Court.
This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I
A
During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which included***672** three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the

first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. App. 50-53. He also stated, however, that he accepted responsibility for the crimes. E.g., id., at 54, 57. The trial judge ****2057** told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision. Id., at 62.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on ***673** the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. Id., at A266.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. See id., at A282. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own. Id., at A223-A225.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." Id., at A227; App. 311. Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. App. to Pet. for Cert. A227-A228, A265-A266.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Id., at A265-A266. Counsel also argued that respondent had no history of criminal activity and that respondent committed***674** the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and ****2058** shooting the murder victim's sisters-in-law, who sustained severe-in one case, ultimately fatal-injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances "would still clearly far outweigh" that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance and could appreciate the criminality of his acts. Third, none of the victims was a participant in, or consented to, respondent's conduct. Fourth, respondent's ***675** participation in the crimes was neither minor nor the result of duress or domination by an accomplice. Finally, respondent's age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent's planning of the crimes and disposition of the proceeds of the various accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances." See Washington v. State, 362 So.2d 658, 663-664 (Fla.1978), (quoting trial court findings), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influence***676** of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes. App. 7; see also id., at 14.

The trial court denied relief without an evidentiary hearing, finding that the record evidence conclusively showed that the ineffectiveness claim was meritless. App. to Pet. for Cert. A206-A243. Four of the assertedly prejudicial errors required little discussion. First, there were no grounds to request a continuance, so there was no error in not requesting one when respondent pleaded guilty. Id., at A218-A220. Second, failure to request a presentence investigation was not a serious error because the trial judge had discretion not to grant such a request and because any presentence investigation would have resulted in admission of respondent's "rap sheet" and thus would have undermined his assertion of no significant history of criminal activity. Id., at A226-A228. Third, the argument and memorandum given to the sentencing judge were "admirable" in light of the overwhelming aggravating circumstances and absence of mitigating circumstances. Id., at A228. Fourth, there was no error in failure to examine the medical ****2059** examiner's reports or to cross-examine the medical witnesses testifying on the manner of death of respondent's victims, since respondent admitted that the victims died in the ways shown by the unchallenged medical evidence. Id., at A229.

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of extreme mental or emotional disturbance. All three ***677** reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack.

Applying the standard for ineffectiveness claims articulated by the Florida Supreme Court in Knight v. State, 394 So.2d 997 (1981), the trial court concluded that respondent had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding. The court specifically found: "[A]s a matter of law, the record affirmatively demonstrates beyond any doubt that even if [counsel] had done each of the ... things [that respondent alleged counsel had failed to do] ***678** at the time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely overwhelming...." App. to Pet. for Cert. A230.

The Florida Supreme Court affirmed the denial of relief. Washington v. State, 397 So.2d 285 (1981). For essentially the reasons given by the trial court, the State Supreme Court concluded that respondent had failed to make out a prima facie case of either "substantial deficiency or possible prejudice" and, indeed, had "failed to such a degree that we believe, to the point of a moral certainty, that he is entitled to no relief...." Id., at 287. Respondent's claims were "shown conclusively to be without merit so as to obviate the need for an evidentiary hearing." Id., at 286.

C

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. He advanced numerous grounds for relief, among them ineffective assistance of counsel based on the same errors, except for the failure to move for a continuance,****2060** as those he had identified in state court. The District Court held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances. Respondent offered the affidavits and reports he had submitted in the state collateral proceedings; he also called his trial counsel to testify. The State of Florida, over respondent's objection, called the trial judge to testify.

The District Court disputed none of the state court factual findings concerning trial counsel's assistance and made findings of its own that are consistent with the state court findings. The account of trial counsel's actions and decisions given above reflects the combined findings. On the legal issue of ineffectiveness, the District Court concluded that, although trial counsel made errors in judgment in failing to ***679** investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. Relying in part on the trial judge's testimony but also on the same factors that led the state courts to find no prejudice, the District Court concluded that "there does not appear to be a likelihood, or even a significant possibility," that any errors of trial counsel had affected the outcome of the sentencing proceeding. App. to Pet. for Cert. A285-A286. The District Court went on to reject all of respondent's other grounds for relief, including one not exhausted in state court, which the District Court considered because, among other reasons, the State urged its consideration. Id., at A286-A292. The court accordingly denied the petition for a writ of habeas corpus.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. 673 F.2d 879 (5th Cir.1982). The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. 679 F.2d 23 (1982). The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards. 693 F.2d 1243 (1982).

The court noted at the outset that, because respondent had raised an unexhausted claim at his evidentiary hearing in the District Court, the habeas petition might be characterized as a mixed petition subject to the rule of Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), requiring dismissal of the entire petition. The court held, however, that the exhaustion requirement is "a matter of comity rather than a matter of jurisdiction" and hence

admitted of exceptions. The court agreed with the District Court that this case came within an exception to the mixed petition rule. 693 F.2d, at 1248, n. 7.

***680** Turning to the merits, the Court of Appeals stated that the Sixth Amendment right to assistance of counsel accorded criminal defendants a right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Id., at 1250. The court remarked in passing that no special standard applies in capital cases such as the one before it: the punishment that a defendant faces is merely one of the circumstances to be considered in determining whether counsel was reasonably effective. Id., at 1250, n. 12. The court then addressed respondent's contention that his trial counsel's assistance was not reasonably effective because counsel breached his duty to investigate nonstatutory mitigating circumstances.

The court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that "[t]he ****2061** amount of pretrial investigation that is reasonable defies precise measurement." Id., at 1251. Nevertheless, putting guilty-plea cases to one side, the court attempted to classify cases presenting issues concerning the scope of the duty to investigate before proceeding to trial.

If there is only one plausible line of defense, the court concluded, counsel must conduct a "reasonably substantial investigation" into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. Id., at 1252. The same duty exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must include " 'an independent examination of the facts, circumstances, pleadings and laws involved.' " Id., at 1253 (quoting Rummel v. Estelle, 590 F.2d 103, 104 (CA5 1979)). The scope of the duty, however, depends ***681** on such facts as the strength of the government's case and the likelihood that pursuing certain leads may prove more harmful than helpful. 693 F.2d, at 1253, n. 16.

If there is more than one plausible line of defense, the court held, counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial. If counsel conducts such substantial investigations, the strategic choices made as a result "will seldom if ever" be found wanting. Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. Id., at 1254.

If counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective. Counsel may not exclude certain lines of defense for other than strategic reasons. Id., at 1257-1258. Limitations of time and money, however, may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence. Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. Thus, "when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." Id., at 1255 (footnote omitted). Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. Id., at 1256-1257, n. 23.

Having outlined the standards for judging whether defense counsel fulfilled the duty to investigate, the Court of Appeals turned its attention to the question of the prejudice to the ***682** defense that must be shown before counsel's errors justify reversal of the judgment. The court observed that only in cases of outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest had this Court said that no special showing of prejudice need be made. Id., at 1258-1259. For cases of deficient performance by counsel, where the government is not directly responsible for the deficiencies and where evidence of deficiency may be more accessible to the defendant than to the prosecution, the defendant must show that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense." Id., at 1262. This standard, the Court of Appeals reasoned, is compatible with the "cause and prejudice" standard for overcoming procedural defaults in federal collateral proceedings and discourages insubstantial claims by requiring more than a showing, which could virtually always be made, of some conceivable adverse effect on the defense from counsel's errors. The specified

showing of prejudice **2062 would result in reversal of the judgment, the court concluded, unless the prosecution showed that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt. Id., at 1260-1262.

The Court of Appeals thus laid down the tests to be applied in the Eleventh Circuit in challenges to convictions on the ground of ineffectiveness of counsel. Although some of the judges of the court proposed different approaches to judging ineffectiveness claims either generally or when raised in federal habeas petitions from state prisoners, id., at 1264-1280 (opinion of Tjoflat, J.); id., at 1280 (opinion of Clark, J.); id., at 1285-1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); id., at 1288-1291 (opinion of Hill, J.), and although some believed that no remand was necessary in this case, id., at 1281-1285 (opinion of Johnson, J., joined by Anderson, J.); id., at 1285-1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); id., at 1288-1291 (opinion of Hill, J.), a majority *683 of the judges of the en banc court agreed that the case should be remanded for application of the newly announced standards. Summarily rejecting respondent's claims other than ineffectiveness of counsel, the court accordingly reversed the judgment of the District Court and remanded the case. On remand, the court finally ruled, the state trial judge's testimony, though admissible "to the extent that it contains personal knowledge of historical facts or expert opinion," was not to be considered admitted into evidence to explain the judge's mental processes in reaching his sentencing decision. Id., at 1262-1263; see Fayerweather v. Ritch, 195 U.S. 276, 306-307, 25 S.Ct. 58, 67-68, 49 L.Ed. 193 (1904).

D

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. E.g., United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657. With the exception of Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial. Cf. United States v. Agurs, 427 U.S. 97, 102, n. 5, 96 S.Ct. 2392, 2397, n. 5, 49 L.Ed.2d 342 (1976).

In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, supra, at pp. 3a-6a; Sarno, *684 Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A.L.R. 4th 99-157, §§ 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, 7a-10a; Sarno, supra, at 83-99, § 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in United States v. Decoster, 199 U.S.App.D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified **2063 deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262.

[1] For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515-520, 102 S.Ct., at 1201-04. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through *685 the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth

Amendment, including the Counsel Clause:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942); see Powell v. Alabama, supra, 287 U.S. at 68-69, 53 S.Ct. 63-64.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

[2] ***686** For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (bar on summation at bench trial); ****2064**Brooks v. Tennessee, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593-596, 81 S.Ct. 756, 768-770, 5 L.Ed.2d 783 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344, 100 S.Ct., at 1716. Id., at 345-350, 100 S.Ct., at 1716-1719 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

[3] The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases-that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose-to ensure a fair trial-as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

[4] The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see ***687**Barclay v. Florida, 463 U.S. 939, 952-954, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial-to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

[5] A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

[6] As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, 397 U.S., at 770, 771, 90 S.Ct., at 1448, 1449, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, 446 U.S., at 344, 100 S.Ct., at 1716. When a convicted defendant***688** complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies****2065** instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michel v. Louisiana, 350 U.S. 91, 100-101, 76 S.Ct. 158, 163-164, 100 L.Ed. 83 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

[7][8][9] Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, 446 U.S., at 346, 90 S.Ct., at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68-69, 53 S.Ct., at 63-64.

[10] These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take ***689** account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S.App.D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

[11] Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered

sound trial strategy." See Michel v. Louisiana, supra, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See ***690****2066**Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

[12] Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

[13] These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic***691** choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

[14] The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, supra, at 372-373, 624 F.2d, at 209-210.

B

[15] An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. ****2067**United States v. Morrison, 449 U.S. 361, 364-365, 101 S.Ct. 665, 667- 668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure***692** that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

[16] In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 658, 104 S.Ct., at 2046. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to

identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

[17] One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345-350, 100 S.Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

[18] ***693** Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866-867, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are ****2068** sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings.***694** Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112, 66 S.Ct. 464, 466, 90 L.Ed. 562 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

[19] Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104, 112-113, 96 S.Ct., at 2397, 2401-2402, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, 458 U.S., at 872-874, 102 S.Ct., at 3449-3450. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

[20] In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. ***695** An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

[21] The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a ****2069** reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

[22][23] In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to ***696** be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different ***697** formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even

to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

****2070** [24] The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. See United States v. Frady, 456 U.S. 152, 162-169, 102 S.Ct. 1584, 1591-1595, 71 L.Ed.2d 816 (1982); Engle v. Isaac, 456 U.S. 107, 126-129, 102 S.Ct. 1558, 1570-1572, 71 L.Ed.2d 783 (1982). An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, see ***698**id., at 126, 102 S.Ct., at 1570, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

[25] Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," Townsend v. Sain, 372 U.S. 293, 309, n. 6, 83 S.Ct. 745, 755, n. 6, 9 L.Ed.2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See Cuyler v. Sullivan, 446 U.S., at 342, 100 S.Ct., at 1714. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. See Pullman-Standard v. Swint, 456 U.S. 273, 291-292, 102 S.Ct. 1781, 1791-1792, 72 L.Ed.2d 66 (1982).

Application of the governing principles is not difficult in this case. The facts as described above, see supra, at 2056-2060, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the ***699** challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

[26] With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, see App. 383-384, 400-401, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, see App. to Pet. for Cert. A282, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well ****2071** known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption

of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

[27] With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the ***700** sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony at the District Court hearing. We therefore need not consider the general admissibility of that testimony, although, as noted supra, at 2069, that testimony is irrelevant to the prejudice inquiry. Moreover, the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence presented at the District Court hearing. The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

***701** We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

Justice BRENNAN, concurring in part and dissenting in part.
I join the Court's opinion but dissent from its judgment. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see Gregg v. Georgia, 428 U.S. 153, 227, 96 S.Ct. 2909, 2971, 49 L.Ed.2d 859 (1976) (BRENNAN, J., dissenting), I would vacate respondent's death sentence and remand the case for further proceedings.[FN1]

FN1. The Court's judgment leaves standing another in an increasing number of capital sentences purportedly imposed in compliance with the procedural standards developed in cases beginning with Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Earlier this Term, I reiterated my view that these procedural requirements have proven unequal to the task of eliminating the irrationality that necessarily attends decisions by juries, trial judges, and appellate courts whether to take or spare human life. Pulley v. Harris, 465 U.S. 37, 59, 104 S.Ct. 871, 886, 79 L.Ed.2d 29 (1984) (BRENNAN, J., dissenting). The inherent difficulty in imposing the ultimate sanction consistent with the rule of law, see Furman v. Georgia, 408 U.S. 238, 274-277, 92 S.Ct. 2726, 2744-2746, 33 L.Ed.2d 346 (1972) (BRENNAN, J., concurring); McGautha v. California, 402 U.S. 183, 248-312, 91 S.Ct. 1454, 1487-1520, 28 L.Ed.2d 711 (1971) (BRENNAN, J., dissenting), is confirmed by the extraordinary pressure put on our own deliberations in recent months by the growing number of applications to stay executions. See Wainwright v. Adams, 466 U.S. 964, 965, 104 S.Ct. 2183, 2184, 80 L.Ed.2d 809 (1984) (MARSHALL, J., dissenting) (stating that "haste and confusion surrounding ... decision [to vacate stay] is itself degrading to our role as judges"); Autry v. McKaskle, 465 U.S. 1085, 104 S.Ct. 1458, 79 L.Ed.2d 906 (1984) (MARSHALL, J., dissenting) (criticizing Court for "dramatically expediting its normal deliberative processes to clear the way for an impending execution"); Stephens v. Kemp, 464 U.S. 1027, 1032, 104 S.Ct. 562, 565, 78 L.Ed.2d 370 (1983) (POWELL, J., dissenting) (contending that procedures by which stay applications are considered "undermines public confidence in the courts and in the laws we are required to

follow"); Sullivan v. Wainwright, 464 U.S. 109, 112, 104 S.Ct. 450, 465, 78 L.Ed.2d 210 (1983) (BURGER, C.J., concurring) (accusing lawyers seeking review of their client's death sentences of turning "the administration of justice into [a] sporting contest"); Autry v. Estelle, 464 U.S. 1, 6, 104 S.Ct. 20, 23, 78 L.Ed.2d 1 (1983) (STEVENS, J., dissenting) (suggesting that Court's practice in reviewing applications in death cases "injects uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the deliberative process within this Court, and increases the risk of error"). It is difficult to believe that the decision whether to put an individual to death generates any less emotional pressure among juries, trial judges, and appellate courts than it does among Members of this Court.

****2072 *702** I

This case and United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657, present our first occasions to elaborate the appropriate standards for judging claims of ineffective assistance of counsel. In Cronic, the Court considers such claims in the context of cases "in which the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial," at 661, 104 S.Ct., at 2048. This case, in contrast, concerns claims of ineffective assistance based on allegations of specific errors by counsel-claims which, by their very nature, require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding. Accordingly, a defendant making a claim of this kind must show not only that his lawyer's performance was inadequate but also that he was prejudiced thereby. See also Cronic, at 659, n. 26, 104 S.Ct., at 2047, n. 26.

I join the Court's opinion because I believe that the standards it sets out today will both provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law. Like all federal courts and most state courts that have previously addressed the matter, see ante, at 2062, the Court concludes that "the proper standard for attorney performance is that of reasonably effective assistance." Ante, at 2064. And, ***703** rejecting the strict "outcome-determinative" test employed by some courts, the Court adopts as the appropriate standard for prejudice a requirement that the defendant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," defining a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Ante, at 2068. I believe these standards are sufficiently precise to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not; at the same time, the standards are sufficiently flexible to accommodate the wide variety of situations giving rise to claims of this kind.

****2073** With respect to the performance standard, I agree with the Court's conclusion that a "particular set of detailed rules for counsel's conduct" would be inappropriate. Ante, at 2065. Precisely because the standard of "reasonably effective assistance" adopted today requires that counsel's performance be measured in light of the particular circumstances of the case, I do not believe our decision "will stunt the development of constitutional doctrine in this area," post, at 2076 (MARSHALL, J., dissenting). Indeed, the Court's suggestion that today's decision is largely consistent with the approach taken by the lower courts, ante, at 2069, simply indicates that those courts may continue to develop governing principles on a case-by-case basis in the common-law tradition, as they have in the past. Similarly, the prejudice standard announced today does not erect an insurmountable obstacle to meritorious claims, but rather simply requires courts carefully to examine trial records in light of both the nature and seriousness of counsel's errors and their effect in the particular circumstances of the case. Ante, at 2069. [FN2]

FN2. Indeed, counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. See Cronic, 466 U.S., at 659-660, 104 S.Ct., at 2047; Javor v. United States, 724 F.2d 831, 834 (CA9 1984) ("Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all").

***704** II

Because of their flexibility and the requirement that they be considered in light of the particular circumstances of the case, the standards announced today can and should be applied with concern for the special considerations that must attend review of counsel's performance in a capital sentencing proceeding. In contrast to a case in which a finding of ineffective assistance requires a new trial, a conclusion that counsel was ineffective with respect to only the penalty phase of a capital trial imposes on the State the far lesser burden of reconsideration of the sentence alone. On the other hand, the consequences to the defendant of incompetent assistance at a capital sentencing could not, of course, be

greater. Recognizing the unique seriousness of such a proceeding, we have repeatedly emphasized that " 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " Zant v. Stephens, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983) (quoting Gregg v. Georgia, 428 U.S., at 188-189, 96 S.Ct., at 2932-2933 (opinion of Stewart, POWELL, and STEVENS, JJ.)).

For that reason, we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding. As Justice MARSHALL emphasized last Term:

"This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), it recognized that right in capital cases, Powell v. Alabama, 287 U.S. 45, 71-72, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932). Time ***705** and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. See, e.g., Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)....

****2074** "Because of th[e] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' Ibid." Barefoot v. Estelle, 463 U.S. 880, 913-914, 103 S.Ct. 3383, 3405, 77 L.Ed.2d 1090 (1983) (dissenting opinion).

See also id., at 924, 103 S.Ct., at 3405 (BLACKMUN, J., dissenting). In short, this Court has taken special care to minimize the possibility that death sentences are "imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) (O'CONNOR, J., concurring).

In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). For that reason, we have repeatedly insisted that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." Eddings v. Oklahoma, 455 U.S., at 112, 102 S.Ct., at 875. In fact, as Justice O'CONNOR has noted, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the "interests of justice" may impose on reviewing courts "a duty to remand [the] case for resentencing." Id., at 117, n., and 119, 102 S.Ct., at 877, n., and 878 (O'CONNOR, J., concurring).

***706** Of course, "[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." Comment, 83 Colum.L.Rev. 1544, 1549 (1983). See, e.g., Burger v. Zant, 718 F.2d 979 (CA11 1983) (defendant, 17 years old at time of crime, sentenced to death after counsel failed to present any evidence in mitigation), stay granted, 466 U.S. 902, 104 S.Ct. 1676, 80 L.Ed.2d 151 (1984). Accordingly, counsel's general duty to investigate, ante, at 2066, takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

That the Court rejects the ineffective-assistance claim in this case should not, of course, be understood to reflect any diminution in commitment to the principle that " 'the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " Eddings v. Oklahoma, supra, 455 U.S., at 112, 102 S.Ct., at 875 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging

their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment.

Justice MARSHALL, dissenting.
The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assistance***707** of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, n. 14, 25 L.Ed.2d 763 (1970). The state and lower federal courts have developed standards for distinguishing effective from inadequate****2075** assistance.[FN1] Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

FN1. See Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster, 93 Harv.L.Rev. 752, 756-758 (1980); Note, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U.Chi.L.Rev. 1380, 1386-1387, 1399-1401, 1408-1410 (1983).

I

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." Ante, at 2065. Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. Ante, at 2068. I disagree with both of these rulings.

A

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave ***708** "reasonably" and must act like "a reasonably competent attorney," ante, at 2065, is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

The debilitating ambiguity of an "objective standard of reasonableness" in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?[FN2] The majority offers no clues as to the proper responses to these questions.

FN2. Cf., e.g., Moore v. United States, 432 F.2d 730, 736 (CA3 1970) (defining the constitutionally required level of performance as "the exercise of the customary skill and knowledge which normally prevails at the time and place").

The majority defends its refusal to adopt more specific standards primarily on the ground that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take ***709** account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."****2076** Ante, at 2065. I agree that counsel must be afforded "wide latitude" when making "tactical decisions" regarding trial strategy, see ante, at 2065; cf. infra, at 2077-2078, but many aspects of the job of a criminal defense attorney are more

amenable to judicial oversight. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one's client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

The opinion of the Court of Appeals in this case represents one sound attempt to develop particularized standards designed to ensure that all defendants receive effective legal assistance. See 693 F.2d 1243, 1251-1258 (CA5 1982) (en banc). For other, generally consistent efforts, see United States v. Decoster, 159 U.S.App.D.C. 326, 333-334, 487 F.2d 1197, 1203-1204 (1973), disapproved on rehearing, 199 U.S.App.D.C. 359, 624 F.2d 196 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Coles v. Peyton, 389 F.2d 224, 226 (CA4), cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968); People v. Pope, 23 Cal.3d 412, 424-425, 590 P.2d 859, 866, 152 Cal.Rptr. 732, 739 (1979); State v. Harper, 57 Wis.2d 543, 55-557, 205 N.W.2d 1, 6-9 (1973).[FN3] By refusing to address the merits of these proposals, and indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of constitutional doctrine in this area.

FN3. For a review of other decisions attempting to develop guidelines for assessment of ineffective-assistance-of-counsel claims, see Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am.Crim.L.Rev. 233, 242-248 (1979). Many of these decisions rely heavily on the standards developed by the American Bar Association. See ABA Standards for Criminal Justice 4-1.1-4-8.6 (2d ed. 1981).

***710** B

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.[FN4] In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

FN4. Cf. United States v. Ellison, 557 F.2d 128, 131 (CA7 1977). In discussing the related problem of measuring injury caused by joint representation of conflicting interests, we observed:

[T]he evil ... is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." Holloway v. Arkansas, 435 U.S. 475, 490-491, 98 S.Ct. 1173, 1181-1182, 55 L.Ed.2d 426 (1978) (emphasis in original). When defense counsel fails to take certain actions, not because he is "compelled" to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.

****2077 *711** Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. [FN5] The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

FN5. See United States v. Decoster, 199 U.S.App.D.C. 359, 454-457, 624 F.2d 196, 291-294 (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Note, 93 Harv.L.Rev., at 767-770.

In Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), we acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." Among these rights is the right to the assistance of counsel at trial. Id., at 23, n. 8, 87 S.Ct., at 827, n. 8; see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).[FN6] In my view, the right ***712** to effective assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter.[FN7] I would thus hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.

FN6. In cases in which the government acted in a way that prevented defense counsel from functioning effectively, we have refused to require the defendant, in order to obtain a new trial, to demonstrate that he was injured. In Glasser v. United States, 315 U.S. 60, 75-76, 62 S.Ct. 457, 467-468, 86 L.Ed. 680 (1942), for example, we held:

"To determine the precise degree of prejudice sustained by [a defendant] as a result of the court's appointment of [the same counsel for two codefendants with conflicting interests] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

As the Court today acknowledges, United States v. Cronic, 466 U.S., at 662, n. 31, 104 S.Ct., at 2048, n. 31, whether the government or counsel himself is to blame for the inadequacy of the legal assistance received by a defendant should make no difference in deciding whether the defendant must prove prejudice.

FN7. See United States v. Yelardy, 567 F.2d 863, 865, n. 1 (CA6), cert. denied, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978); Beasley v. United States, 491 F.2d 687, 696 (CA6 1974); Commonwealth v. Badger, 482 Pa. 240, 243-244, 393 A.2d 642, 644 (1978).

II

Even if I were inclined to join the majority's two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority's discussion of the "presumption" of reasonableness to be accorded lawyers' decisions and its attempt to prejudge the merits of claims previously rejected by lower courts using different legal standards.

A

In defining the standard of attorney performance required by the Constitution, the majority appropriately notes that many problems confronting criminal defense attorneys admit of "a range of legitimate" responses. Ante, at 2065. And the majority properly cautions courts, when reviewing a lawyer's selection amongst a set of options, to avoid the hubris of hindsight. Ibid. The majority goes on, however, to suggest that reviewing courts should "indulge a strong presumption that counsel's conduct" was constitutionally acceptable, ibid.; see ante, at 2066, 2069, and should "appl[y] a heavy measure of deference to counsel's judgments," ante, at 2066.

****2078** I am not sure what these phrases mean, and I doubt that they will be self-explanatory to lower courts. If they denote nothing more than that a defendant claiming he was denied effective assistance of counsel has the burden of proof, I ***713** would agree. See United States v. Cronic, 466 U.S., at 658, 104 S.Ct., at 2046. But the adjectives "strong" and "heavy" might be read as imposing upon defendants an unusually weighty burden of persuasion. If that is the majority's intent, I must respectfully dissent. The range of acceptable behavior defined by "prevailing professional norms," ante, at 2065, seems to me sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by "strongly presuming" that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of

ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits and "dampen the ardor" of defense counsel. See ante, at 2066. I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments and to ensure that responsible, innovative lawyering is not inhibited. In my view, little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant's challenge to his lawyer's performance will be insubstantial.

B

For many years the lower courts have been debating the meaning of "effective" assistance of counsel. Different courts have developed different standards. On the issue of the level of performance required by the Constitution, some courts have adopted the forgiving "farce-and-mockery" standard,[FN8] while others have adopted various versions of ***714** the "reasonable competence" standard. [FN9] On the issue of the level of prejudice necessary to compel a new trial, the courts have taken a wide variety of positions, ranging from the stringent "outcome-determinative" test, [FN10] to the rule that a showing of incompetence on the part of defense counsel automatically requires reversal of the conviction regardless of the injury to the defendant.[FN11]

FN8. See, e.g., State v. Pacheco, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978); Hoover v. State, 270 Ark. 978, 980, 606 S.W.2d 749, 751 (1980); Line v. State, 272 Ind. 353, 354-355, 397 N.E.2d 975, 976 (1979).

FN9. See, e.g., Trapnell v. United States, 725 F.2d 149, 155 (CA2 1983); Cooper v. Fitzharris, 586 F.2d 1325, 1328-1330 (CA9 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

FN10. See, e.g., United States v. Decoster, 199 U.S.App.D.C., at 370, and n. 74, 624 F.2d, at 208, and n. 74 (plurality opinion); Knight v. State, 394 So.2d 997, 1001 (Fla.1981).

FN11. See n. 7, supra.

The Court today substantially resolves these disputes. The majority holds that the Constitution is violated when defense counsel's representation falls below the level expected of reasonably competent defense counsel, ante, at 2064-2067, and so affects the trial that there is a "reasonable probability" that, absent counsel's error, the outcome would have been different, ante, at 2067-2069.

Curiously, though, the Court discounts the significance of its rulings, suggesting that its choice of standards matters little and that few if any cases would have been decided differently if the lower courts had always applied the tests announced today. See ante, at 2069. Surely the judges in the state and lower federal courts will be surprised to learn that the distinctions they have so fiercely debated for many years are in fact unimportant.

The majority's comments on this point seem to be prompted principally by a reluctance****2079** to acknowledge that today's decision will require a reassessment of many previously rejected ineffective-assistance-of-counsel claims. The majority's unhappiness on this score is understandable, but its efforts to mitigate the perceived problem will be ineffectual. Nothing the majority says can relieve lower courts that hitherto***715** have been using standards more tolerant of ineffectual advocacy of their obligation to scrutinize all claims, old as well as new, under the principles laid down today.

III

The majority suggests that, "[f]or purposes of describing counsel's duties," a capital sentencing proceeding "need not be distinguished from an ordinary trial." Ante, at 2064. I cannot agree.

The Court has repeatedly acknowledged that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.

"[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death

is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion) (footnote omitted).[FN12]

FN12. See also Zant v. Stephens, 462 U.S. 862, 884-885, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S.Ct. 869, 873-875, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion).

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The job of amassing that information and presenting it ***716** in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts,[FN13] combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings.[FN14]

FN13. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 303 (1983).

FN14. As Justice BRENNAN points out, ante, at 2073, an additional reason for examining especially carefully a Sixth Amendment challenge when it pertains to a capital sentencing proceeding is that the result of finding a constitutional violation in that context is less disruptive than a finding that counsel was incompetent in the liability phase of a trial.

It matters little whether strict scrutiny of a claim that ineffectiveness of counsel resulted in a death sentence is achieved through modification of the Sixth Amendment standards or through especially careful application of those standards. Justice BRENNAN suggests that the necessary adjustment of the level of performance required of counsel in capital sentencing proceedings can be effected simply by construing the phrase, "reasonableness under prevailing professional norms," in a manner that takes into account the nature of the impending penalty. Ante, at 2073-2074. Though I would prefer a more specific iteration of counsel's duties in this special context,[FN15] I can accept that proposal. However, when instructing lower courts regarding****2080** the probability of impact upon the outcome that requires a resentencing, I think the Court would do best explicitly to modify the legal standard itself. [FN16] In my view, a person on death row, whose counsel's performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a "reasonable probability"***717** that he would have been given a life sentence if his lawyer had been competent, see ante, at 2068; if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate. Cf. United States v. Agurs, 427 U.S. 97, 121-122, 96 S.Ct. 2392, 2405-2406, 49 L.Ed.2d 342 (1976) (MARSHALL, J., dissenting).[FN17]

FN15. See Part I-A, supra. For a sensible effort to formulate guidelines for the conduct of defense counsel in capital sentencing proceedings, see Goodpaster, supra, at 343-345, 360-362.

FN16. For the purposes of this and the succeeding section, I assume, solely for the sake of argument, that some showing of prejudice is necessary to state a violation of the Sixth Amendment. But cf. Part I-B, supra.

FN17. As I read the opinion of the Court, it does not preclude this kind of adjustment of the legal standard. The majority defines "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Ante, at 2068. In view of the nature of the sanction at issue, and the difficulty of determining how a sentencer would have responded if presented with a different set of facts, it could be argued that a lower estimate of the likelihood that the outcome of a capital sentencing proceeding was influenced by attorney error is sufficient to "undermine confidence" in that outcome than would be true in an ordinary criminal case.

IV

The views expressed in the preceding section oblige me to dissent from the majority's disposition of the case before us.[FN18] It is undisputed that respondent's trial counsel made virtually no investigation of the possibility of obtaining

testimony from respondent's relatives, friends, or former employers pertaining to respondent's character or background. Had counsel done so, he would have found several persons willing and able to testify that, in their experience, respondent was a responsible, non-violent man, devoted to his family, and active in the affairs of his church. See App. 338-365. Respondent contends that his lawyer could have and should have used that testimony to "humanize" respondent, to counteract the impression conveyed by the trial that he was little more than a cold-blooded killer. Had this evidence been admitted, respondent argues, his chances of obtaining a life sentence would have been significantly better.

FN18. Adhering to my view that the death penalty is unconstitutional under all circumstances, Gregg v. Georgia, 428 U.S. 153, 231, 96 S.Ct. 2909, 2973, 49 L.Ed.2d 859 (1976) (MARSHALL, J., dissenting), I would vote to vacate respondent's sentence even if he had not presented a substantial Sixth Amendment claim.

***718** Measured against the standards outlined above, respondent's contentions are substantial. Experienced members of the death-penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 300-303, 334-335 (1983). The State makes a colorable-though in my view not compelling-argument that defense counsel in this case might have made a reasonable "strategic" decision not to present such evidence at the sentencing hearing on the assumption that an unadorned acknowledgment of respondent's responsibility for his crimes would be more likely to appeal to the trial judge, who was reputed to respect persons who accepted responsibility for their actions.[FN19] But however justifiable ****2081** such a choice might have been after counsel had fairly assessed the potential strength of the mitigating evidence available to him, counsel's failure to make any significant effort to find out what evidence might be garnered from respondent's relatives and acquaintances surely cannot be described as "reasonable." Counsel's failure to investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the course of the trial gave him a feeling of "hopelessness" regarding the possibility of saving respondent's life, see App. 383-384, 400-401.

FN19. Two considerations undercut the State's explanation of counsel's decision. First, it is not apparent why adducement of evidence pertaining to respondent's character and familial connections would have been inconsistent with respondent's acknowledgement that he was responsible for his behavior. Second, the Florida Supreme Court possesses-and frequently exercises-the power to overturn death sentences it deems unwarranted by the facts of a case. See State v. Dixon, 283 So.2d 1, 10 (Fla.1973). Even if counsel's decision not to try to humanize respondent for the benefit of the trial judge were deemed reasonable, counsel's failure to create a record for the benefit of the State Supreme Court might well be deemed unreasonable.

***719** That the aggravating circumstances implicated by respondent's criminal conduct were substantial, see ante, at 2071, does not vitiate respondent's constitutional claim; judges and juries in cases involving behavior at least as egregious have shown mercy, particularly when afforded an opportunity to see other facets of the defendant's personality and life. [FN20] Nor is respondent's contention defeated by the possibility that the material his counsel turned up might not have been sufficient to establish a statutory mitigating circumstance under Florida law; Florida sentencing judges and the Florida Supreme Court sometimes refuse to impose death sentences in cases "in which, even though statutory mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." Barclay v. Florida, 463 U.S. 939, 958, 103 S.Ct. 3418, 3431, 77 L.Ed.2d 1134 (1983) (STEVENS, J., concurring in judgment) (emphasis in original).

FN20. See, e.g., Farmer & Kinard, The Trial of the Penalty Phase (1976), reprinted in 2 California State Public Defender, California Death Penalty Manual N-33, N-45 (1980).

If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding.

I respectfully dissent.

U.S.,1984
Strickland v. Washington
466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

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Notes of Decisions

1.In general

RCr 11.42 is the exclusive remedy where a collateral attack is made upon a judgment. Richardson v. Howard (Ky. 1969) 448 S.W.2d 49.

2-3.Constitutional issues

2.Constitutional issues - In general

There is no federal constitutional right to relitigate issues raised on direct appeal, in a collateral attack proceeding such as a motion to vacate, set aside, or correct sentence. Sanders v. Com. (Ky. 2002) 89 S.W.3d 380, rehearing denied, certiorari denied 124 S.Ct. 96, 540 U.S. 838, 157 L.Ed.2d 70. Criminal Law 1433(1)

3.Constitutional issues - Due process

Also listed as **Due process, constitutional issues**
Evidentiary hearing in a post-conviction proceeding ensures a defendant the protections of due process in securing his right to effective assistance of trial counsel; to that end, he is permitted to call witnesses and present evidence in support of his motion, to cross-examine the witnesses for the Commonwealth, and to be represented by counsel. Knuckles v. Com. (Ky.App. 2014) 421 S.W.3d 399. Constitutional Law 4836

Defendant was not denied due process or fundamental fairness by denial of motion for leave to amend motion for postconviction relief, where verdict was rendered approximately four years prior to motion, defendant had sufficient time in which to investigate issues and formulate arguments to present to court, and he tendered no amended petition and simply solicited open end approval to amend. Haight v. Com. (Ky. 2001) 41 S.W.3d 436, certiorari denied 122 S.Ct. 471, 534 U.S. 998, 151 L.Ed.2d 386. Constitutional Law 4836; Criminal Law 1575

Error asserted in postconviction motion to vacate, set aside or correct sentence must rise to the level of a constitutional deprivation of due process. Com. v. Basnight (Ky.App. 1989) 770 S.W.2d 231. Criminal Law 1451

Under rule providing relief to prisoners in custody under a sentence “subject to collateral attack,” error must be of such magnitude as to render judgment for conviction so fundamentally unfair that defendant can be said to have been denied due process of law. Schooley v. Com. (Ky.App. 1977) 556 S.W.2d 912. Criminal Law 1451

3.Due process, constitutional issues

See Constitutional issues - Due process

4.Construction and application

Generally, a second motion to vacate, set aside, or correct a sentence is not allowed. McDaniel v. Commonwealth (Ky. 2016) 495 S.W.3d 115. Criminal Law 1668(1)

Criminal rule governing motions to vacate, set aside or correct sentence is derived from the Sixth Amendment and, therefore, applies to criminal prosecutions, and, because a dependency action is a civil action, the rule has no application. Z.T. v. M.T. (Ky.App. 2008) 258 S.W.3d 31. Infants 2188

Defendant is required to avail himself of rule providing for postconviction relief while in custody under sentence or on probation, parole, or conditional discharge, as to any ground of which he is aware, or should be aware, during period when the remedy is available to him; final disposition of that motion, or waiver of opportunity to make it, concludes all issues that reasonably could have been presented in that proceeding and forecloses defendant from raising, under Rule 60.02 motion to vacate or set aside prior final judgment of conviction, any questions which could reasonably have been presented by postconviction relief proceedings. Gross v. Com. (Ky. 1983) 648 S.W.2d 853. Criminal Law 1447; Criminal Law 1668(3)

Rule governing postconviction relief may not be treated as an overall blanket to grant relief any time individual judge thinks it is equitable and fair. Nicholson v. Judicial Retirement and Removal Commission (Ky. 1978) 573 S.W.2d 642. Criminal Law 1407

Absence of counsel at the arraignment is not grounds for relief under RCr 11.42. Parrish v. Com. (Ky. 1971) 472 S.W.2d 69. Criminal Law 1513

Postconviction relief rule is not substitute for appeal and does not permit review of all alleged trial errors. Harris v. Com. (Ky. 1969) 441 S.W.2d 143. Criminal Law 1429(2); Criminal Law 1508

Ruling upon request for separate trials was within discretion of trial court and not a substantial constitutional right and any prejudicial error on trial court's part would render judgment erroneous but not void. Polsgrove v. Com. (Ky. 1969) 439 S.W.2d 776. Criminal Law 622.6(3)
A motion under RCr 11.42 does not reach matters that could have been raised on an appeal of the case. Kiper v. Com. (Ky. 1967) 415 S.W.2d 92, certiorari denied 88 S.Ct. 170, 389 U.S. 875, 19 L.Ed.2d 161.
Defendant who was in custody pending imposition of sentence was not entitled to relief under rule relating to right to relief from sentence subject to collateral attack. Chick v. Com. (Ky. 1966) 405 S.W.2d 14, certiorari denied 87 S.Ct. 518, 385 U.S. 977, 17 L.Ed.2d 439. Criminal Law 1447

RCr 11.42(3) is merely declaratory of the common law which already applied to motions under this rule. Tipton v. Com. (Ky. 1966) 398 S.W.2d 493.

The order revoking a probation cannot be tested by a motion under RCr 11.42. Wright v. Com. (Ky. 1965) 391 S.W.2d 685.

The improper reception of evidence obtained by an unlawful search cannot be raised by a motion under RCr 11.42, and a motion raising this ground should be summarily overruled. Collier v. Com. (Ky. 1965) 387 S.W.2d 858. Criminal Law 1426(1)

Rule providing for a motion to vacate a judgment of conviction does not provide, expressly or by implication, for review of any judgment other than one or ones pursuant to which movant is being held in custody. Sipple v. Com. (Ky. 1964) 384 S.W.2d 332. Criminal Law 1447

Although a judgment rendered in a criminal case was involved, and remedy of a writ of coram nobis is civil in its nature, and although rule which abolished writs of coram nobis became effective in 1953, Court of Appeals would treat a proceeding for such a writ as a request for relief under the applicable rule. Sherrill v. Com. (Ky. 1959) 323 S.W.2d 586. Criminal Law 1576

The proper procedure to obtain relief from judgment of conviction on ground that a member of jury was employed by or associated with the commonwealth's attorney and that false testimony was given against accused was by motion to set aside judgment, made in lieu of petition for writ of error coram nobis. Harris v. Com. (Ky. 1956) 296 S.W.2d 700. Criminal Law 1491; Criminal Law 1537

5. Construction with other laws

Rule providing for relief from judgment under certain circumstances, including mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud, is not intended as merely an additional opportunity to raise claims which could and should have been raised in prior proceedings, but, rather, is for relief that is not available by direct appeal and not available under rule governing motions to vacate, set aside, or correct sentence. Sanders v. Com. (Ky. 2011) 339 S.W.3d 427, certiorari denied 132 S.Ct. 1792, 566 U.S. 907, 182 L.Ed.2d 620, rehearing denied 132 S.Ct. 2451, 566 U.S. 1017, 182 L.Ed.2d 1077. Judgment 336; Judgment 338

Kentucky's three-year limitations period for bringing a postconviction motion to vacate sentence does not suspend the privilege of the writ of habeas corpus, as would violate the Kentucky Constitution. Com. v. Carneal (Ky. 2008) 274 S.W.3d 420, rehearing denied, certiorari denied 130 S.Ct. 274, 558 U.S. 906, 175 L.Ed.2d 184. Criminal Law 1404; Habeas Corpus 911

For purposes of proceedings on post-conviction movant's motion, under rules of criminal procedure, to vacate, set aside, or correct his sentence of death, rule governing such motions was not inconsistent with, and did not supersede, civil procedural rule governing motions to alter, amend, or vacate judgment, and movant was therefore entitled to seek relief from denial of motion filed under rules of criminal procedure by way of motion filed under rules of civil procedure. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 996(1)
Post-conviction relief in which counsel's former client obtained exoneration from his conviction and sentence was pre-requisite to maintaining legal malpractice action against counsel. Stephens v. Denison (Ky.App. 2004) 150 S.W.3d 80. Attorney And Client 112

Trial court was not required to consider defendant's allegations of ineffective assistance of counsel at time of prior convictions used in persistent felony offender phase of defendant's trial as rules provide that collateral attack on prior judgment shall be made in court in which they were obtained. Corbett v. Com. (Ky. 1986) 717 S.W.2d 831. Sentencing And Punishment 1320

Since time had expired for filing of direct appeal at time defendant filed his "motion for a concurrent sentence", said motion would be construed as a collateral attack on the sentences ordered to be served consecutively. McBride v. Com. (Ky. 1968) 432 S.W.2d 410. Judgment 518
Rule allowing one convicted of crime to move to vacate, set aside or correct sentence is not a bar to motion under rule allowing relief from final judgment, order or proceeding by motion on grounds of mistake, newly discovered evidence or fraud but supplements it. Wilson v. Com. (Ky. 1966) 403 S.W.2d 710. Criminal Law 1426(1)
Criminal rule regarding motion to vacate, set aside, or correct sentence supplements and does not supplant rule regarding relief from judgment by motion on grounds of mistake, newly discovered evidence, fraud, etc. Perkins v. Com. (Ky. 1964) 382 S.W.2d 393. Criminal Law 1402

6.Purpose

Rule governing a motion to vacate, set aside or correct sentence provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal. Bratcher v. Com. (Ky.App. 2012) 406 S.W.3d 865, rehearing denied, review denied. Criminal Law 1407
The purpose of rule governing post-conviction relief is to provide a forum for known grievances, not to provide an opportunity to research for grievances. Hodge v. Com. (Ky. 2003) 116 S.W.3d 463, as amended, rehearing denied, certiorari denied 124 S.Ct. 1619, 541 U.S. 911, 158 L.Ed.2d 258. Criminal Law 1403

Defendant would not be permitted to fish through official records in hopes that something may turn up to his benefit for postconviction relief hearing. Foley v. Com. (Ky. 2000) 17 S.W.3d 878, modified on denial of rehearing, certiorari denied 121 S.Ct. 663, 531 U.S. 1055, 148 L.Ed.2d 565. Criminal Law 1590

Purpose of motion to vacate, set aside, or correct sentence is to provide a forum for known grievances and not the opportunity to conduct a fishing expedition for potential grievances. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1410

Rule governing motion to vacate, set aside or correct sentence was intended to provide postconviction relief to persons under sentence or on probation or parole who feel aggrieved by errors in process which lead to their convictions that cannot be reached by direct appeal; it was never intended as defense to persistent felony charge. Com. v. Stamps (Ky. 1984) 672 S.W.2d 336. Sentencing And Punishment 1200

Purpose of rule governing postconviction relief is to provide a forum for known grievances, not to provide an opportunity to research for grievances. Gilliam v. Com. (Ky. 1983) 652 S.W.2d 856. Criminal Law 1403

It is not the purpose of motion to vacate judgment of conviction to permit a convicted defendant to retry issues which should and could have been raised in the original proceeding, nor to permit retrial of issues that were raised in trial court and were considered on appeal. Thacker v. Com. (Ky. 1972) 476 S.W.2d 838. Criminal Law 1427; Criminal Law 1433(1)

Motion to vacate, set aside or correct sentence is a procedural remedy designed to give a convicted prisoner a direct right to attack conviction under which he is being held and is supplemental to right of habeas corpus. Wilson v. Com. (Ky. 1966) 403 S.W.2d 710. Criminal Law 1407

Purpose of post-conviction relief rule amendment providing that motion to vacate conviction shall state all grounds for holding sentence invalid of which movant has knowledge and that final disposition of motion shall conclude all issues that could reasonably have been presented in the same proceeding was to dispel doubt, if any, that the common-law rule to that effect applied. Tipton v. Com. (Ky. 1966) 398 S.W.2d 493. Criminal Law 1583

7-22.Grounds

7.Grounds - In general

The denial of defendant's initial motion to be removed from the sex offender registry, whether with or without prejudice, did not operate to bar a subsequent collateral attack on his sentence based on a claim of ineffective assistance of counsel; the initial motion was a simple request to be relieved the statutory registration requirement, something the trial court was not authorized to do, and thus, the subsequent motion did not constitute an impermissible successive motion. Commonwealth v. Thompson (Ky. 2018) 548 S.W.3d 881. Criminal Law 1668(3)

Post-conviction movant's unsupported and speculative claim that he might have been sexually abused, and that effects of such abuse, should he have found himself in situation in which he believed he was being abused again, were unknown, could not serve as basis for vacation, setting aside, or correction of his sentence of death, where such claim essentially admitted that movant did not know whether such claim was true. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1450

Defendant could not combine an insufficient new trial motion with an insufficient motion to vacate so as to be entitled to a new trial. Com. v. Tamme (Ky. 2002) 83 S.W.3d 465, as amended, rehearing denied. Criminal Law 909

Neither circuit court nor Court of Appeals denied defendant a meaningful process for development and presentation of issues on motion to vacate his death sentence for intentional murder and consecutive 95-year sentences for kidnapping, first-degree rape, and first-degree sodomy; certain issues that defendant was denied the opportunity to raise could have been raised on direct appeal, while other issues defendant unsuccessfully attempted to raise lacked support of specific facts. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1429(2); Criminal Law 1656

Evidence that defendant's attitude and character changed during his 16 years of confinement on capital murder conviction did not permit court to grant relief from death penalty; even if defendant has been model prisoner and religious convert during his myriad appeals, defendant's evidence would afford no basis for relieving him from punishment legally imposed for crimes he committed. McQueen v. Com. (Ky. 1997) 948 S.W.2d 415, certiorari denied 117 S.Ct. 2535, 521 U.S. 1130, 138 L.Ed.2d 1035. Sentencing And Punishment 2265

Reasons for collateral attack on judgment by motion to vacate, set aside, or correct sentence need not be jurisdictional in nature, nor such as to render judgment void or even voidable, and may encompass substantive or procedural defects with no bearing on power of court to enter judgment under which prisoner is confined. Com. v. Marcum (Ky. 1994) 873 S.W.2d 207. Criminal Law 1450

Proper way to challenge prior convictions for driving on suspended license arising from driving under the influence (DUI), on which charge of driving on suspended sentence (third or more offense arising from DUI) was based, was motion to vacate judgment or motion for relief from judgment made in court in which previous convictions were obtained rather than by asserting ineffective assistance of counsel claim made in court in which charges against defendant were pending. Lovett v. Com. (Ky.App. 1993) 858 S.W.2d 205. Automobiles 359.1

Constitutional grounds must form the basis upon which relief can be granted by a collateral attack on a judgment or sentence in an independent action other than in the action in which the judgment or sentence was rendered, or its appeal, since the procedure outlined in RCr 11.42 is not designed to give a convicted defendant an additional appeal or a review of trial errors that should have been addressed upon the direct appeal. Com. v. Basnight (Ky.App. 1989) 770 S.W.2d 231.

Fact that movant was given preliminary hearing on only one of two counts of indecent and immoral practices with another did not deny movant any constitutional right, such that he would be entitled to vacation of sentence. Russell v. Com. (Ky. 1971) 472 S.W.2d 259. Criminal Law 1484

Evidence upon motion to vacate judgment or judgments of sentence sustained finding that no bodily harm was inflicted upon defendant while he was in jail after an attempted jailbreak and before defendant pleaded guilty to various charges. Cunningham v. Com. (Ky. 1969) 447 S.W.2d 81. Criminal Law 1618(3)

Relief cannot be given on the ground of improper arrest. Triplett v. Com. (Ky. 1969) 439 S.W.2d 944.
Motion for post-conviction relief filed by prisoner proceeding pro se which gave court and opposing party fair notice of nature of claim was sufficient. Com. v. Miller (Ky. 1967) 416 S.W.2d 358. Criminal Law 1578
When it is revealed that material false statements are made in the motion, it should be dismissed. Com. v. Miller (Ky. 1967) 416 S.W.2d 358.
Finding that confession was voluntary could not be relitigated in proceeding on motion to vacate judgment. Davis v. Com. (Ky. 1967) 415 S.W.2d 372. Criminal Law 1433(1)

A proceeding on motion to vacate judgment does not provide an arena in which all claims of violation of constitutional rights shall be tested, and only those violations which may have had some bearing on the legality or fundamental fairness of trial may be considered. Dupin v. Com. (Ky. 1966) 404 S.W.2d 280. Criminal Law 1451
Defendant's conviction for voluntary manslaughter would not be vacated on theory that preliminary hearing, if held, would have given counsel ample time to prepare for trial where defendant had secured counsel in March and his trial was held in June. Banton v. Com. (Ky. 1966) 404 S.W.2d 277, certiorari denied 87 S.Ct. 163, 385 U.S. 879, 17 L.Ed.2d 107. Criminal Law 1484

The failure to have a preliminary hearing is not a ground for relief unless some prejudice is shown. Banton v. Com. (Ky. 1966) 404 S.W.2d 277, certiorari denied 87 S.Ct. 163, 385 U.S. 879, 17 L.Ed.2d 107.

When grounds stated in motion to vacate conviction, even if found true, would not be sufficient to invalidate the judgment, the motion may be overruled without a hearing. Maye v. Com. (Ky. 1965) 386 S.W.2d 731. Criminal Law 1652

The motion must state facts to support it. Sharp v. Com. (Ky. 1964) 385 S.W.2d 317.

Rule providing for motion to vacate judgment of conviction grants relief only when judgment is void and therefore subject to collateral attack. Hobbs v. Stivers (Ky. 1964) 385 S.W.2d 76. Criminal Law 1558

A motion to vacate sentence under RCr 11.42 may not be used for a general review of alleged errors made at trial, and a conviction may be set aside under this rule only where there was a violation of a constitutional right, a lack of jurisdiction, or such statutory violation as to make the conviction void and subject to collateral attack. (See also Hobbs v Stivers, 385 SW(2d) 76 (Ky 1964).) Warner v. Com. (Ky. 1964) 385 S.W.2d 62. Criminal Law 1493; Criminal Law 1508

Rule providing for motion to vacate judgment of conviction does not authorize relief from judgment for mere errors of trial court and may be invoked only for violation of constitutional right, lack of jurisdiction, or such violation of statute as to make judgment void and therefore subject to collateral attack. Tipton v. Com. (Ky. 1963) 376 S.W.2d 290. Criminal Law 1493; Criminal Law 1508

8.Grounds - Specificity

Also listed as **Specificity, grounds**

Motions to vacate, set aside or correct sentence which fail adequately to specify grounds for relief may be summarily denied, as may be motions asserting claims refuted or otherwise resolved by the record. Com. v. Pridham (Ky. 2012) 394 S.W.3d 867, rehearing denied, certiorari denied 134 S.Ct. 312, 571 U.S. 922, 187 L.Ed.2d 221. Criminal Law 1652

Conclusory allegations that counsel was ineffective without a statement of the facts upon which those allegations are based do not meet the specificity standard of the rule governing motions to vacate, set aside, or correct sentence and so warrant a summary dismissal of such a motion. Roach v. Com. (Ky. 2012) 384 S.W.3d 131, rehearing denied. Criminal Law 1580(10)

Defendant did not meet the specificity standard of the rule governing motions to vacate, set aside, or correct sentence with respect to his claim that his girlfriend's consent to a recording of phone conversations between her and defendant had been coerced and that defense counsel rendered ineffective assistance by not moving to suppress the recordings, and thus the motion could be summarily dismissed with respect to the claim; defendant asserted that police somehow threatened his girlfriend but failed to allege the threat with any particularity. Roach v. Com. (Ky. 2012) 384 S.W.3d 131, rehearing denied. Criminal Law 1580(6); Criminal Law 1580(10)
Motions to withdraw plea which fail adequately to specify grounds for relief may be summarily denied, as may be motions asserting claims refuted or otherwise resolved by the record. Stiger v. Com. (Ky. 2012) 381 S.W.3d 230. Criminal Law 274(1)
Allegation in postconviction motion regarding jurors sleeping during part of penalty phase was insufficiently specific where defendant did not state which jurors were alleged to be sleeping, did not indicate when sleeping occurred, and did not indicate what information jurors supposedly missed, or how information would have changed outcome. Haight v. Com. (Ky. 2001) 41 S.W.3d 436, certiorari denied 122 S.Ct. 471, 534 U.S. 998, 151 L.Ed.2d 386. Criminal Law 1580(12)

Verified motion to vacate judgment should contain actual basis on which movant relies with respect to allegations and, in absence of such factual basis, motion should be summarily overruled. Stanford v. Com. (Ky. 1993) 854 S.W.2d 742, certiorari denied 114 S.Ct. 703, 510 U.S. 1049, 126 L.Ed.2d 669. Criminal Law 1575; Criminal Law 1655(1)

Where defendant was not serving sentence as an habitual criminal, and failed to allege any fact which he considered "trickery," allegations that trial court, by using influence of trickery, induced defendant to enter plea of guilty authorizing judgment and sentence he was serving as habitual criminal were insufficient to justify vacation of sentences. Newsome v. Com. (Ky. 1970) 456 S.W.2d 686. Criminal Law 1580(3)

Ground asserted in motion to vacate judgment that defendant was not given credit for his jail time was not sufficiently definite to merit inquiry. Farmer v. Com. (Ky. 1970) 450 S.W.2d 494. Criminal Law 1557(2)

Ground for motion to vacate conviction was insufficiently specific where movant alleged that he was defended by "inadequate and ineffective counsel" in that the attorney (a) failed to advise petitioner of his "constitutional rights," (b) failed to object to "the many irregularities during the trial," and (c) "went through the niceties and formalities of the trial and procedures, but failed to adequately defend this petitioner." Baldwin v. Com. (Ky. 1966) 406 S.W.2d 860. Criminal Law 1580(10)

8.Specificity, grounds

See Grounds - Specificity

9.Grounds - Jury

Also listed as **Jury, grounds**
Defendant was not entitled to relief based on juror misconduct, despite evidence from four witnesses, trial attorney, one juror, and two other persons, that jurors told others that jury had already decided guilt during trial, where all three of jurors unequivocally denied making statements, trial lawyer sent associate to restaurant to investigate claim, but associate was not able to verify allegation, witnesses called by defendant to support contention could not name single individual who supposedly heard such statements or passed information on to them, defendant offered no proof as to assertions regarding kinship of jurors to assistant commonwealth attorney, and commonwealth offered proof that there was no such kinship. Foley v. Com. (Ky. 2000) 17 S.W.3d 878, modified on denial of rehearing, certiorari denied 121 S.Ct. 663, 531 U.S. 1055, 148 L.Ed.2d 565. Criminal Law 1618(1)

Movant was not entitled to relief from judgment of murder conviction for appellate counsel's failure to raise an issue on appeal concerning the racial make-up of the jury pool. Com. v. Davis (Ky. 1999) 14 S.W.3d 9, as modified, rehearing denied. Criminal Law 1969

Separation of jury in a capital case was proper where record contained written agreement of commonwealth's attorney and counsel for defendant authorizing separation, and order showed that separation was by agreement of parties; and even if improper, separation would not constitute ground for post-conviction relief. Collins v. Com. (Ky. 1968) 433 S.W.2d 663. Criminal Law 854(3); Criminal Law 1554

The simple assertion that one of the jurors was related to a prosecuting witness did not raise a constitutional question or form the basis for relief under rule relating to motion to vacate judgment. Dupin v. Com. (Ky. 1966) 404 S.W.2d 280. Criminal Law 1491

Jurors' conduct in running their own experiment during deliberations to determine if broken tipped knife could be used to unscrew a cabinet door, as the Commonwealth's theory at trial was that murder defendant used the knife to remove paint covered screws and remove storm window to gain access to the victim's house, was not misconduct warranting the reversal of conviction; jurors were free to use their own senses, observations, and experiences to conduct an experiment or reenactment with already admitted evidence, and the experiment did not contribute to the verdict. Fields v. Commonwealth (Ky. 2014) 2014 WL 7688714, Unreported, rehearing denied, certiorari denied 136 S.Ct. 798, 193 L.Ed.2d 723. Criminal Law 861

9.Jury, grounds

See Grounds - Jury

10.Grounds - Ineffective assistance of counsel

Also listed as **Ineffective assistance of counsel - Grounds**
Defendant's claim that he was denied effective assistance of counsel in his murder and assault trial when his counsel failed to effectively cross-examine and impeach victim with prior inconsistent statements did not arise from same conduct, transaction, or occurrence as allegations in defendant's original motion to vacate sentence, and, therefore, defendant's claim did not relate back to his original, timely filed motion to vacate sentence and could not be added to motion outside three-year limitations period; alleged facts underlying claims in original motion involved counsel's alleged failure to have jury view crime scene at night in order to discredit victim's testimony that he was able to see the killer, and defendant's new claim involved victim's overall character for truthfulness. Haley v. Commonwealth (Ky.App. 2019) 2019 WL 1966807, review denied. Criminal Law 1586

When considering a motion for ineffective assistance of counsel, the threshold issue is not whether appellant's attorney was inadequate; rather, it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory. Cherry v. Commonwealth (Ky.App. 2018) 545 S.W.3d 318, rehearing denied. Criminal Law 1655(6); Criminal Law 1660

Defense counsel's conduct in investigating allegations and advising on guilty plea in prosecution for murder and drug-related offenses was not deficient performance, and thus was not ineffective assistance of counsel, where counsel retained second investigator, consulted toxicology expert, counsel hired ballistic expert, and Commonwealth never extended formal plea offer. Cherry v. Commonwealth (Ky.App. 2018) 545 S.W.3d 318, rehearing denied. Criminal Law 1891; Criminal Law 1920

A successful petition to vacate a sentence on the basis of ineffective assistance of counsel must survive the dual prongs of "performance" and "prejudice" required by *Strickland*. Stanfill v. Commonwealth (Ky.App. 2016) 515 S.W.3d 193, review denied. Criminal Law 1519(4)

Evidentiary hearing was warranted on postconviction petitioner's claim that counsel failed to investigate and advise him of extreme emotional distress defense, and thus that his guilty plea to first degree assault was invalid due to ineffective assistance of counsel; mitigation of assault conviction was possible if defendant acted under influence of extreme emotional distress for which there was reasonable explanation, defendant was enraged upon hearing that his cohabitant girlfriend was breaking up their relationship and he immediately attacked her violently and intensely, and defendant raised material question as to reasonableness of counsel's investigation of potential for extreme emotional distress defense. Commonwealth v. Rank (Ky. 2016) 494 S.W.3d 476. Criminal Law 1920

Review of defendant's allegations of ineffective assistance by trial counsel was appropriate on motion to vacate sentence and was not precluded by his failure to raise them on direct appeal, where defendant specially waived his right to appeal all trial errors when he accepted Commonwealth's offer of a 25-year sentence during penalty phase of murder prosecution, such that a direct appeal was "unavailable" to defendant. Bratcher v. Com. (Ky.App. 2012) 406 S.W.3d 865, rehearing denied, review denied. Criminal Law 1440(1)

Trial counsel's ineffective assistance in failing to advise defendant about the parole consequences of his guilty plea to first-degree robbery within the violent offender statute, namely that he would be ineligible for parole until he had served 85 percent of his sentence, was not prejudicial and thus did not provide grounds to permit defendant to withdraw his guilty plea; there was no doubt that defendant was at least a second-degree persistent felony offender (PFO), and there were victims ready to identify him as the perpetrator of at least three of the five robberies, and defendant alleged no defenses to those three robberies. Stiger v. Com. (Ky. 2012) 381 S.W.3d 230. Criminal Law 274(7)

Supreme Court's decision in *Hollon v. Commonwealth*, holding that ineffective assistance of direct appeal counsel is a cognizable claim, and may be brought within a timely filed motion to vacate, set aside, or correct sentence, and that this ruling was to have prospective effect only, did not apply retroactively to allow capital murder defendant to prosecute his claims of ineffective assistance of direct appeal counsel on his motion for relief from judgment, as proceeding on defendant's previously filed motion to vacate set aside, or correct sentence had long since been decided and become final. Sanders v. Com. (Ky. 2011) 339 S.W.3d 427, certiorari denied 132 S.Ct. 1792, 566 U.S. 907, 182 L.Ed.2d 620, rehearing denied 132 S.Ct. 2451, 566 U.S. 1017, 182 L.Ed.2d 1077. Courts 100(1)

Ineffective assistance claim, alleging that trial counsel had failed to properly advise defendant concerning the law and the facts of the case before defendant's entry of guilty plea to multiple sex offenses, was conclusively refuted by the record such that no evidentiary hearing was warranted on motion to vacate sentence; during his colloquy, defendant specified that he had no complaints about his attorney's performance and stated that he had no questions because his attorney had answered all his questions. Hensley v. Com. (Ky.App. 2010) 305 S.W.3d 434. Criminal Law 1655(6)

Ineffective assistance claim, alleging that trial counsel had inadequately investigated defendant's case, was conclusively refuted by the record such that no evidentiary hearing was warranted on motion to vacate sentence; claim contradicted defendant's statements to the trial court, both verbally and in writing, when he said he believed his attorney was fully informed about his case and he had no complaints about her performance, and defendant failed to establish that more investigation by his attorney would have changed the result. Hensley v. Com. (Ky.App. 2010) 305 S.W.3d 434. Criminal Law 1655(6)

Ineffective assistance claim, alleging that trial counsel had failed to obtain a defense expert and adequately prepare for defendant's competency hearing, was conclusively refuted by the record such that no evidentiary hearing was warranted on motion to vacate sentence; an expert, who was beholden to neither party, did conclude that defendant was competent to proceed, and defendant failed to establish that a defense expert would have changed the trial court's ruling. Hensley v. Com. (Ky.App. 2010) 305 S.W.3d 434. Criminal Law 1655(6)

Attorney's advice to accept plea bargain in which defendant pled guilty to murder and burglary in the first-degree was reasonable, and, thus, not ineffective assistance of counsel; defendant avoided death penalty after commonwealth repeatedly and successfully defended any attempt to remove the case from capital punishment eligibility. Com. v. Elza (Ky. 2009) 284 S.W.3d 118. Criminal Law 1920

As collateral consequences were outside the scope of the guarantee of the Sixth Amendment right to counsel, it followed that counsel's failure to advise defendant about the potential for deportation as a consequence of his guilty plea or counsel's act of advising defendant incorrectly provided no basis for vacating or setting aside defendant's sentence; in neither instance was the matter required to be addressed by counsel, and so attorney's failure in that regard could not constitute ineffectiveness. Com. v. Padilla (Ky. 2008) 253 S.W.3d 482, rehearing denied, certiorari granted 129 S.Ct. 1317, 555 U.S. 1169, 173 L.Ed.2d 582, reversed and remanded 130 S.Ct. 1473, 559 U.S. 356, 176 L.Ed.2d 284. Criminal Law 1920

Post-conviction petitioner failed to show he was deprived of a fundamentally fair and reliable trial as result of trial counsel's failure to object to improper allocation of peremptory challenges in murder prosecution, and thus such failure was not ineffective assistance of counsel. Com. v. Young (Ky. 2006) 212 S.W.3d 117, rehearing denied. Criminal Law 1901

Supreme Court's holding in defendant's direct appeal of his convictions that prosecutor's improper closing argument was not palpable error did not preclude defendant from successfully maintaining an ineffective assistance of counsel claim based on the same claim of error, in his motion to vacate, set aside, or correct sentence, as there were distinctions between palpable error standard and *Strickland's* prejudice requirement, such that palpable error analysis was not dispositive of an ineffective assistance claim. Martin v. Com. (Ky. 2006) 207 S.W.3d 1, as modified, rehearing denied, on remand 2007 WL 1201697. Criminal Law 1433(2)

Postconviction counsel's mailing of notice of appeal from denial of postconviction relief to incorrect court deprived defendant of statutory right to appeal, and thus, constituted ineffective assistance, warranting reinstatement of defendant's right to appeal. Moore v. Com. (Ky. 2006) 199 S.W.3d 132, rehearing denied. Criminal Law 1081(3); Criminal Law 1081(6); Criminal Law 1971

Post-conviction movant's claim that his trial counsel had been ineffective by reason of counsel's failure to introduce toxicology report showing that he had drugs in his blood at time of murder was presented with sufficient specificity to satisfy requirements of criminal rule governing motions to vacate, set aside, or correct sentence, where movant identified specific report that should have been introduced and relevant findings within that report. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1580(10)

Post-conviction movant's claims of ineffective assistance of counsel were claims of constitutional violations, sufficient to satisfy first prong of test for entitlement to evidentiary hearing, namely, that movant show entitlement to relief. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1655(6)

In his post-conviction relief motion alleging he was denied his constitutional right to testify in murder trial because his attorney refused his request to do so, petitioner, convicted of murder and sentenced to death, failed to identify what facts he would have testified to that jury was not already aware of, or how his testimony would have influenced jury to have reached different verdict; petitioner's vague claims, that he would have “fought harder” than his trial counsel did, and that his would have refuted testimony of his ex-wife and of his co-defendant failed to satisfy specificity requirements of rule governing post-conviction relief. Hodge v. Com. (Ky. 2003) 116 S.W.3d 463, as amended, rehearing denied, certiorari denied 124 S.Ct. 1619, 541 U.S. 911, 158 L.Ed.2d 258. Criminal Law 1580(10)

Defense counsel's investigation and cross-examination of petitioner's former wife in capital murder trial was tactical decision, for purposes of ineffective assistance of counsel claims, which would not be second guessed in proceeding for post-conviction relief. Hodge v. Com. (Ky. 2003) 116 S.W.3d 463, as amended, rehearing denied, certiorari denied 124 S.Ct. 1619, 541 U.S. 911, 158 L.Ed.2d 258. Criminal Law 1891; Criminal Law 1925

Counsel did not perform deficiently in failing to file a formal motion for discovery, in postconviction proceeding to vacate, set aside, or correct sentence, where counsel relied on the open discovery policy that was embodied in the circuit court's standard discovery order in which it required the Commonwealth to furnish counsel with exculpatory evidence. Sanders v. Com. (Ky. 2002) 89 S.W.3d 380, rehearing denied, certiorari denied 124 S.Ct. 96, 540 U.S. 838, 157 L.Ed.2d 70. Criminal Law 1971

Defendant's vague and general allegations that additional family members, and unidentified friends and clergy, were available to testify at penalty phase of capital murder trial did not warrant an evidentiary hearing on defendant's claim, in postconviction motion to vacate, set aside, or correct sentence, that defense counsel was ineffective in failing to present those witnesses; defendant did not specify what testimony the witnesses would have offered. Sanders v. Com. (Ky. 2002) 89 S.W.3d 380, rehearing denied, certiorari denied 124 S.Ct. 96, 540 U.S. 838, 157 L.Ed.2d 70. Criminal Law 1655(6)

Defendant was not entitled to postconviction relief based on general allegations of ineffective assistance of trial counsel with regard to individual jurors and jury pool, where petition failed to state with particularity facts that would warrant relief, some allegations were raised and rejected on direct appeal, and complaint that was not raised on direct appeal concerned juror who appeared open to range of penalties and willing to consider all evidence. Haight v. Com. (Ky. 2001) 41 S.W.3d 436, certiorari denied 122 S.Ct. 471, 534 U.S. 998, 151 L.Ed.2d 386. Criminal Law 1433(1); Criminal Law 1491; Criminal Law 1580(10)

Trial counsel was not ineffective in not seeking expert assistance to evaluate defendant's mental status and psychological make up early in preparation for trial, even though one report mentioned a possibility of brain damage, where report did not make a finding of brain damage, clinical forensic psychologist who examined defendant in preparation for trial specifically found no evidence that defendant was psychotic, suffered from any serious neurological defect, or was otherwise retarded, and there was no reasonable probability that evaluation would have changed result reached by jury or sentence fixed by it. Haight v. Com. (Ky. 2001) 41 S.W.3d 436, certiorari denied 122 S.Ct. 471, 534 U.S. 998, 151 L.Ed.2d 386. Criminal Law 1931

Defendant could not couch as ineffective assistance claim in post-conviction relief proceeding prejudicial effect of presence of police officers in courtroom during capital trial for murder of two police officers, where defendant did not raise issue of prejudicial effect on direct appeal. Baze v. Com. (Ky. 2000) 23 S.W.3d 619, rehearing denied, certiorari denied 121 S.Ct. 1109, 531 U.S. 1157, 148 L.Ed.2d 979. Criminal Law 1429(1)

Mitigating information that witnesses, including members of defendant's family, offered at postconviction relief hearing, which was not offered during penalty phase of defendant's double murder trial, would have been offset by testimony regarding defendant's propensity for violence, and thus there was no showing of either deficient performance by trial counsel or substantial prejudice based on ineffective assistance for decision not to present testimony, where counsel met family and discussed trial strategy with defendant, there was no evidence to substantiate claim that defendant may not have understood mitigation, there was no reason for trial counsel to investigate defendant's background more thoroughly, and there was no evidence of any mental defect. Foley v. Com. (Ky. 2000) 17 S.W.3d 878, modified on denial of rehearing, certiorari denied 121 S.Ct. 663, 531 U.S. 1055, 148 L.Ed.2d 565. Criminal Law 1955

Trial counsel's failure to object to concurrent/consecutive sentence instruction given by trial court did not rise to the level of ineffective assistance in sexual abuse case; at evidentiary hearing regarding his motion for postconviction relief, defendant asked no questions of his original trial counsel concerning sentencing instruction issue, and defendant was not prejudiced by trial jury's recommended sentence of 39 years for defendant's crimes that was merely recommendation and not binding on court at final sentencing. Com. v. Pelfrey (Ky. 1999) 998 S.W.2d 460, rehearing denied. Criminal Law 1957

Following evidentiary hearing on defendant's motion to vacate conviction based on ineffective assistance of counsel in failing to reach plea agreement with Commonwealth, if trial court determined that defendant suffered prejudice through ineffective assistance, means by which to repair that constitutional deprivation was for defendant to serve sentence harmonious to that originally offered by Commonwealth; Commonwealth could withdraw its prior offer only if it could rebut presumption that withdrawal was the product of prosecutorial vindictiveness. Osborne v. Com. (Ky.App. 1998) 992 S.W.2d 860, rehearing denied. Criminal Law 1663

Postconviction relief movant failed to show denial of effective assistance in trial counsel's failure to challenge grand jury selection procedure; practice of grand jury selection had not been questioned or contested during period at issue, and fact that one attorney had successfully raised argument, ultimately striking down procedure, did not render trial counsel's performance inadequate or ineffective, and, moreover, Commonwealth would have sought to reindict defendant, albeit later in time, on same charges. Pierce v. Com. (Ky.App. 1995) 902 S.W.2d 837, review denied. Criminal Law 1894

Where the defense of intoxication is previously established through other witnesses, and the defendant fails to establish that he was prejudiced when counsel did not specifically inform him that he had a right to testify at the penalty phase of his trial, defendant has not established ineffective assistance of counsel. McQueen v. Com. (Ky. 1986) 721 S.W.2d 694, certiorari denied 107 S.Ct. 2203, 481 U.S. 1059, 95 L.Ed.2d 858. Criminal Law 1955

Defendant, who alleged that his plea was not voluntarily and intelligently given, that he was not advised of his constitutional rights, and that his attorneys failed to make motions to protect his rights, was not entitled to have his conviction set aside where record and defendant's testimony disclosed that at time of his plea of guilty charges were thoroughly explained to him, that he was advised of his rights by lower court, and that he was satisfied with his attorneys. Taylor v. Com. (Ky.App. 1982) 642 S.W.2d 344. Criminal Law 1618(3); Criminal Law 1618(10)

Defendant's voluntary abandonment of his appeal on the advice of an attorney about whom defendant had never complained prior to the reversal of his codefendant's conviction could not, per se, indicate ineffective assistance of counsel as basis for vacation of judgment. Lomax v. Com. (Ky.App. 1979) 581 S.W.2d 27. Criminal Law 1519(15)

Contention that petitioner, who related that interviews with retained counsel were brief and that they did not go into the facts of case thoroughly, was denied effective assistance of counsel did not require evidentiary hearing on motion to vacate judgments of conviction, in absence of allegation that petitioner's desire to communicate with his attorney was frustrated either because the attorney was not available or refused to talk to him. Lewis v. Com. (Ky. 1971) 472 S.W.2d 65, certiorari denied 92 S.Ct. 1299, 405 U.S. 1018, 31 L.Ed.2d 481. Criminal Law 1655(6)

Broad general allegations that movant's constitutional rights had not been explained to him and that he did not receive effective assistance of counsel at trial were insufficient, in absence of allegation that any evidence obtained in violation of his constitutional rights was used against him or in what respect his counsel rendered ineffective assistance, to entitle movant to vacation of judgment. Adkins v. Com. (Ky. 1971) 471 S.W.2d 721. Criminal Law 1580(1); Criminal Law 1580(10)

Standard procedure of circuit court in selecting counsel to defend indigent defendants from list of 15 most recently admitted attorneys did not deny petitioner who had been defended by appointed counsel effective assistance of counsel. Stinnett v. Com. (Ky. 1971) 468 S.W.2d 784, certiorari denied 92 S.Ct. 541, 404 U.S. 994, 30 L.Ed.2d 546. Criminal Law 1876

Mere conclusory allegations that petitioner was denied effective assistance of counsel in that he received belated appointment, that petitioner was coerced into guilty plea and that counsel was appointed too late to prepare a defense were insufficient to require hearing on postconviction petition filed over 20 years following conviction. Wedding v. Com. (Ky. 1971) 468 S.W.2d 273. Criminal Law 1655(6)

Allegation of ineffective assistance of counsel does not state ground for relief unless petition alleges sufficient facts to show that representation of counsel was inadequate. Thomas v. Com. (Ky. 1970) 459 S.W.2d 72. Criminal Law 1580(10)

Allegations of “ineffective assistance of counsel” and “coerced by his own counsel” to plead guilty are insufficient to entitle one to a hearing. Evans v. Com. (Ky. 1970) 453 S.W.2d 601. Criminal Law 1655(6)

Prior trial record, proceedings in Court of Appeals and evidence at hearing on motion to vacate sentence on subsequent conviction failed to substantiate charge of ineffective representation by counsel at trial resulting in prior conviction. Thomas v. Com. (Ky. 1968) 437 S.W.2d 512, certiorari denied 90 S.Ct. 949, 397 U.S. 956, 25 L.Ed.2d 142. Criminal Law 1618(10)

Conviction would not be set aside on ground that there was no effective assistance of counsel because trial attorney did not attack indictment, instructions and conviction for unlawfully breaking into office and attempting to open safe on theory that conduct charged was one act and could not legally be split into two offenses. Penn v. Com. (Ky. 1968) 427 S.W.2d 808. Criminal Law 1519(7)

Where reviewing court rejected contention of prisoner in post conviction proceeding which petitioner argued would have resulted in reversal if urged on appeal from conviction, petitioner would be denied post conviction relief on theory that failure of counsel to appeal and to advise petitioner of right to appeal deprived him of his constitutional rights. Adams v. Com. (Ky. 1968) 424 S.W.2d 849. Criminal Law 1519(15)

Where judgment of court showed motion for new trial was overruled, and where defendant's motion to vacate judgment sentencing him to life imprisonment did not indicate that he requested his attorney to file appeal, motion to vacate judgment on grounds that attorney failed to file motion for new trial although allegedly requested to do so and that attorney failed to perfect an appeal would be overruled. Odewahn v. Com. (Ky. 1966) 407 S.W.2d 137. Criminal Law 1519(15)

The ground that the court appointed attorney refused to appeal must reflect some valid grounds for an appeal. Williams v. Com. (Ky. 1966) 405 S.W.2d 17.

Where defendant alleged that his court-appointed counsel failed to represent him effectively at trial but did not allege exactly in what respects counsel failed to give him effective assistance, such ground did not justify a hearing on defendant's motion to vacate judgment. Benoit v. Com. (Ky. 1966) 402 S.W.2d 706, certiorari denied 87 S.Ct. 138, 385 U.S. 870, 17 L.Ed.2d 97. Criminal Law 1655(6)

Before directing a hearing on motion to vacate judgment of conviction on ground that movant had been denied effective assistance of counsel in a criminal proceeding, trial court is entitled to know exactly in what respects movant claims counsel failed to give him effective assistance so that court can determine from face of motion whether facts intended to be proved amount to a constitutional violation. Ringo v. Com. (Ky. 1965) 391 S.W.2d 392. Criminal Law 1655(6)

When a defendant is represented by counsel of his own choosing he cannot complain that he was not properly represented. Whack v. Com. (Ky. 1965) 390 S.W.2d 161. Criminal Law 1975

No constitutional question is raised by the allegation of incompetency of counsel employed by the defendant. King v. Com. (Ky. 1965) 387 S.W.2d 582.

New procedural rule that issues unsuccessfully appealed under the palpable error rule could still give rise to a separate ineffective assistance of counsel claim did not apply to defendant's petition for postconviction relief, where portion of the decision in prior proceeding reversing and remanding certain parts of the trial court's order in postconviction proceeding did not leave the remainder of the Supreme Court's decision affirming other parts of the order non-final, and, thus, the order denying postconviction relief, having been appealed and affirmed, was final four years before the rule was announced. Mills v. Com. (Ky. 2014) 2014 WL 2809790, Unreported, rehearing denied, certiorari denied 135 S.Ct. 1711, 191 L.Ed.2d 684. Courts 100(1)

10, 36.Ineffective assistance of counsel

10.Ineffective assistance of counsel - Grounds

See Grounds - Ineffective assistance of counsel

11.Grounds - Lack of counsel

Also listed as **Lack of counsel, grounds**
The United States Supreme Court decision holding that a juvenile has constitutional right to representation by counsel in juvenile court hearing would not be given retroactive effect with respect to defendant who was over 21 when he petitioned for postconviction relief on ground that he had been denied representation by counsel at hearing which his mother attended and which dealt with charge that defendant, then 16 years old, had committed murder. Bailey v. Com. (Ky. 1971) 468 S.W.2d 304. Courts 100(1)

Accused was not deprived of his constitutional rights in not having counsel at hearing when his probation was revoked. Bowling v. Com. (Ky. 1970) 461 S.W.2d 382. Sentencing And Punishment 2014

An error in failing to provide counsel in the juvenile court cannot be reached by a motion after the juvenile has been convicted of a felony. Smith v. Com. (Ky. 1967) 412 S.W.2d 256, certiorari denied 88 S.Ct. 162, 389 U.S. 873, 19 L.Ed.2d 155.

Bare allegation in motion to vacate judgment of conviction that movant was not furnished counsel at examining trial, without allegation of prejudice flowing from such omission, was not basis for relief under statute concerned with motions to vacate judgments of conviction. Parsley v. Com. (Ky. 1966) 400 S.W.2d 202. Criminal Law 1580(10)

Preliminary hearing was not such a "critical stage of criminal proceedings" against one accused of murder that failure to afford him such hearing would justify vacation of conviction, particularly where defendant was convicted upon his plea of guilty, even though he might have derived some incidental benefit from opportunity to hear and cross-examine witnesses for commonwealth at preliminary hearing. Com. v. Watkins (Ky. 1966) 398 S.W.2d 698, certiorari denied 86 S.Ct. 1596, 384 U.S. 965, 16 L.Ed.2d 677. Criminal Law 1484

Allegations in defendant's motion to vacate judgment of conviction that he had been denied counsel throughout all proceedings culminating in judgment of conviction entitled defendant to hearing with counsel on question whether he did in fact have counsel on his trial, where court records contained nothing other than formal recitations of representation by unnamed counsel. Moore v. Com. (Ky. 1965) 394 S.W.2d 931. Criminal Law 1605; Criminal Law 1655(6)

The fact that one is tried on the same day that counsel is appointed to represent him is not a denial of due process. Collins v. Com. (Ky. 1965) 392 S.W.2d 77, certiorari denied 86 S.Ct. 171, 382 U.S. 881, 15 L.Ed.2d 121. Constitutional Law 4611

11. Lack of counsel, grounds

See Grounds - Lack of counsel

Also listed as **Lack of jurisdiction, grounds**
A prisoner is not entitled to postconviction relief on the ground of alleged improper jurisdiction where the order from the juvenile court waiving jurisdiction over him was valid when entered, and especially where the prisoner waited twenty-three years after his conviction to file the motion when the victim and witnesses are unavailable and memories dimmed, and in light of the extensive publicity and use of postconviction relief before and during the time of his trial in 1968. Hayes v. Com. (Ky.App. 1992) 837 S.W.2d 902.
Delay in sentencing an accused after conviction when occasioned at the specific request of probation by the accused is not so unreasonable as to deprive trial court of jurisdiction over the person of the accused. Payton v. Com. (Ky.App. 1980) 605 S.W.2d 37.

Absent an appeal to the Court of Appeals from a county court order waiving jurisdiction of juvenile, propriety of order may not be raised in an RCr 11.42 proceeding. Holt v. Com. (Ky. 1975) 525 S.W.2d 660.

Trial court lacked jurisdiction to rule on defendant's motion to vacate judgment, where the Supreme Court had previously denied defendant's motion to abate and had affirmed the judgment on defendant's underlying motion to set aside sentence. Haight v. Com. (Ky. 2007) 2007 WL 2404494, Unreported, rehearing denied. Criminal Law 1668(3)

12. Lack of jurisdiction, grounds

See Grounds - Lack of jurisdiction

Also listed as **Guilty pleas - Grounds**
Under rule governing motions to vacate, set aside or correct sentence, to be entitled to relief from a guilty plea, the movant must allege with particularity specific facts which, if true, would render the plea involuntary under the Due

Process Clause, would render the plea so tainted by counsel's ineffective assistance as to violate the Sixth Amendment, or would otherwise clearly render the plea invalid. Com. v. Pridham (Ky. 2012) 394 S.W.3d 867, rehearing denied, certiorari denied 134 S.Ct. 312, 571 U.S. 922, 187 L.Ed.2d 221. Criminal Law 1480; Criminal Law 1481; Criminal Law 1482

To be entitled to withdraw a guilty plea, the movant must allege with particularity specific facts which, if true, would render the plea involuntary and violative of due process, would render the plea tainted by counsel's ineffective assistance, or would otherwise clearly render the plea invalid. Stiger v. Com. (Ky. 2012) 381 S.W.3d 230. Criminal Law 274(1); Criminal Law 274(3.1); Criminal Law 274(7)

Record refuted defendant's claim that he was misinformed about the consequences of his persistent felony offender (PFO) sentence, and thus, trial court appropriately summarily dismissed defendant's motion to withdraw guilty plea to first-degree robbery; plea agreement, which defendant signed and acknowledged in court, provided as part of the Commonwealth's recommendations that defendant would receive a ten-year concurrent sentence for all of his offenses and that "that 10 year sentence would be enhanced to 20 years by the PFO I indictment," and that was precisely the sentencing agreement that the trial court's judgment reflected. Stiger v. Com. (Ky. 2012) 381 S.W.3d 230. Criminal Law 274(1); Criminal Law 274(4)

Defendant's guilty plea to murder and burglary in the first-degree was voluntary and valid; nothing in plea colloquy negated the presumption that plea was voluntary, defendant stated that he was satisfied with his attorney who had fully explained the defenses available to him, and denied that he had been coerced or induced to accept the plea agreement, and he appeared coherent, engaged, and involved during the colloquy, signed the motion to enter a guilty plea, and indicated that he read and understood its contents. Com. v. Elza (Ky. 2009) 284 S.W.3d 118. Criminal Law 273.1(4)

Defendant was not entitled to hearing on motion to vacate sentence after pleading guilty to first-degree murder and burglary on advice of counsel; defendant filed no affidavits in support of his claim of coercion and did not identify any particular instance of alleged manipulation other than defense counsel's truthful warning that the death penalty was a very real possibility, and record clearly established that plea was voluntary and plea agreement was reasonable in light of the circumstances. Com. v. Elza (Ky. 2009) 284 S.W.3d 118. Criminal Law 1655(6)

Defendant, who pled guilty to murder that he committed when he was 16 years old and who received life in prison without the possibility of parole for 25 years so as to avoid the death penalty, was not entitled to a new sentencing hearing after United States Supreme Court decision in *Roper v. Simmons* ruled that the Constitution prohibited the execution of defendants who committed capital murder before they attained age 18; the *Roper* decision applied retroactively only to cases in which the sentence of death was imposed. Sims v. Com. (Ky.App. 2007) 233 S.W.3d 731. Criminal Law 1456

Where a defendant's guilty pleas to prior convictions were valid on their face, defendant did not suggest that they were constitutionally defective, and defense counsel testified that he habitually reviewed the files of a client's prior convictions to determine whether they were knowingly, intelligently, and voluntarily made at the time, defense counsel did not render constitutionally ineffective assistance at the trial of the defendant by failing to determine whether the defendant entered the guilty pleas to his prior convictions knowingly and voluntarily. Adkins v. Com. (Ky.App. 1986) 721 S.W.2d 719.

Failure of trial court to inform defendant, before accepting guilty plea, of mandatory service of sentence before eligibility for parole was not a violation of constitutional due process nor was ground to vacate judgment. Turner v. Com. (Ky.App. 1982) 647 S.W.2d 500. Constitutional Law 4587; Criminal Law 1482

The fact that the accused entered a guilty plea before he was informed that he would be ineligible for parole is not grounds to vacate judgment and does not render the plea involuntary. Turner v. Com. (Ky.App. 1982) 647 S.W.2d 500.

Allegations in motion to set aside judgment of sentence indicating that plea of guilty was not voluntary raised an issue of fact on which defendant was entitled to a hearing. Haskins v. Com. (Ky. 1973) 500 S.W.2d 407. Criminal Law 1655(3)

Plea-bargaining to receive a light sentence does not deny constitutional rights. Davis v. Com. (Ky. 1971) 471 S.W.2d 740.

Assertion, in support of motion for postconviction relief, that guilty plea was accepted without compliance with rule was insufficient in that it fell short of affirmative statement that plea was involuntary or made without understanding of the nature of the charge. Lucas v. Com. (Ky. 1971) 465 S.W.2d 267. Criminal Law 1481

Defendant's allegations that he lacked adequate and effective assistance of counsel, that he was induced to enter a plea of guilty by trickery and that he was denied compulsory process for witnesses, without allegations of any facts on

which such conclusions were based, were insufficient to require evidentiary hearing on motion to vacate judgment. Bruner v. Com. (Ky. 1970) 459 S.W.2d 138. Criminal Law 1655(3)

Alleged pretrial irregularities cannot be raised after a plea of guilty. Thomas v. Com. (Ky. 1970) 459 S.W.2d 72.
Where defendant was indicted for storehouse breaking and for being an habitual criminal but habitual criminal charge was dismissed in return for plea of guilty to storehouse breaking charge, defendant's complaints regarding the habitual criminal charge did not furnish basis for vacating conviction and were moot. Hack v. Com. (Ky. 1970) 449 S.W.2d 762. Criminal Law 1134.26; Criminal Law 1556

The illegality of a confession is not a ground for an attack on a conviction entered upon a plea of guilty. Holcomb v. Com. (Ky. 1969) 441 S.W.2d 140.

Since defendant entered plea of guilty and since his confessions were not used against him, defendant was not entitled to have his conviction vacated on ground that the confessions were unlawfully obtained. Triplett v. Com. (Ky. 1969) 439 S.W.2d 944. Criminal Law 1434; Criminal Law 1530(1)

Where it appeared from face of motion for vacation of judgment that alleged “coercion” causing defendant to plead guilty consisted of an expectation, induced by “pressure” from sheriff and county jailer, that he would receive probated sentence and that alleged inefficacy of counsel consisted of his attorney's failure to withdraw plea of guilty when it appeared that sentence would not be probated, motion did not state grounds sufficient to require hearing. McFalls v. Com. (Ky. 1969) 439 S.W.2d 78. Criminal Law 1655(3)

The advice of counsel to enter a plea of guilty is proper and not the basis for sustaining a motion under RCr 11.42. Com. v. Campbell (Ky. 1967) 415 S.W.2d 614.

The charge of inadequate counsel, if stated with sufficient particularity, may be the basis for the granting of a hearing on a RCr 11.42 motion to vacate sentence; where, however, the defendant raises such a contention and the record shows that he pled guilty and received the minimum sentence and does not claim that he was badgered into, or did not understand the consequences of pleading, his motion may be overruled without a hearing. Lawson v. Com. (Ky. 1965) 386 S.W.2d 734, certiorari denied 85 S.Ct. 1789, 381 U.S. 946, 14 L.Ed.2d 709.

13, 37, 61. Guilty pleas

13. Guilty pleas - Grounds

See Grounds - Guilty pleas

14. Grounds - Sentencing

Also listed as **Sentencing, grounds**
It is incorrect to say that a court is without jurisdiction to impose an unauthorized sentence; rather, the imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion. Myers v. Com. (Ky. 2001) 42 S.W.3d 594. Criminal Law 1007; Criminal Law 1008; Sentencing And Punishment 225; Sentencing And Punishment 2255
Disproportionality of punishment to crime is not an appropriate reason for relief under rule governing motions to vacate, set aside, or correct sentence, as only those violations that may have a bearing on the legality or fundamental fairness of trial provide appropriate grounds for relief. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1556
Fact that three and one-half-year sentence for knowingly receiving stolen property was imposed some seven months after defendant was convicted of the offense did not entitle defendant to have the sentence vacated where the delay in sentencing was occasioned by defendant's affirmative request for probation and where the delay was not oppressive or a purposeful circumvention of the probation statutes. Payton v. Com. (Ky.App. 1980) 605 S.W.2d 37. Criminal Law 1556

Accused who was given one-year sentence and placed on probation and then given two-year sentence following revocation of probation was entitled to immediate release, assuming he had already served one-year sentence properly imposed, notwithstanding fact that he had adequate remedy under rule allowing modification or correction of judgment. Hardy v. Howard (Ky. 1970) 458 S.W.2d 764. Habeas Corpus 791

Conviction was not constitutionally infirm where, although death was among penalties authorized by statute under which defendant, who pled guilty, was convicted, statutory scheme required that jury, rather than court, fix punishment whether plea was guilty or not guilty. Ruggles v. Com. (Ky. 1970) 451 S.W.2d 634. Jury 31.3(1)

The remedy provided by RCr 11.42 is not available to attack a completely executed sentence when it is invoked as a basis for a life sentence. Wilson v. Com. (Ky. 1966) 403 S.W.2d 710.

The only possible verdicts with regard to sentence for willful murder were death or life imprisonment, and verdict, which recited that jurors fixed punishment of defendant at life imprisonment, could not be shown on motion to vacate conviction, to have provided for imprisonment for eight years. Grider v. Com. (Ky. 1966) 398 S.W.2d 496. Criminal Law 1556

14. Sentencing, grounds

See Grounds - Sentencing

15. Grounds - Mental incompetence

Also listed as **Mental incompetence, grounds**
Where only indication that defendant may have had a mental problem came from lay testimony of his aunt and a police officer, and psychiatrist who examined defendant prior to trial reported that defendant was in contact with reality and showed no symptoms of mental illness, defendant who challenged his rape conviction on sole ground he was mentally incompetent to stand trial was not entitled to have issue of his mental competence adjudicated at a hearing. Whitney v. Com. (Ky. 1972) 479 S.W.2d 620. Criminal Law 1655(5)

On motion to vacate judgment of conviction, evidence that some 15 years prior to trial defendant was adjudicated incompetent and was never judicially restored, without any evidence of mental incapacity as of time of trial, was insufficient to require vacation of judgment. Matthews v. Com. (Ky. 1971) 468 S.W.2d 313, certiorari denied 92 S.Ct. 341, 404 U.S. 966, 30 L.Ed.2d 285. Criminal Law 1618(5)

Failure to give psychiatric examination to defendant charged as a habitual criminal did not void the judgment of conviction on another charge to which defendant had pleaded guilty, and it was not a ground for setting aside judgment. Capps v. Com. (Ky. 1971) 465 S.W.2d 42. Criminal Law 1497

Allegation that judgment of conviction was void because defendant was of unsound mind at time he committed crimes was insufficient to serve as ground for vacating judgment in that it constituted plea that was properly presentable at defendant's original trial as defense to crimes. Mullins v. Com. (Ky. 1970) 454 S.W.2d 689. Criminal Law 1465

Evidence, including testimony of court-appointed attorney on original trial that he had suggested to defendant that he stare vacantly at ceiling in presence of jury in an effort to bolster his claim of insanity, supported finding of court that defendant had mental competence to stand trial in October 1962 when he was tried and convicted of armed robbery. Conner v. Com. (Ky. 1968) 430 S.W.2d 321. Criminal Law 1618(5)
Claim of insanity at time crime was committed is defense which must be presented at trial, and, unlike claim of insanity at time of trial, is not a ground for vacating a judgment by post-conviction procedure. Hearon v. Wingo (Ky. 1967) 411 S.W.2d 461. Criminal Law 1465; Criminal Law 1498
Where the sanity of the accused was an issue at the trial, it cannot be raised by a motion under RCr 11.42. Conners v. Com. (Ky. 1966) 400 S.W.2d 519, certiorari denied 87 S.Ct. 722, 385 U.S. 1012, 17 L.Ed.2d 549.

Allegations which were made by defendant, convicted of several counts of armed robbery upon guilty plea, in his motion to vacate judgment and which stated that at time alleged crimes were committed and at time of trial defendant was insane and that his counsel was aware of it and documentary evidence filed with motion entitled defendant to a hearing on his motion. Barnes v. Com. (Ky. 1965) 397 S.W.2d 44. Criminal Law 1655(5)

Refusal to vacate judgment of conviction on ground that at time of commission of offense charged and at time of trial defendant was insane was not error, where only evidence on issue of defendant's sanity at time of commission of offense and time of trial in 1961 was public record of insanity judgments rendered in 1944 and 1946. Wagner v. Com. (Ky. 1964) 379 S.W.2d 731. Criminal Law 1618(5)

In the absence of a hearing on a defendant's mental capacity to plead after he has been adjudged of unsound mind, a prisoner, upon a post conviction proceeding, would be entitled to relief upon a showing that at time he entered his

plea or was tried he did not have sufficient mental competence to defend himself. Com. v. Strickland (Ky. 1964) 375 S.W.2d 701. Criminal Law 1498; Judgment 751

15.Mental incompetence, grounds

See Grounds - Mental incompetence

16.Evidence, generally, grounds

Also listed as **Grounds - Evidence, generally**
Defense counsel was not ineffective in failing to introduce, as evidence in mitigation in death penalty sentencing phase, a letter written by defendant in which he admitted committing murders, expressed sorrow at having caused pain and suffering, and expressed desire to die for having done so; defense counsel stated a desire not to reemphasize defendant's guilt phase testimony to the jury. Haight v. Com. (Ky. 2001) 41 S.W.3d 436, certiorari denied 122 S.Ct. 471, 534 U.S. 998, 151 L.Ed.2d 386. Criminal Law 1961

Defendant had full benefit of mental health evaluations and experts during trial, and thus was not entitled to funding for expert assistance in neuropsychology, even though expert offered by defendant said that there was high degree of certainty that it was possible that defendant may suffer from brain damage which may be material in a defense based upon extreme emotional disturbance, where opinion was mere speculation. Haight v. Com. (Ky. 2001) 41 S.W.3d 436, certiorari denied 122 S.Ct. 471, 534 U.S. 998, 151 L.Ed.2d 386. Costs 302.4

Defendant was not entitled to postconviction relief based on assertion that prosecutor met with prosecution witnesses prior to trial, provided them with portions of discovery and instructed them on testimony, where postconviction counsel did not introduce any evidence to substantiate allegation at evidentiary hearing. Foley v. Com. (Ky. 2000) 17 S.W.3d 878, modified on denial of rehearing, certiorari denied 121 S.Ct. 663, 531 U.S. 1055, 148 L.Ed.2d 565. Criminal Law 1618(9)

Defendant was not entitled to postconviction relief based on alleged letter from wife, which indicated that she became pregnant by state police officer and that another police officer had given her money, even though defense counsel did not cross-examine wife about letter or about relationships with either of two police officers, where defendant did not state when he received letter, nor did he indicate when trial counsel became aware of letter during trial, and defendant, in testimony for own defense, made no mention of letter. Foley v. Com. (Ky. 2000) 17 S.W.3d 878, modified on denial of rehearing, certiorari denied 121 S.Ct. 663, 531 U.S. 1055, 148 L.Ed.2d 565. Criminal Law 1519(10)

Counsel's failure to present evidence of intoxication, consisting of photographs of track marks on accused's arms, in accused's second trial for capital murder, after presenting similar evidence at accused's first trial, was sound trial strategy that did not rise to the level of ineffective assistance; evidence was presented in second trial through the introduction of accused's own testimony and the testimony of witness, both of whom told the jury about accused's drug use on the night before the murder, and one of accused's attorneys testified that he chose not to use the photographs because they were of poor quality and did not clearly indicate the presence of track marks. Moore v. Com. (Ky. 1998) 983 S.W.2d 479, as amended, rehearing denied, certiorari denied 120 S.Ct. 110, 528 U.S. 842, 145 L.Ed.2d 93. Criminal Law 1933

Allegations that trial defense counsel failed to properly investigate possibility of asserting extreme emotional disturbance (EED) defense in capital murder trial did not demonstrate ineffective assistance of counsel, where evidence regarding EED was before trial court at end of penalty phase and was not even sufficient to warrant instruction on EED as mitigating factor. Bowling v. Com. (Ky. 1998) 981 S.W.2d 545, rehearing denied, certiorari denied 119 S.Ct. 2375, 527 U.S. 1026, 144 L.Ed.2d 778. Criminal Law 1892

General complaint that government committed misconduct by failing to disclose exculpatory evidence or information did not entitle defendant to vacation of his death sentence for intentional murder or consecutive 95-year sentences for kidnapping, first-degree rape, and first-degree sodomy; audio tapes of witness interviews that Commonwealth's attorney allegedly destroyed were made available to defense at retrial, prior to retrial defense counsel was aware of those matters defendant claimed the prosecution improperly withheld, defendant should have raised or actually did raise certain allegations of misconduct on direct appeal, and there was overwhelming evidence of defendant's guilt. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1505

Defendant's self-serving claim that he was not person who shot murder victim was not “exculpatory evidence” for purposes of claimed *Brady* discovery violation. McQueen v. Com. (Ky. 1997) 948 S.W.2d 415, certiorari denied 117 S.Ct. 2535, 521 U.S. 1130, 138 L.Ed.2d 1035. Criminal Law 2001

Totality of circumstances surrounding original criminal trial and subsequent Rule 11.42 hearing provides ample evidence of trial court's opportunity to see witnesses and observe their demeanor, and recognition must be given to court's superior position to judge witnesses' credibility and weight to be given their testimony. McQueen v. Com. (Ky. 1986) 721 S.W.2d 694, certiorari denied 107 S.Ct. 2203, 481 U.S. 1059, 95 L.Ed.2d 858. Criminal Law 1158.30
Assertions that petitioner had been convicted on uncorroborated testimony of accomplice and that he had been questioned improperly on cross-examination were not grounds for postconviction relief. Page v. Com. (Ky. 1969) 446 S.W.2d 552. Criminal Law 1534; Criminal Law 1544

Introduction, in armed robbery prosecution, of written statement made by co-defendant after arrest confessing his guilt and implicating defendant did not justify post conviction relief of defendant in view of positive identification of defendant by victim of robbery and arrest of defendant in his home where brief bag fitting description of one used in robbery was found. Polsgrove v. Com. (Ky. 1969) 439 S.W.2d 776. Criminal Law 1528

Contention that defendants were convicted on false evidence of named witness stated no grounds for relief under rule relating to vacation of judgments. Hargrove v. Com. (Ky. 1965) 396 S.W.2d 75. Criminal Law 1537

The issue as to whether one was convicted by the uncorroborated testimony of an accomplice cannot be raised by motion under RCr 11.42. Henry v. Com. (Ky. 1965) 391 S.W.2d 355.

Expert testimony about professional requirements established six years after capital murder trial and discovery of experts who would testify favorably 20 years after trial could not establish in postconviction proceeding that trial counsel provided ineffective assistance in presenting expert testimony, and particularly by failure to provide life history records to forensic psychiatrist who was available, considering additionally that none of the records were presented at postconviction hearing. Willoughby v. Com. (Ky. 2006) 2006 WL 3751392, Unreported, rehearing denied, certiorari denied 128 S.Ct. 650, 552 U.S. 1043, 169 L.Ed.2d 517. Criminal Law 1618(10)

16.Grounds - Evidence, generally

See Evidence, generally, grounds

17.Grounds - Newly discovered evidence

Also listed as **Newly discovered evidence, grounds**
Newly discovered evidence is not a ground for relief under RCr 11.42. Fannin v. Com. (Ky. 1965) 394 S.W.2d 897; Parsley v. Com. (Ky. 1966) 400 S.W.2d 202; Perkins v. Com. (Ky. 1964) 382 S.W.2d 393.
Newly discovered evidence that defendant offers as “proof” of his innocence of murder and ineligibility for death sentence is ground only for new trial, and is not basis for court to commute sentence from death to life without benefit of parole. McQueen v. Com. (Ky. 1997) 948 S.W.2d 415, certiorari denied 117 S.Ct. 2535, 521 U.S. 1130, 138 L.Ed.2d 1035. Criminal Law 938(1); Sentencing And Punishment 2265
Newly discovered evidence relating to issue of guilt does not constitute a ground for granting relief under statute relating to vacation of judgment of conviction. Roark v. Com. (Ky. 1966) 404 S.W.2d 22. Criminal Law 1536
A motion to vacate judgment of conviction on grounds that movant was denied preliminary hearing and that he had newly discovered evidence relating to issue of guilt was properly overruled without a hearing where there was no intimation of prejudice and there was no suggestion of nature of the newly discovered evidence. Roark v. Com. (Ky. 1966) 404 S.W.2d 22. Criminal Law 1655(1)
Newly discovered evidence is not ground for relief under the rule relating to motion to vacate judgment. Bell v. Com. (Ky. 1965) 395 S.W.2d 784, certiorari denied 86 S.Ct. 640, 382 U.S. 1020, 15 L.Ed.2d 535. Criminal Law 1536

Capital murder defendant was not entitled to an evidentiary hearing regarding additional mitigation witnesses claimed in his motion to alter, amend, or vacate judgment denying his motion for post-conviction relief, insofar as witnesses were named in large group of documents prepared for postconviction motion and thus could not qualify as newly discovered. Willoughby v. Com. (Ky. 2006) 2006 WL 3751392, Unreported, rehearing denied, certiorari denied 128 S.Ct. 650, 552 U.S. 1043, 169 L.Ed.2d 517. Criminal Law 1655(6)

17.Newly discovered evidence, grounds

See Grounds - Newly discovered evidence

18.Grounds - Sufficiency of evidence

Also listed as **Sufficiency of evidence, grounds**
Where defendant who was convicted of armed robbery and willful murder made no motion for directed verdict of acquittal either at close of commonwealth's case or at close of all the evidence and first mention of sufficiency of evidence to convict appeared in defendant's motion to vacate conviction and grounds for new trial, issue as to sufficiency of evidence was not preserved for review. Minor v. Com. (Ky. 1971) 478 S.W.2d 716, certiorari denied 93 S.Ct. 563, 409 U.S. 1064, 34 L.Ed.2d 517, certiorari denied 94 S.Ct. 1439, 415 U.S. 929, 39 L.Ed.2d 487. Criminal Law 1044.1(7)

Illegal arrest and insufficiency of evidence are not basis for postconviction relief. Johnson v. Com. (Ky. 1971) 473 S.W.2d 823. Criminal Law 1475; Criminal Law 1534

Insufficient evidence is not proper ground for postconviction relief. Bartley v. Com. (Ky. 1971) 463 S.W.2d 321. Criminal Law 1534

Insufficiency of evidence to support conviction is not a ground for relief in proceeding to vacate judgment of conviction. Newberry v. Com. (Ky. 1970) 451 S.W.2d 670. Criminal Law 1534

Sufficiency of evidence presented against defendant at his trial could not be raised in a postconviction proceeding. Nickell v. Com. (Ky. 1970) 451 S.W.2d 651. Criminal Law 1534

The sufficiency of evidence or errors in the instructions cannot be reviewed upon a motion. Boles v. Com. (Ky. 1966) 406 S.W.2d 853.

Failure of the court to instruct in writing and the insufficiency of the evidence cannot be reviewed on a motion under RCr 11.42. Davenport v. Com. (Ky. 1965) 390 S.W.2d 662, certiorari denied 86 S.Ct. 1278, 383 U.S. 970, 16 L.Ed.2d 310.

18.Sufficiency of evidence, grounds

See Grounds - Sufficiency of evidence

Also listed as **Perjured testimony, grounds**
Perjured testimony will not be a basis for impeaching a jury verdict in a proceeding under RCr 11.42, and therefore the issue whether a discrepancy between a juvenile witness' testimony at a criminal trial for sodomy, sexual abuse, and distribution of obscene matter to a minor and his testimony in a subsequent civil lawsuit exonerated the defendant is not a justiciable issue in a postconviction proceeding on a motion to vacate, set aside, or correct a sentence. Com. v. Basnight (Ky.App. 1989) 770 S.W.2d 231.
Affidavit of complaining witness that she did not have intercourse with defendant charged with carnal knowledge of child under 16 and that she signed complaint because officials had threatened to send her to reform school was not ground for vacation of judgment where grand jury's records showed that witness' mother and brother testified that victim had been forced to have sexual relations with defendant, so that there was incriminating evidence available without victim's testimony. Hendrickson v. Com. (Ky. 1970) 450 S.W.2d 234. Criminal Law 1618(12)
Alleged conviction on perjured testimony was not a ground on which relief was available under rule providing for a motion to set aside a judgment of conviction. Fields v. Com. (Ky. 1966) 408 S.W.2d 638. Criminal Law 1537

19.Perjured testimony, grounds

See Grounds - Perjured testimony

20.Defective indictment, grounds

Also listed as **Grounds - Defective indictment**
Where grand jury returned four-count indictment charging, in first count, storehouse breaking and charging, in other counts, prior felony convictions, and where Commonwealth, at time of arraignment, amended the indictment to storehouse breaking with only one felony conviction, the penalty of ten years as fixed by the jury following return of guilty verdict was proper, notwithstanding defendant's claim that his sentence should not have exceeded four years because the second count of his amended indictment should have charged his first conviction for which he had received just a two-year sentence, not, as was elected by state, a later conviction for which he had received a five-year sentence. Newton v. Com. (Ky. 1972) 487 S.W.2d 950. Sentencing And Punishment 1404

Claim on petition for postconviction relief that indictment was not signed by foreman of grand jury was refuted by record. Satterly v. Com. (Ky. 1969) 441 S.W.2d 144. Criminal Law 1618(2)

Claim of ineffective aid of counsel was not ground for vacating judgment where such claim was based on argument that indictment was void and indictment was found to be sufficient. Whitworth v. Com. (Ky. 1969) 437 S.W.2d 731. Criminal Law 1519(7)

A defect in the indictment cannot be raised by a motion under RCr 11.42. Ramsey v. Com. (Ky. 1966) 399 S.W.2d 473, certiorari denied 87 S.Ct. 126, 385 U.S. 865, 17 L.Ed.2d 93.

A defect in the indictment, short of one that completely vitiates it, does not affect the validity of the conviction. Davenport v. Com. (Ky. 1965) 390 S.W.2d 662, certiorari denied 86 S.Ct. 1278, 383 U.S. 970, 16 L.Ed.2d 310. Indictments And Charging Instruments 323

Defects in the indictment will not support a collateral attack. Jones v. Com. (Ky. 1965) 388 S.W.2d 601.
A motion to vacate the judgment on the ground that the indictment did not state the section number of the statute and that no notice was given to the commissioner of mental health, does not state grounds for relief, and may be overruled without a hearing or the appointment of counsel. Lairson v. Com. (Ky. 1965) 388 S.W.2d 592.

Defects in the indictment will not support a collateral attack upon a judgment of conviction. Warner v. Com. (Ky. 1964) 385 S.W.2d 77. Criminal Law 1478

20.Grounds - Defective indictment

See Defective indictment, grounds

21.Grounds - Improper venue

Also listed as **Improper venue, grounds**
Inasmuch as trial court some years before in connection with change of venue petition had had before it the very adverse publicity invoked subsequently to justify setting aside petitioner's conviction and there was no charge that trial judge had acted from improper motive in overruling change of venue motion and it was conceded that all forms of fair trial were followed, vacation of conviction because of such publicity was not warranted. Wolfe v. Com. (Ky. 1968) 431 S.W.2d 859. Criminal Law 1433(1)
An allegation that defendant was denied a fair trial because of publicity may be reviewed upon a motion. Baldwin v. Com. (Ky. 1966) 406 S.W.2d 860.
A conviction is not subject to collateral attack by way of a RCr 11.42 motion to vacate sentence based on an insufficiency of proof of venue. Warner v. Com. (Ky. 1964) 385 S.W.2d 62. Criminal Law 1534
The insufficiency of proof of venue at the trial is not grounds for setting the judgment aside. (See also Higbee v Thomas, 376 SW(2d) 305 (Ky 1963) for a clarification of the Tipton case.) Tipton v. Com. (Ky. 1963) 376 S.W.2d 290.

21.Improper venue, grounds

See Grounds - Improper venue

22.Defective judgment, grounds

Also listed as **Grounds - Defective judgment**
When defendant is charged as persistent felony offender (PFO), it is incumbent upon defendant to challenge validity of prior conviction within the PFO proceeding, and if defendant fails to do so, validity of conviction is final and cannot be challenged in subsequent proceeding to vacate judgment. Graham v. Com. (Ky. 1997) 952 S.W.2d 206. Criminal Law 1429(1)

A judgment, defective in form, is not void. Hall v. Com. (Ky. 1972) 503 S.W.2d 503.

Resume of the judgment and orders of court concerning the conviction sufficed to show that the judgment of conviction, though defective as to form for not compactly complying with rule requirements, was not invalid in the sense of being void. Hall v. Com. (Ky. 1972) 503 S.W.2d 503. Criminal Law 995(1)

Provision of judgment, directing that three two-year terms for three offenses of forgery be served consecutively, was valid, although judgment had been pronounced sentencing defendant to serve three terms concurrently, where before

judgment was signed or entered, defendant had been released on bond pending convenience of sheriff for transportation to penitentiary and defendant had absconded and was not reapprehended until more than eight months later, at which time judgment was signed and entered sentencing defendant to serve terms consecutively. Evans v. Com. (Ky. 1970) 453 S.W.2d 601. Sentencing And Punishment 585

The judgment is not void where the sentence is fixed by the judge without the intervention of a jury. Ingram v. Wingo (Ky. 1969) 440 S.W.2d 264.

Judgment which was not void was not subject to attack by motion to vacate same. Hicks v. Com. (Ky. 1965) 388 S.W.2d 568. Criminal Law 1558

Where trial court sentenced defendant to imprisonment for five years under indictment No. 5976, and to imprisonment for one year under indictment No. 5977, but order of sentence read: "At the termination of §5976 he will begin his sentence of one (1) year on §5976.", the quoted portion contained a clerical misprision so that defendant was not entitled to vacation of conviction under indictment No. 5977. Koonze v. Com. (Ky. 1964) 378 S.W.2d 804. Criminal Law 1558

The postconviction court's adoption of the Commonwealth's proposed findings of fact and conclusions of law did not violate the criminal rule that provided "[a]t the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter a final order accordingly"; the court confirmed that it looked at the order, determined that it covered every item that needed to be covered, and was consistent with the court's decision before it was adopted. Fields v. Commonwealth (Ky. 2014) 2014 WL 7688714, Unreported, rehearing denied, certiorari denied 136 S.Ct. 798, 193 L.Ed.2d 723. Criminal Law 1660

22.Grounds - Defective judgment

See Defective judgment, grounds

23-27.Filing

23.Filing - In general

Trial court did not have jurisdiction to adjudicate defendant's motion for postconviction relief, where defendant failed to file motion within three-year statute of limitations, and failed to meet elements required to toll the statute. Bush v. Com. (Ky.App. 2007) 236 S.W.3d 621. Criminal Law 1586

Defendant who chooses not to file for postjudgment relief from his conviction and death sentence is not entitled to stay of execution of his sentence. Bowling v. Com. (Ky. 1998) 964 S.W.2d 803, rehearing denied. Sentencing And Punishment 1798

Defendant who chooses not to file for postjudgment relief from his conviction and sentence is not entitled to funds for investigations or "fishing expeditions." Bowling v. Com. (Ky. 1998) 964 S.W.2d 803, rehearing denied. Costs 302.3

Motion to vacate, set aside, or correct sentence must be filed in an expeditious manner and is subject to amendment, if appropriate, with leave of court. Bowling v. Com. (Ky. 1996) 926 S.W.2d 667, modified on rehearing, rehearing denied, certiorari denied 116 S.Ct. 1855, 517 U.S. 1223, 134 L.Ed.2d 955. Criminal Law 1575; Criminal Law 1586

Motion to vacate judgment was premature where motion for new trial was pending. Dawson v. Com. (Ky. 1973) 498 S.W.2d 128. Criminal Law 1586

In proceeding on motion to vacate judgment because of alleged denial of effective assistance of counsel, no matter how unfounded claim may be and even though court knows it is not true, if on its face claim states a valid basis for relief the bare essentials of opportunity to litigate claim are: (1) effective assistance of counsel, (2) a hearing, (3) a determination of material facts, followed by judgment based on that determination, (4) a transcript of record including the hearing in event he appeals, and (5) an appeal. Coles v. Com. (Ky. 1965) 386 S.W.2d 465. Criminal Law 1602; Criminal Law 1652

24.Filing - Time

Also listed as **Time - Filing**

Three year period for defendant to file motion for post-conviction relief alleging ineffective assistance of counsel began to run on date he was sentenced to probated 20-year sentence, rather than when probation was revoked and sentence was imposed, and thus motion, which was filed more than three years after date of sentencing, was untimely; defendant did not allege any exceptions applied to toll the time period, and order amending the judgment in one of defendant's cases did not have any effect on the running of the three-year period in which he could have sought relief. Clark v. Commonwealth (Ky.App. 2015) 476 S.W.3d 895. Criminal Law 1586

Inmate's post-conviction claim, alleging ineffective assistance of counsel for three convictions, which caused entry of enhanced federal sentence for additional crime, accrued, at the latest, when he received enhanced federal sentence. King v. Com. (Ky.App. 2012) 384 S.W.3d 193. Criminal Law 1586

Amended motion to vacate, set aside, or correct sentence was untimely unless its claims arose from the same conduct, transaction, or occurrence that defendant set forth or attempted to set forth in his original motion; the amended motion was not proffered until more than one and one-half years after the expiration of the three-year limitations period for filing a motion to vacate, set aside, or correct sentence after the judgment became final. Roach v. Com. (Ky. 2012) 384 S.W.3d 131, rehearing denied. Criminal Law 1586

Even amendments to a motion to vacate, set aside, or correct sentence within the three-year limitations period for filing such a motion are subject to scrutiny on the basis of unreasonable delay. Roach v. Com. (Ky. 2012) 384 S.W.3d 131, rehearing denied. Criminal Law 1586

Judgment became final, so that limitations period for bringing postconviction motion to vacate sentence began to run, when defendant, who had been a youthful offender at time of negotiated *Alford* plea of guilty but mentally ill with respect to three counts of murder, five counts of attempted murder, and first-degree burglary, was sentenced to life without possibility of parole for 25 years, rather than at time of defendant's 18-year-old hearing; at sentencing, all issues relating to guilt and the sentence were adjudicated, and at 18-year-old hearing the circuit court, under the statute in effect at time of hearing, did not have the option of ordering probation or conditional discharge, nor did it have the ability to return the defendant to juvenile custody so that he could complete a treatment program whereupon he would be finally discharged, and instead, by virtue of the sentence itself, the circuit court's only option was to transfer the defendant to adult custody. Com. v. Carneal (Ky. 2008) 274 S.W.3d 420, rehearing denied, certiorari denied 130 S.Ct. 274, 558 U.S. 906, 175 L.Ed.2d 184. Criminal Law 1586

Defendant's schizophrenia, which allegedly had rendered him incompetent, as youthful offender, to enter a negotiated *Alford* plea of guilty but mentally ill with respect to three counts of murder, five counts of attempted murder, and first-degree burglary, was not a fact unknown to defendant or which he could not have discovered with due diligence, as would delay commencement of limitations period for postconviction motion to vacate sentence; the plea itself reflected awareness of a mental deficiency, and the defendant had been diagnosed with schizotypal personality disorder before he entered the plea, which was a very grave diagnosis, though such disorder was less severe than schizophrenia. Com. v. Carneal (Ky. 2008) 274 S.W.3d 420, rehearing denied, certiorari denied 130 S.Ct. 274, 558 U.S. 906, 175 L.Ed.2d 184. Criminal Law 1586

Good cause was not demonstrated so as to establish that justice required that petitioner's motions for leave to file an amendment to his post-conviction relief motion should have been granted; motion for extension offered no specific facts or particular amendments, defense counsel were on practical notice that they needed to move expeditiously after a certiorari petition to United States Supreme Court was denied, since defendant had obtained limited stay of execution to file certiorari. Hodge v. Com. (Ky. 2003) 116 S.W.3d 463, as amended, rehearing denied, certiorari denied 124 S.Ct. 1619, 541 U.S. 911, 158 L.Ed.2d 258. Criminal Law 1575

Criminal procedure rule governing post-conviction relief petitions does not establish any right on the part of an accused sentenced to death to delay the filing of his motion for post-conviction relief. Hodge v. Com. (Ky. 2003) 116 S.W.3d 463, as amended, rehearing denied, certiorari denied 124 S.Ct. 1619, 541 U.S. 911, 158 L.Ed.2d 258. Criminal Law 1586

Supreme Court would not revisit issue of whether requirement to file postconviction relief motion within three years after final judgment in state Supreme Court provided death-sentenced defendant with adequate time to prepare postconviction relief motion, where defendant had 14 months after final state judgment to prepare his motion and he did not identify any issue he would have raised but for time constraints. Baze v. Com. (Ky. 2000) 23 S.W.3d 619, rehearing denied, certiorari denied 121 S.Ct. 1109, 531 U.S. 1157, 148 L.Ed.2d 979. Criminal Law 1134.85

There was no valid reason for circuit court to grant defendant additional time to prepare postconviction relief motion, where defendant had sufficient time to prepare issues for motion, defendant started preparing for his hearing approximately one year before the evidentiary hearing would eventually be scheduled, defendant and lawyers were well aware of what was coming and had commendable foresight to begin preparations even before direct appeal was affirmed, and defendant was unable to identify with particularity any witnesses or evidence that he would have been

able to present with continuance. Foley v. Com. (Ky. 2000) 17 S.W.3d 878, modified on denial of rehearing, certiorari denied 121 S.Ct. 663, 531 U.S. 1055, 148 L.Ed.2d 565. Criminal Law 1586

Time for filing motion to vacate conviction and sentence runs from appellate court's judgment on direct appeal, rather than from trial court's filing of judgment of conviction. Palmer v. Com. (Ky.App. 1999) 3 S.W.3d 763. Criminal Law 1586

Counsel's discovery that there was entry in police investigative file indicating that defendant claimed several days after robbery and murder that it was not he, but his half-brother, who actually killed victim, occurred more than one year after conviction and more than one year before defendant sought extraordinary postconviction relief or relief from judgment and death sentence and, thus, motion for relief from judgment was untimely. McQueen v. Com. (Ky. 1997) 948 S.W.2d 415, certiorari denied 117 S.Ct. 2535, 521 U.S. 1130, 138 L.Ed.2d 1035. Criminal Law 1586

Statute requiring motion to vacate, set aside, or correct sentence to be filed within three years after judgment becomes final serves only as outer time limit on bringing such actions and in no way affects prerogatives of Governor with respect to enforcement of criminal judgments and signing of death warrants. Bowling v. Com. (Ky. 1996) 926 S.W.2d 667, modified on rehearing, rehearing denied, certiorari denied 116 S.Ct. 1855, 517 U.S. 1223, 134 L.Ed.2d 955. Sentencing And Punishment 1795

Filing notice of intent to file motion to vacate, set aside, or correct sentence cannot serve as basis for circuit court to issue stay of sentence of execution, even if injunction or restraining order is sought; action must be commenced or pending before court can issue such an order. Bowling v. Com. (Ky. 1996) 926 S.W.2d 667, modified on rehearing, rehearing denied, certiorari denied 116 S.Ct. 1855, 517 U.S. 1223, 134 L.Ed.2d 955. Sentencing And Punishment 477

When trial court entered judgment sentencing defendant, judgment became final once ten days had passed with no action taken to alter, amend, or vacate it, and thus trial court's later judgment purporting to amend its earlier judgment was nullity, because court had lost jurisdiction over case, despite court's calling earlier judgment a “final hearing,” rather than a judgment. Com. v. Marcum (Ky. 1994) 873 S.W.2d 207. Criminal Law 996(2)
After being convicted of being a persistent felony offender, defendant would not be permitted to, for the first time, attack 12-year-old convictions by postconviction motion in hopes of doing away with underpinning for his persistent felony conviction. Ray v. Com. (Ky.App. 1982) 633 S.W.2d 71. Criminal Law 1586

It was too late to claim in 1972 on motion to vacate judgment and sentence that counsel did not advise defendant of his right to appeal at the time of his 1940 conviction, since there was no requirement in 1940 that a defendant be so advised and since such lawyer had been dead for many years. King v. Com. (Ky. 1972) 487 S.W.2d 683. Criminal Law 1519(15)

Pro se indigent defendant's untimely notice of appeal from denial of motion to vacate sentence did not warrant the harsh penalty of automatic dismissal, and thus appeal would be considered on the merits, where original motion to proceed in forma pauperis and notice of appeal were timely filed, although defendant should have appealed that denial to the Court of Appeals, he did not unduly delay appellate procedure when he moved for reconsideration within fifteen days, trial court considered motion to reconsider on the merits and granted it, and ultimately, the notice of appeal was untimely by a mere eleven days. Turner v. Com. (Ky. 2009) 2009 WL 2707220, Unreported, on remand 2010 WL 2132676. Criminal Law 1081(6)

24, 32.Time

24.Time - Filing

See Filing - Time

25.Filing - Tolling

Also listed as **Tolling, filing**
Relation back in the context of a motion to vacate sentence should be limited to amended pleadings amplifying and clarifying the original claims, and to amendments adding claims only if the new, otherwise untimely claims are related to the original ones by shared facts such that the claims can genuinely be said to have arisen from the same conduct, transaction, or occurrence; new claims based on facts of a different time or type will not meet that standard and so,

generally, should not be allowed. Haley v. Commonwealth (Ky.App. 2019) 2019 WL 1966807, review denied. Criminal Law 1586

The existence of a mental disability that serves to toll the limitations period for filing a petition for postconviction relief is a question of fact. Stacey v. Com. (Ky.App. 2004) 2004 WL 691760, as modified, review granted, reversed 177 S.W.3d 813. Criminal Law 1586

Untimely amended motion to vacate, set aside, or correct sentence did not qualify for equitable tolling of the three-year limitations period for filing such a motion, even assuming that equitable tolling could ever apply to an untimely motion to vacate, set aside, or correct sentence, even though defendant diligently filed his original motion within two months after the Supreme Court's decision to affirm his convictions on direct appeal became final; defendant then failed, for more than four years as the end of the limitations period came and went, to make any inquiry of the court or of counsel as to why his motion had not been amended and his case moved forward, which was not a diligent pursuit of his rights. Roach v. Com. (Ky. 2012) 384 S.W.3d 131, rehearing denied. Criminal Law 1586

Defendant's schizophrenia did not warrant equitable tolling of limitations period for filing a postconviction motion to vacate sentence, relating to conviction, pursuant to a negotiated *Alford* plea of guilty but mentally ill, entered by defendant as youthful offender, with respect to three counts of murder, five counts of attempted murder, and first-degree burglary; consistent with such disorder, defendant had experienced temporary periods of mental incompetence since the time of the offenses but had not been totally incompetent for the uninterrupted duration, and he had been aware of his mental disability for many years and had actively sought treatment. Com. v. Carneal (Ky. 2008) 274 S.W.3d 420, rehearing denied, certiorari denied 130 S.Ct. 274, 558 U.S. 906, 175 L.Ed.2d 184. Criminal Law 1586

Defendant, who filed an out of time motion for post-conviction relief that claimed that his plea was invalid since he suffered from diminished mental capacity, failed to establish that he was entitled to equitable tolling of the three year limitations period for filing a motion for post-conviction relief; psychologist report defendant submitted in support of his claim did not address defendant's mental status at the time of his plea or during the statutory time period in which he was required to file the post-conviction relief motion, and defendant failed to present any evidence that his alleged mental incapacity was either unknown to him or could not have been ascertained by him by the exercise of due diligence during the limitations period. Com. v. Stacey (Ky. 2005) 177 S.W.3d 813. Criminal Law 1586

Defendant, who filed an out of time motion for post-conviction relief that claimed that his plea was invalid since he suffered from diminished mental capacity, was not entitled to toll the three-year limitations period for filing a motion for post-conviction relief; psychologist report defendant submitted in support of his claim did not address defendant's mental status at the time of his plea or during the statutory time period in which he was required to file the post-conviction relief motion, and defendant failed to present any evidence that his alleged mental incapacity was either unknown to him or could not have been ascertained by him by the exercise of due diligence during the limitations period. Com. v. Stacey (Ky. 2005) 177 S.W.3d 813. Criminal Law 1586

"Equitable tolling rule" having been deemed applicable to cases in which prisoners seek, belatedly, postconviction relief, when they have done all that could be reasonably expected to get the motion to its destination within the required time limit, remand was necessary for trial court to conduct evidentiary hearing to determine whether three-year period of limitation was equitably tolled in case in which defendant claimed that, despite his delivery to prison officials a properly prepared and addressed pro se motion to vacate, set aside, or correct his sentence, motion was not filed in trial court until 20 days later, by which time motion was 14 days beyond expiration of limitations period; Supreme Court refused to adopt "prison mailbox rule," which would have considered defendant's motion "filed" upon its delivery to prison authorities. Robertson v. Com. (Ky. 2005) 177 S.W.3d 789. Criminal Law 1181.5(3.1)

Supreme Court would treat post-conviction movant's appeal from denial of his motion to vacate, set aside, or correct sentence as timely, despite fact that technically correct reading of applicable civil and criminal rules dictated that movant's filing of civil motion with respect to motion under criminal rules to vacate, set aside, or correct sentence did not toll 30-day period for filing notice of appeal applicable to criminal motion, where movant reasonably relied upon incomplete analysis undertaken in prior Supreme Court cases for proposition that filing of civil motion tolled appeals period for criminal motion, and where sentence which was subject of criminal motion was one of death; abrogating *Turner v. Commonwealth*, 2004 WL 758285. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1081(6)

25. Tolling, filing

See Filing - Tolling

26. Civil motion, filing

Also listed as **Filing - Civil motion**
Under the civil rules concerning appellate procedure, the filing of a motion to alter, amend, or vacate judgment suspends the running of the time for an appeal, and the entry of an order overruling such motion resets the time for appeal, so that a party has the full 30 days to begin the appeals process; however, such suspension is not an inherent aspect of the rule governing motions to alter, amend, or vacate judgment, but arises solely from the action of another specific civil rule concerning appellate procedure. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Appeal And Error 346.2

Until such time as the criminal or civil rules are amended, the filing of a civil motion to alter, amend, or vacate judgment will not suspend the running of the time for filing a notice of appeal in a criminal proceeding, and such interpretation of the rules governing the interplay between the civil rule governing motions to alter, amend, or vacate judgment and the criminal rule governing motions to vacate, set aside, or correct sentence shall be applicable in all future cases. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1081(6)

Civil motion to alter, amend, or vacate judgment can be filed in a criminal case, but such a filing has no real effect, because the time for an appeal still runs after the filing of such a motion; because the provisions of the civil rules that allow for suspension of the time for appeal upon the filing of a civil motion to alter, amend, or vacate judgment do not apply to criminal cases and there is no analogous provision in the criminal rules, the filing of such a motion after a trial court has ruled on a motion to vacate, set aside, or correct sentence under the criminal rules does not suspend the running of the time for an appeal. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1069(1)

Post-conviction movant's timely filing of motion, under rules of civil procedure, seeking to alter, amend, or vacate post-conviction court's denial of his motion, under rules of criminal procedure, to vacate, set aside, or correct his sentence of death did not suspend running of 30-day time period for notice of appeal from denial of his motion as set forth in rules of criminal procedure. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1081(6)

26.Filing - Civil motion

See Civil motion, filing

27.Filing - Proper court

Also listed as **Proper court, filing**
Defendant could not collaterally attack prior conviction for a capital offense, during penalty phase of prosecution for capital murder, through motion to vacate sentence of prior capital conviction, where the motion was pending at the time of trial, and defendant was being tried in a different court than the one that imposed the prior capital sentence. Hodge v. Com. (Ky. 2000) 17 S.W.3d 824, modified on denial of rehearing, certiorari denied 121 S.Ct. 581, 531 U.S. 1018, 148 L.Ed.2d 498, denial of post-conviction relief affirmed 116 S.W.3d 463, as amended, rehearing denied, certiorari denied 124 S.Ct. 1619, 541 U.S. 911, 158 L.Ed.2d 258, habeas corpus denied 2006 WL 1895526, affirmed 579 F.3d 627, rehearing and rehearing en banc denied, certiorari denied 130 S.Ct. 2107, 176 L.Ed.2d 736, rehearing denied 130 S.Ct. 3407, 177 L.Ed.2d 319. Criminal Law 1556

Affidavits cannot be filed in the Court of Appeals in the support of the motion. Morris v. Com. (Ky. 1972) 488 S.W.2d 680.

27.Proper court, filing

See Filing - Proper court

28.Amendment of motion

Failure-to-investigate claim of ineffective assistance of counsel asserted in an amendment to a motion to vacate, set aside, or correct sentence did not arise from the same conduct, transaction, or occurrence as the claims in the original motion and, thus, did not relate back to the original motion, such that the amendment was untimely as to the claim, given that the amendment was proffered after the three-year limitations period for filing a motion to vacate, set aside, or correct sentence; claim involved facts of a type different from the alleged facts underlying the claims in the original motion, which were defense counsel's misinterpretation of sentencing laws and failure to seek suppression of

defendant's phone conversations with his girlfriend. Roach v. Com. (Ky. 2012) 384 S.W.3d 131, rehearing denied. Criminal Law 1586

In considering whether to grant leave to amend a pleading under the rule allowing a pleading to be amended once as a matter of course before a responsive pleading has been served and thereafter only by consent of the adverse party or by leave of court, a court may take the movant's delay or any dilatory motive into account. Roach v. Com. (Ky. 2012) 384 S.W.3d 131, rehearing denied. Criminal Law 632(3.1); Pleading 233.1

Relation back in the context of motions to vacate, set aside, or correct sentence, which are subject to a three-year limitations period for filing, should be limited to amended pleadings amplifying and clarifying the original claims and to amendments adding claims only if the new, otherwise untimely claims are related to the original ones by shared facts such that the claims can genuinely be said to have arisen from the same conduct, transaction, or occurrence; new claims based on facts of a different time or type will not meet that standard and so, generally, should not be allowed. Roach v. Com. (Ky. 2012) 384 S.W.3d 131, rehearing denied. Criminal Law 1586

29.Withdrawal of motion

Defendant's withdrawal of postconviction motion on the day of hearing was voluntary; trial court asked defendant, several times, if he understood what he was doing and that he would not be able to re-file his motion, defendant stated that he understood what he was doing and its implications, that he was acting knowingly and voluntarily, that he had not been offered anything in exchange for dismissing his motion, and that he had not been unduly influenced to do so, and trial court further took the time to determine whether defendant and the attorneys correctly understood the parameters of his plea agreement as well as understanding when defendant would become eligible for parole. Cox v. Com. (Ky.App. 2010) 2010 WL 3717237, Unreported. Criminal Law 1575

30-33.Answer

30.Answer - In general

An answer may be filed to the motion but it is not required. Polsgrove v. Com. (Ky. 1969) 439 S.W.2d 776.

31.Answer - Necessity of response

Also listed as **Necessity of response, answer**

No response is necessary where the motion does not present a ground upon which relief can be granted. Roark v. Com. (Ky. 1966) 404 S.W.2d 22.

A motion to vacate judgment is not a pleading and no written response is required to entitle Commonwealth to oppose it. Ramsey v. Com. (Ky. 1966) 399 S.W.2d 473, certiorari denied 87 S.Ct. 126, 385 U.S. 865, 17 L.Ed.2d 93. Criminal Law 1582

31.Necessity of response, answer

See Answer - Necessity of response

32.Answer - Time

Also listed as **Time - Answer**

Post-conviction movant was not entitled to have state's response to his motion to vacate, set aside, or correct sentence stricken, in absence of any evidence that circuit court's clerk mailed requisite notice of filing at any time prior to filing of state's response. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1582

For purposes of post-conviction movant's motion to strike as untimely state's response to his motion to vacate, set aside, or correct his sentence of death, evidence of date of state's service of motion seeking to prohibit ex parte filings in proceedings on movant's motion was not evidence that circuit court's clerk had mailed requisite notice of movant's filing of his motion prior to date of state's motion, where state's motion could also have been response to post-conviction court's order staying movant's execution due to receipt of, or in response to, movant's motion to vacate, set aside, or correct sentence. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1582

Twenty-day period for state to respond to post-conviction movant's filing of motion to vacate, set aside, or correct his sentence of death did not begin to run until circuit court's clerk mailed notice of filing to state. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1582

Twenty days given Commonwealth, by rule allowing motion to vacate judgment, to serve an answer is not time limit on circuit judge in deciding matter; there is no specific time limit within which motion to vacate judgment must be ruled on although, if trial court takes too long in ruling, Court of Appeals may grant mandamus. Davis v. Knuckles (Ky. 1971) 469 S.W.2d 702. Criminal Law 1586

Trial court was authorized within its sound discretion to enlarge time for filing of answer to motion to vacate judgment of conviction for uttering worthless checks. Weigand v. Ropke (Ky. 1967) 419 S.W.2d 151. Criminal Law 1582

32.Time - Answer

See Answer - Time

33.Answer - Default judgment

Also listed as **Default judgment, answer**

Defendant's pro se motion to strike Commonwealth's response to his motion to vacate, set aside, or correct sentence did not act as a substitute for a motion for default judgment, so as to entitle him to a new trial on murder charge based on Commonwealth's failure to respond to its complaint within 20 days its his failure to respond at all to supplemental pleading. Harris v. Com. (Ky.App. 1984) 688 S.W.2d 338, certiorari denied 106 S.Ct. 127, 474 U.S. 842, 88 L.Ed.2d 104. Criminal Law 1665

Fact that Commonwealth did not answer when defendant made motion to vacate judgment of conviction, and thus failed to create any issues of fact, did not entitle defendant to prevail by default, if his allegations were refuted by record. Maggard v. Com. (Ky. 1965) 394 S.W.2d 893. Criminal Law 1652

33.Default judgment, answer

See Answer - Default judgment

34.Discovery

Discovery is not authorized under Kentucky law in a post-conviction motion to vacate, set aside, or correct sentence or other post-conviction proceeding. Hiatt v. Clark (Ky. 2006) 194 S.W.3d 324, corrected. Criminal Law 1590
Discovery is not authorized in proceedings on a motion to vacate, set aside, or correct sentence. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1590

Trial court denial of defendant's post-conviction discovery motions was not an abuse of discretion; defendant was not entitled to discovery during a post-conviction proceeding. Stopher v. Com. (Ky. 2006) 2006 WL 3386641, Unreported, rehearing denied, certiorari denied 128 S.Ct. 113, 552 U.S. 850, 169 L.Ed.2d 80. Criminal Law 1590

35-42.Hearing

35.Hearing - In general

In proceeding on motion for postconviction relief, an evidentiary hearing is warranted only if there is an issue of fact which cannot be determined on the face of the record. Farmer v. Com. (Ky.App. 2012) 2012 WL 5042119, reversed 2014 WL 5410235. Criminal Law 1652
An evidentiary hearing is required on petition for postconviction relief 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, and the trial court may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. Stacey v. Com. (Ky.App. 2004) 2004 WL 691760, as modified, review granted, reversed 177 S.W.3d 813. Criminal Law 1652
When the allegations in a motion to vacate, set aside, or correct a sentence are not clearly refuted by the record, the movant is entitled to an opportunity to create a record through an evidentiary hearing with the assistance of counsel,

which may be appointed, if needed. Jackson v. Commonwealth (Ky.App. 2019) 567 S.W.3d 615. Criminal Law 1602; Criminal Law 1652

On a motion to correct, set aside, or vacate a sentence, if there is a material issue of fact that cannot be determined on the face of the record, the court shall grant a prompt hearing. Ky. R. Crim. P. 11.42. Skaggs v. Commonwealth (Ky.App. 2016) 488 S.W.3d 10, rehearing denied. Criminal Law 1652

Hearing is not necessary on a motion to vacate, set aside, or correct sentence when a trial court is able to resolve issues on the basis of the record or when it determines that the allegations, even if true, would not be sufficient to invalidate the convictions. Com. v. Searight (Ky. 2014) 423 S.W.3d 226. Criminal Law 1652

Evidentiary hearing on a motion to vacate, set aside, or correct sentence is required only when there is a material issue of fact that cannot be determined on the face of the record. Com. v. Searight (Ky. 2014) 423 S.W.3d 226. Criminal Law 1652

An evidentiary hearing on a claim of error in a motion for relief from sentence is not required when the record refutes the claim of error or when the allegations, even if true, would not be sufficient to invalidate the conviction. Cawl v. Com. (Ky. 2014) 423 S.W.3d 214, on remand 2014 WL 5510795. Criminal Law 1652

When considering a post-conviction relief motion alleging ineffective assistance of counsel, the trial court must conduct an evidentiary hearing if there is a material issue of fact that cannot be conclusively resolved, that is, conclusively proved or disproved, by an examination of the record. Knuckles v. Com. (Ky.App. 2014) 421 S.W.3d 399. Criminal Law 1655(6)

When assumed-to-be-true factual allegations in a motion to vacate, set aside, or correct sentence show that there has a been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack, an evidentiary hearing on that issue is only required when the motion raises an issue of fact that cannot be determined on the face of the record; a court must examine whether the record refuted the allegations raised, as opposed to examining whether the record supported the allegations, which is the incorrect test. Parrish v. Com. (Ky. 2008) 272 S.W.3d 161, rehearing denied. Criminal Law 1652

Post-conviction movant's allegation that trial court violated judicial ethics by conducting independent investigation into facts surrounding allegation against jailhouse witness, as purportedly evidenced by trial court's reference, in order denying movant's motion to vacate, set aside, or correct sentence, to videotape made in witness' trial, was not sufficient to warrant evidentiary hearing on motion, where trial court was entitled to take notice of other proceedings before it, and videotape was referenced in order to give parties opportunity to verify truth of court's statement that it had postponed witness' sentencing to permit witness to testify in movant's trial. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1655(1)

Two prisoners' allegations of jury tampering, in post-conviction motions to vacate the judgments, were pled with sufficient specificity to warrant an evidentiary hearing, where the prisoners alleged specific incidents of tampering, e.g., daily ex parte contact by the Commonwealth's Attorney, the supplying of newspapers to the jury, and providing the jury access to television, though the prisoners did not supply the underlying factual bases for these allegations, i.e., the facts they intended to rely on to prove the allegations. Hodge v. Com. (Ky. 2001) 68 S.W.3d 338, modified on denial of rehearing. Criminal Law 1655(8)

Allegations of jury tampering, in two prisoners' post-conviction motions to vacate the judgments, rose to the level of a potential violation of a constitutional right, so that an evidentiary hearing would be required if the motions raised an issue of fact that could not be determined on the face of the record. Hodge v. Com. (Ky. 2001) 68 S.W.3d 338, modified on denial of rehearing. Criminal Law 1655(8)

Trial court should have examined whether the record refuted the allegations raised, rather than focusing on whether the record supported the allegations, when determining whether an evidentiary hearing was warranted as to prisoners' post-conviction motions to vacate the judgments. Hodge v. Com. (Ky. 2001) 68 S.W.3d 338, modified on denial of rehearing. Criminal Law 1652

Defendant was not entitled to hearing on postconviction relief motion, where many of defendant's claims were raised and disposed of on direct appeal, some were based on speculation or were not pled with particularity, defendant failed to prove prejudice on any claims, defendant had opportunity to present claims in lengthy and detailed motion accompanied by exhibits, there was no indication that defendant was denied due process under either federal or state constitution, motion raised numerous factual issues about counsel's conduct, none of which were persuasive, and special judge who presided over postconviction proceedings was same judge who presided over trial. Haight v. Com. (Ky. 2001) 41 S.W.3d 436, certiorari denied 122 S.Ct. 471, 534 U.S. 998, 151 L.Ed.2d 386. Criminal Law 1652

There is no right to an evidentiary hearing on motion for postconviction relief, even in a death penalty case. Baze v. Com. (Ky. 2000) 23 S.W.3d 619, rehearing denied, certiorari denied 121 S.Ct. 1109, 531 U.S. 1157, 148 L.Ed.2d 979. Criminal Law 1652

Evidentiary hearing on postconviction motion to vacate is not necessary if the record refutes the claims of error, or where the allegations, even if true, would not be sufficient to invalidate the conviction. Bowling v. Com. (Ky. 1998) 981 S.W.2d 545, rehearing denied, certiorari denied 119 S.Ct. 2375, 527 U.S. 1026, 144 L.Ed.2d 778. Criminal Law 1652

Even in a capital case, a movant is not automatically entitled to an evidentiary hearing on a post-conviction motion to vacate. Harper v. Com. (Ky. 1998) 978 S.W.2d 311, rehearing denied, certiorari denied 119 S.Ct. 1367, 526 U.S. 1056, 143 L.Ed.2d 527. Criminal Law 1652

There is no need for an evidentiary hearing on a post-conviction motion to vacate if the record refutes the claims of error, or if the allegations, even if true, would not be sufficient to invalidate the conviction. Harper v. Com. (Ky. 1998) 978 S.W.2d 311, rehearing denied, certiorari denied 119 S.Ct. 1367, 526 U.S. 1056, 143 L.Ed.2d 527. Criminal Law 1652

Defendant's allegations regarding alleged misconduct of some jurors in discussing case prior to close of evidence and of one juror in falling asleep during trial were insufficient to warrant an evidentiary hearing on motion to vacate his death sentence for intentional murder and consecutive 95-year sentences for kidnapping, first-degree rape, and first-degree sodomy, where those allegations were conclusory, lacked specificity, and did not indicate when, where, or among whom the alleged discussions took place. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1655(8)

An evidentiary hearing on motion to vacate, set aside, or correct a sentence is not required for issues refuted by the record of the trial court. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1652

A movant in a proceeding brought under criminal rule governing motions to vacate, set aside, or correct sentence is not automatically entitled to an evidentiary hearing, even in death penalty cases. Wilson v. Com. (Ky. 1998) 975 S.W.2d 901, rehearing denied, certiorari denied 119 S.Ct. 1263, 526 U.S. 1023, 143 L.Ed.2d 359. Criminal Law 1652

Once an evidentiary hearing is granted upon a defendant's motion to vacate, set aside, or correct sentence, a hearing as to each and every issue raised in the motion is not required. Wilson v. Com. (Ky. 1998) 975 S.W.2d 901, rehearing denied, certiorari denied 119 S.Ct. 1263, 526 U.S. 1023, 143 L.Ed.2d 359. Criminal Law 1656

Trial court did not err in failing to hold hearing on motion to vacate, set aside or correct judgment in capital punishment case where there were no issues of fact that could not be determined on face of record. Stanford v. Com. (Ky. 1993) 854 S.W.2d 742, certiorari denied 114 S.Ct. 703, 510 U.S. 1049, 126 L.Ed.2d 669. Criminal Law 1652

Movant is not automatically entitled to evidentiary hearing in capital case on motion to vacate, set aside or correct judgments entered against him. Stanford v. Com. (Ky. 1993) 854 S.W.2d 742, certiorari denied 114 S.Ct. 703, 510 U.S. 1049, 126 L.Ed.2d 669. Criminal Law 1652

Where the defendant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required on his motion pursuant to RCr 11.42. Sparks v. Com. (Ky.App. 1986) 721 S.W.2d 726. Criminal Law 1652

Where the allegations raised by the defendant are refuted by the record as a whole, no evidentiary hearing is required, and the trial court's denial without hearing of a motion to vacate the sentence is not an abuse of discretion. Robbins v. Com. (Ky.App. 1986) 719 S.W.2d 742.

In motion for postconviction relief, hearings and appointments of counsel are not necessary when record in case refutes movant's allegations. Hopewell v. Com. (Ky.App. 1985) 687 S.W.2d 153. Criminal Law 1602; Criminal Law 1652

A prior adjudication of incompetency and no adjudication of restoration are not sufficient to require a vacation of the judgment. Matthews v. Com. (Ky. 1971) 468 S.W.2d 313, certiorari denied 92 S.Ct. 341, 404 U.S. 966, 30 L.Ed.2d 285.

The entire record of conviction will not be reviewed on motion even though there has been no postconviction review of the case. Szabo v. Com. (Ky. 1970) 458 S.W.2d 167.

Allegations, in motion to vacate judgment for armed assault with intent to rob, that defendant was unable to assist in preparation of his defense due to fact of severe pain and effects of narcotic drugs administered by county officials and that defendant was forced into trial without proper time being allowed for preparation of a defense were sufficient, if true, to invalidate defendant's conviction, and raised material issue of fact concerning whether defendant was deprived of his constitutional right to obtain a fair trial, necessitating the holding of an evidentiary hearing. Barnes v. Com. (Ky. 1970) 454 S.W.2d 352. Criminal Law 1655(5)
The applicant should be given a hearing where the allegations and supporting affidavits show, if found to be true, that the conviction was invalid. Barnes v. Com. (Ky. 1970) 454 S.W.2d 352.
Where facts alleged by defendant were not sufficient to support his motion to vacate conviction for armed robbery, an evidentiary hearing with defendant present was not necessary. Nickell v. Com. (Ky. 1970) 451 S.W.2d 651. Criminal Law 1652

Where facts alleged by defendant were insufficient to support his motion to vacate conviction for armed robbery, evidentiary hearing on motion was not necessary. Brooks v. Com. (Ky. 1969) 447 S.W.2d 614. Criminal Law 1655(1)

Record reciting that defendant had been arraigned refuted bald assertion that he had never been informed of date of offense; and court appropriately denied without hearing motion, grounded on such assertion, to vacate conviction. Carter v. Com. (Ky. 1966) 404 S.W.2d 461. Criminal Law 1655(4)
Where motion to vacate judgment showed on its face that there was no valid ground for relief, defendant was not entitled to a hearing or to appointment of counsel. Lairson v. Com. (Ky. 1965) 388 S.W.2d 592. Criminal Law 1602; Criminal Law 1652

A motion under RCr 11.42 will not lie when the statements alleged therein are contradicted by the record. King v. Com. (Ky. 1965) 387 S.W.2d 582. Criminal Law 1617

A RCr 11.42 motion to vacate sentence may be overruled without a hearing or without appointing counsel for the movant where the grounds, if true, would not invalidate the judgment. (See also Maye v Com, 386 SW(2d) 731 (1965).) Lawson v. Com. (Ky. 1965) 386 S.W.2d 734, certiorari denied 85 S.Ct. 1789, 381 U.S. 946, 14 L.Ed.2d 709.

The movant on a RCr 11.42 motion to vacate sentence is not entitled to either a hearing or appointed counsel where the issues can be determined from the record. (See also Lawson v Com, 386 SW(2d) 734 (Ky 1965).) Maye v. Com. (Ky. 1965) 386 S.W.2d 731. Criminal Law 1652

Denial without hearing of motion to vacate conviction as habitual criminal, based on lack of counsel at time of plea of guilty, was error and hearing must be had with adequate counsel appointed for defendant if he was unable to employ counsel. Moore v. Com. (Ky. 1964) 380 S.W.2d 76. Criminal Law 1556

36.Hearing - Ineffective assistance of counsel

Also listed as **Ineffective assistance of counsel - Hearing**
Evidentiary hearing was required on defendant's motion for postconviction relief asserting ineffective assistance based on counsel's alleged misadvice to defendant, at the time of guilty plea, that he would be eligible for parole after serving 20% of his sentence rather than the 85% that was statutorily required based on his violent offender status; trial court, which had denied motion without a hearing, would be required on remand to make findings of fact as to whether counsel failed to advise or erroneously advised defendant about parole eligibility, and, if so, whether the requisite prejudice resulted from that erroneous or missing advice. Jacobi v. Com. (Ky.App. 2011) 2011 WL 1706528. Criminal Law 1655(6)
A hearing on a post-conviction motion alleging ineffective assistance of counsel is required only if there is an issue of fact which cannot be determined on the face of the record; if there is no hearing, then no findings are required. Cherry v. Commonwealth (Ky.App. 2018) 545 S.W.3d 318, rehearing denied. Criminal Law 1891; Criminal Law 1920
Evidentiary hearing was not required to determine whether defense counsel was ineffective for allegedly failing to present mitigating evidence at defendant's sentencing hearing, and thus whether postconviction petitioner's guilty plea to first degree assault was invalid due to ineffective assistance of counsel; significant amount of sentencing hearing testimony reinforced counsel's plea for mitigation, and record refuted claim that counsel's performance with respect to mitigation witnesses was prejudicial to his case. Commonwealth v. Rank (Ky. 2016) 494 S.W.3d 476. Criminal Law 1655(6)

Evidentiary hearing was not required to determine whether defense counsel was ineffective for allegedly providing inaccurate advice to defendant about his eligibility for probation and parole in response to defendant's motion to vacate his 15-year prison sentence following his guilty plea to first degree assault; trial court correctly and clearly informed defendant that he was pleading guilty to violent crime and would have to serve 85 percent of sentence before becoming eligible for parole, and defendant acknowledged that his guilty plea was knowing, intelligent, and voluntary. Commonwealth v. Rank (Ky. 2016) 494 S.W.3d 476. Criminal Law 1655(6)

Evidentiary hearing was not required to determine whether defense counsel was ineffective for allegedly advising defendant that posting bond would be adverse to his interest and that he should grant attorney his power of attorney, and thus whether postconviction petitioner's guilty plea to first degree assault was invalid due to ineffective assistance of counsel; while allegations raised troubling ethical concerns, defendant did not explain how they would have impacted his decision to plead guilty. Commonwealth v. Rank (Ky. 2016) 494 S.W.3d 476. Criminal Law 1784

Evidentiary hearing was not required to determine whether defense counsel was ineffective for allegedly failing to comply with criminal practice and procedure with respect to victim's deposition, and thus whether postconviction petitioner's guilty plea to first degree assault was invalid due to ineffective assistance of counsel; defendant did not indicate how he was prejudiced by counsel's alleged lack of understanding of criminal law practice and procedure. Commonwealth v. Rank (Ky. 2016) 494 S.W.3d 476. Criminal Law 1655(6)

Evidentiary hearing was not required to determine whether defense counsel was ineffective for alleged failure to file routine motion for discovery and for failing to provide defendant with discovery voluntarily disclosed by State, and thus whether postconviction petitioner's guilty plea to first degree assault was invalid due to ineffective assistance of counsel; record indicated, and defendant acknowledged, that all discovery material was obtained, and defendant could not demonstrate how he was prejudiced by not seeing all discovery material counsel obtained. Commonwealth v. Rank (Ky. 2016) 494 S.W.3d 476. Criminal Law 1655(6)

Evidentiary hearing was not required to determine if defense counsel's effectiveness was impaired due to his alleged conflict of interest, and thus whether postconviction petitioner's guilty plea to first degree assault was invalid due to ineffective assistance of counsel; while defendant alleged that his acquaintance and personal attorney recommended that he hire counsel and that attorney acted as co-counsel, attorney's previous representation of defendant in eviction case could not have affected counsel's defense in criminal case. Commonwealth v. Rank (Ky. 2016) 494 S.W.3d 476. Criminal Law 1655(6)

Movant was entitled to evidentiary hearing on his motion to vacate his convictions based upon claim of ineffective assistance of counsel, as trial court's reliance upon Commonwealth's affidavits in disposing of his motion constituted determination that record was insufficient to resolve motion and deprived movant of opportunity to cross-examine witnesses or present his own evidence. Knuckles v. Com. (Ky.App. 2014) 421 S.W.3d 399. Criminal Law 1655(6)

Trial counsel was not a real party in interest with respect to defendant's post-conviction motion seeking to vacate the sentence and conviction, based on allegations of ineffective assistance of counsel; possibility that counsel would be adversely affected was no more probable than that counsel would be exonerated of any claims of ineffective assistance. Hiatt v. Clark (Ky. 2006) 194 S.W.3d 324, corrected. Criminal Law 1573

Post-conviction movant's claim that his trial counsel was ineffective for failing to obtain expert to support his claim of intoxication was insufficiently factually supported to warrant evidentiary hearing thereon, where movant gave no proof that he knew of specific expert who was willing to testify in manner helpful to defense or what such testimony would consist of. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1655(6)

Post-conviction movant's claim that trial counsel in his capital murder prosecution was ineffective by reason of counsel's failure to present third party's testimony that change purse found under movant's bed, and alleged to have belonged to murder victim, was given to him by third party, was insufficiently factually supported to entitle movant to evidentiary hearing on his motion to vacate, set aside, or correct sentence, or to serve as basis of claim of ineffective assistance of counsel, absent any claim or evidence that movant had told trial counsel about third party, or that counsel knew or even had reason to know about third party. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1655(6)

Petitioner, convicted of murder and sentenced to death, was not entitled to evidentiary hearing on petition for post-conviction relief based on ineffective assistance of counsel, where circuit judge was able to resolve issues from record and determined that petitioner's allegations were not sufficient to invalidate convictions; petitioner's contentions that he was not given opportunity to develop allegations ran afoul of purpose of post-conviction relief rule,

which was to provide forum for known grievances. Hodge v. Com. (Ky. 2003) 116 S.W.3d 463, as amended, rehearing denied, certiorari denied 124 S.Ct. 1619, 541 U.S. 911, 158 L.Ed.2d 258. Criminal Law 1655(6)

Trial court should have held evidentiary hearing, regarding prisoners' post-conviction motions to vacate the judgments based on their allegations that their respective trial counsel were ineffective in failing to investigate, develop, and present mitigating evidence for penalty phase of capital murder trial; it was necessary to determine if any mitigating evidence could have and should have been admitted, and whether the failure to introduce mitigating evidence was trial strategy or instead an abdication of advocacy. Hodge v. Com. (Ky. 2001) 68 S.W.3d 338, modified on denial of rehearing. Criminal Law 1655(6)

Indigent defendant was entitled to evidentiary hearing on his post-trial motion to vacate, correct, or set aside sentence based upon claim of ineffective assistance of counsel, where defendant received maximum sentence for offense to which he pled guilty, alleged that his attorney told him to plead guilty because attorney was unprepared for trial, and further alleged that his attorney had represented to him the existence of secret plea agreement whereby defendant would receive minimum sentence; assuming truth of defendant's allegations, issue of whether there had in fact been a plea agreement could not be conclusively resolved on record of plea hearing. Fraser v. Com. (Ky. 2001) 59 S.W.3d 448. Criminal Law 1655(6)

Defendant was entitled to evidentiary hearing on his motion to vacate conviction based on his claim that counsel provided ineffective assistance in failing to act on defendant's desire to enter into plea agreement; record reflected evidence that defendant had communicated to appointed trial counsel his willingness to accept Commonwealth's plea offers. Osborne v. Com. (Ky.App. 1998) 992 S.W.2d 860, rehearing denied. Criminal Law 1655(6)

Postconviction petitioner was not entitled to evidentiary hearing on claim of ineffective assistance of counsel; issues could be resolved based upon the record. Hayes v. Com. (Ky.App. 1992) 837 S.W.2d 902. Criminal Law 1655(6)

Circuit court's failure to consider, on motion to vacate conviction, question of whether defendant was prejudiced by counsel's failure to cross-examine prosecution witness regarding possible “deal” with the Commonwealth required remand for evidentiary hearing on that question. Com. v. Gilpin (Ky.App. 1989) 777 S.W.2d 603. Criminal Law 1181.5(3.1)

A constitutional error which contributes to conviction is presumed to be prejudicial unless it is harmless beyond a reasonable doubt, and where a person convicted of murder claims that he was rendered ineffective assistance of counsel because his trial counsel failed to cross-examine a prosecution witness regarding a possible “deal” with the Commonwealth to testify against the defendant in exchange for dismissal of his forgery charge, and the circuit court fails to consider, on the motion to vacate the defendant's conviction, the question of whether the defendant was prejudiced by his attorney's failure, requires a remand for an evidentiary hearing on that question. Com. v. Gilpin (Ky.App. 1989) 777 S.W.2d 603.

A trial court is permitted to examine the question of prejudice before it determines whether there have been errors in counsel's performance; in making its decision on actual prejudice the trial court should consider the totality of the evidence, and if this may be accomplished from a review of the record the defendant is not entitled to an evidentiary hearing. Brewster v. Com. (Ky.App. 1986) 723 S.W.2d 863. Criminal Law 1655(6)

Where it is clear from the record that a defendant claiming ineffective assistance of counsel fails to establish a reasonable probability that the result of his trial would have been different but for alleged errors of counsel, the trial court does not abuse its discretion in denying a postconviction motion without an evidentiary hearing. Brewster v. Com. (Ky.App. 1986) 723 S.W.2d 863. Criminal Law 1655(6)
Failure to hold evidentiary hearing in postconviction proceeding to consider whether original trial counsel was ineffective in failing to present specious argument totally refuted by record was not error; record failed to show claim as to what evidence could have been offered in evidentiary hearing. Freeman v. Com. (Ky. 1985) 697 S.W.2d 133. Criminal Law 1655(6)

Where the accused answered favorably to the trial court's inquiry as to whether he was satisfied in all respects with his attorney's advice and he signed before the court a statement that asserted that he believed that his “attorney has done all that anyone could do to counsel and assist me, and that there is nothing about the proceedings in this case against me which I do not fully understand,” the accused is precluded from arguing ineffective assistance of counsel in a RCr 11.42 motion. Harris v. Com. (Ky.App. 1984) 688 S.W.2d 338, certiorari denied 106 S.Ct. 127, 474 U.S. 842, 88 L.Ed.2d 104. Criminal Law 1434

It is not error for a trial judge to deny an RCr 11.42 ineffective assistance of counsel motion without an evidentiary hearing and without appointing counsel where the record in the case refutes the accused's allegations. Hopewell v. Com. (Ky.App. 1985) 687 S.W.2d 153.

New evidentiary hearing on defendant's motion to vacate conviction based on allegation that record failed to establish he was fully aware of potential conflict of interest in his postconviction attorney's attempting to show ineffectiveness of one of attorney's colleagues was not warranted where record indicated that, regardless of what representation defendant might have had at postconviction hearing, outcome would have been as it was and defendant failed to show realistically how counsel's conflict of interest, actual or potential, had affected adequacy of representation given him in attack on guilty plea. Milsap v. Com. (Ky.App. 1984) 662 S.W.2d 488. Criminal Law 1181.5(6)

Ineffective assistance of counsel occurred when counsel failed, without a reasonable basis, to present a defense that would compel dismissal of the charges; therefore, an accused's RCr 11.42 motion that proves such an allegation should be granted and the judgment against him should be vacated. Ivey v. Com. (Ky.App. 1983) 655 S.W.2d 506.

Defendant's motion to set aside his conviction alleging that his plea was not given voluntarily or intelligently lacked merit where the record and the defendant's testimony showed otherwise. Taylor v. Com. (Ky.App. 1982) 642 S.W.2d 344.

Without a showing of prejudice a judgment will not be vacated because counsel was not present at the final sentencing of accused. Reams v. Com. (Ky. 1975) 522 S.W.2d 853.

The conviction should be set aside where the court-appointed attorney was not given time to prepare the case. Vaughan v. Com. (Ky. 1974) 505 S.W.2d 768.

Where defendant's motion to vacate conviction for murder asserted that he had been incompetent to stand trial and was not represented by counsel at the trial but record disclosed that defendant had been abundantly represented by appointed counsel and was not hospitalized for psychiatric treatment until four years after his conviction, overruling of the motion to vacate was proper and no evidentiary hearing was required. Lett v. Com. (Ky. 1970) 461 S.W.2d 83. Criminal Law 1618(5); Criminal Law 1618(10); Criminal Law 1655(5); Criminal Law 1655(6)

Where pro se petition for postconviction relief alleged that counsel for defendant, who pled guilty to all charges, was appointed on day petitioner was brought to trial, that such counsel stated that he was there to do one thing, advise petitioner of his rights, that counsel was with petitioner less than 10 minutes, and that petitioner had been released from mental institution only 25 days earlier, evidentiary hearing with counsel was required. Miller v. Com. (Ky. 1970) 458 S.W.2d 453. Criminal Law 1602; Criminal Law 1655(6)

Defendant's allegations that counsel was appointed for him about one month before trial but from time of appointment until day of trial counsel did not once visit with him, that counsel did not confer with him in regard to any possible defenses he might have and did not conduct investigations to determine if matters of defense could be developed, that counsel refused to prepare a defense or try the case before a jury and that counsel coerced prisoner to enter a plea of guilty were such as to entitle defendant to evidentiary hearing on motion to vacate judgment of conviction. Carter v. Com. (Ky. 1970) 450 S.W.2d 257. Criminal Law 1655(6)

There should be a hearing where it is alleged that court-appointed counsel refused to perfect an appeal because the defendant was indigent, but no hearing should be granted where the counsel was hired by the defendant. (See also Stinnett v Com, 446 SW(2d) 292 (Ky 1969).) Howard v. Com. (Ky. 1969) 446 S.W.2d 293.

Where a defendant files a postconviction petition alleging ineffective assistance of counsel many years after his conviction, the old public records from his case should be given great weight in ruling on his motion, especially when one or more of the principal actors from the original proceedings are dead or unavailable. (See also McKinney v Com, 445 SW(2d) 874 (Ky 1969).) Jordan v. Com. (Ky. 1969) 445 S.W.2d 878.

Allegations that court-appointed counsel: (1) conferred with defendant on only two occasions, once six months before trial and once five minutes before trial; (2) refused to come to jail to confer with defendant; (3) refused to subpoena witnesses or to seek postponement because of absence of witnesses; (4) advised defendant not to plead double jeopardy, based upon previous conviction of same offense; (5) failed to take appeal after promising that he would do so made out potential case of farce and mockery and entitled defendant to hearing on his motion to vacate judgment of conviction. Stevenson v. Com. (Ky. 1969) 445 S.W.2d 708. Criminal Law 1580(10)

Where the record shows that the defendant was represented by counsel, relief cannot be given on the ground that he was not so represented. Triplett v. Com. (Ky. 1969) 439 S.W.2d 944.

The allegation of facts which, if established, would show that defendant was denied effective counsel, entitles the party to a hearing. McCarthy v. Com. (Ky. 1968) 432 S.W.2d 50.

Defendant who alleged that his appointed counsel did not confer with him until day of trial, that counsel did not want to be bothered with trying case, and that counsel advised him that unless he entered plea of guilty counsel would see that he got life as habitual criminal was entitled to hearing on him motion to vacate judgment. McCarthy v. Com. (Ky. 1968) 432 S.W.2d 50. Criminal Law 1655(6)

Allegations in petitioner's motion for postconviction relief that appointed counsel had refused to prepare a defense for petitioner at his trial for armed robbery on the ground that counsel was not receiving compensation and that attorney coerced him into entering plea of guilty were sufficient to require evidentiary hearing despite attorney's affidavit to the contrary. Hall v. Com. (Ky. 1968) 429 S.W.2d 359. Criminal Law 1655(6)

Record of robbery prosecution disclosed no true issue requiring hearing on motion to set aside conviction, in which defendant claimed denial of adequate counsel at trial. Johnson v. Com. (Ky. 1968) 427 S.W.2d 246. Criminal Law 1655(6)

The rule requiring counsel at the interrogation of the accused will not be applied retroactively. Davis v. Com (Ky. 1967) 415 S.W.2d 372.

Where the order states “Came defendants, by attorneys” it clearly reflects that they were represented by counsel, and the motion must be overruled on the basis of the record. Davis v. Com. (Ky. 1966) 408 S.W.2d 199.

The bare allegation that counsel was not furnished at the examining trial is not sufficient. Parsley v. Com. (Ky. 1966) 400 S.W.2d 202.

An unsupported allegation of lack of counsel cannot contradict the record. Brown v. Com. (Ky. 1965) 396 S.W.2d 773.

The allegation that employed counsel refused to take an appeal does not require a hearing. Short v. Com. (Ky. 1965) 394 S.W.2d 937.

The movant is not entitled to appointed counsel or a hearing unless the alleged facts, if true, would render the judgment void; nor is he entitled to a hearing if the material issues can be determined on the face of the record. Maggard v. Com. (Ky. 1965) 394 S.W.2d 893.

The charge of inadequate counsel, if stated with sufficient particularity, may be the basis for the granting of a hearing on a RCr 11.42 motion to vacate sentence; where, however, the defendant raises such a contention and the record shows that he pled guilty and received the minimum sentence and does not claim that he was badgered into, or did not understand the consequences of pleading, his motion may be overruled without a hearing. Lawson v. Com. (Ky. 1965) 386 S.W.2d 734, certiorari denied 85 S.Ct. 1789, 381 U.S. 946, 14 L.Ed.2d 709.

36.Ineffective assistance of counsel - Hearing

See Hearing - Ineffective assistance of counsel

37.Guilty pleas - Hearing

Also listed as **Hearing - Guilty pleas**
Defendant's untimely petition for postconviction relief from conviction by guilty plea to various sex offenses, along with evidentiary material documenting defendant's “vast array of neuropsychological deficits,” was facially sufficient to warrant evidentiary hearing on issue concerning whether defendant suffered from an on-going mental incapacity following his guilty plea such that three-year limitations period for filing petition should have been tolled; letters from psychiatric experts supported defendant's allegation that facts upon which his claim was predicated, i.e., that he was incompetent to enter a guilty plea due to mental incapacity, were unknown to him and could not have been ascertained by exercise of due diligence. Stacey v. Com. (Ky.App. 2004) 2004 WL 691760, as modified, review granted, reversed 177 S.W.3d 813. Criminal Law 1586; Criminal Law 1655(5)

Motions to withdraw plea adequately alleging valid claims not refuted by the record entitle the movant to an evidentiary hearing. Stiger v. Com. (Ky. 2012) 381 S.W.3d 230. Criminal Law 274(1)

Record refuted in every way defendant's allegations in motion to vacate judgment, and no evidentiary hearing was required on motion, where trial court conducted lengthy and constitutionally complete guilty plea proceedings, and defendant freely admitted guilt to charges, satisfaction with assistance of counsel, and that he was freely, voluntarily, knowingly, and intelligently entering guilty pleas. Allen v. Com. (Ky.App. 1984) 668 S.W.2d 556. Criminal Law 1655(3)

Where record in proceeding in which relief is sought from sentence imposed following entry of a guilty plea contains some indicia of understanding on part of the defendant, the correct path is to remand for an evidentiary hearing on the issue. Lynch v. Com. (Ky.App. 1980) 610 S.W.2d 902. Criminal Law 1181.5(8)

Where record showed that trial court carefully examined defendant at time of entry of guilty plea and that at that time defendant stated to the court that he was fully aware of consequences of the plea, that he was pleading guilty because he was guilty, and that he was fully satisfied with representation that he had received from appointed counsel as well as counsel retained by his mother, defendant was not entitled to an evidentiary hearing on his motion to vacate judgment of conviction alleging that his guilty plea was not voluntary in that he was not mentally capable of entering such a plea at the time and that he had ineffective representation by counsel. Armour v. Com. (Ky. 1973) 495 S.W.2d 180. Criminal Law 1655(3)

Evidence in proceeding on motion to vacate judgment of conviction on charge of murder supported trial court's findings that defendant had received effective representation by his court-appointed attorney and that his plea of guilty was not coerced by the Commonwealth's attorney. Wisdom v. Com. (Ky. 1970) 453 S.W.2d 762. Criminal Law 264; Criminal Law 1920; Criminal Law 1974

Where record affirmatively showed that trial court made inquiry to determine whether defendant voluntarily made plea of guilty, it was unnecessary to conduct hearing before denial of motion to vacate conviction. Ford v. Com. (Ky. 1970) 453 S.W.2d 551. Criminal Law 1655(3)

An evidentiary hearing should be held where it is alleged that the appointed counsel refused to defend unless the defendant pleaded guilty, coupled with an averment that the defendant pleaded guilty under duress. Hall v. Com. (Ky. 1968) 429 S.W.2d 359.

Prisoner, who moved to vacate judgment of conviction, was entitled to a hearing with assistance of counsel, where he alleged that he had been deprived of assistance of counsel at time he entered plea of guilty. Hall v. Com. (Ky. 1966) 403 S.W.2d 288. Criminal Law 1602; Criminal Law 1655(6)

Prisoner who sought vacation of conviction on plea of guilty to robbery charge was entitled to hearing on allegation that court-appointed counsel had refused to defend prisoner unless prisoner pleaded guilty, that counsel had pointed out that he was not getting paid, and that prisoner had pleaded guilty under duress. Jones v. Com. (Ky. 1965) 389 S.W.2d 927. Criminal Law 1655(3)

37.Hearing - Guilty pleas

See Guilty pleas - Hearing

38.Denial of right to appeal, hearing

Also listed as **Hearing - Denial of right to appeal**

Trial court was not required to hold evidentiary hearing on postconviction relief petition which claimed unwilling waiver of right to appeal where that claim flew in the face of what was contained in the record and was absolutely without merit. Trice v. Com. (Ky.App. 1982) 632 S.W.2d 458. Criminal Law 1655(1)

Where the defendant was properly informed as to his appeal rights and does nothing he is not entitled to a hearing on a motion stating that he was denied an appeal. Lay v. Com. (Ky. 1974) 506 S.W.2d 507.

Where discrepancies in record made it impossible to determine which one of two defendants was tried and which one pleaded guilty, where record did not show that trial judge, after imposing sentence, made any effort to advise them of their right to appeal, and where there was nothing in the record showing that defendants may have waived such right, defendants who sought postconviction relief were entitled to a hearing on question of denial of right to direct appeal. Prater v. Com. (Ky. 1972) 476 S.W.2d 833. Criminal Law 1655(1)

Evidence in proceeding on motion by defendant, who was convicted of voluntary manslaughter, to vacate judgment supported finding that defendant knew of his right to appeal and, with benefit of counsel of his own choice, chose to waive such right. Trowel v. Com. (Ky. 1971) 473 S.W.2d 134. Criminal Law 1618(14)

The allegation of a denial of the right to appeal requires the granting of a hearing. Johnson v. Com. (Ky. 1970) 461 S.W.2d 379.

Applicant for postconviction relief was entitled to a hearing on his claim that he was denied an appeal from original judgment of conviction. Johnson v. Com. (Ky. 1970) 461 S.W.2d 379. Criminal Law 1655(1)

Where there was no hint of any fraud or attempt by authorities to frustrate perfection of appeal and record failed to show why timely filed notice of appeal was not perfected by privately retained counsel, denial, without hearing, of motion to vacate conviction was proper. Howard v. Com. (Ky. 1969) 446 S.W.2d 293. Criminal Law 1655(1)

38.Hearing - Denial of right to appeal

See Denial of right to appeal, hearing

39.Hearing - Presence of accused

Also listed as **Presence of accused, hearing**
See, for the criteria in determining whether the accused has the right to be present at the hearing on the motion. Nickell v. Com. (Ky. 1970) 451 S.W.2d 651.

39.Presence of accused, hearing

See Hearing - Presence of accused

40.Appointment of counsel, hearing

Also listed as **Hearing - Appointment of counsel**
Defendant was not entitled to belated appeal from denial of motion for postconviction relief in which he alleged that ineffectiveness of plea counsel rendered guilty pleas to second-degree rape and other crimes involuntary; defendant did not have constitutional right to counsel on collateral review, since allegations could be determined on face of record of *Boykin* hearing without evidentiary hearing, and therefore, although defendant had statutory right to appeal from denial of postconviction relief, it was his obligation to exercise that right in timely fashion. Moore v. Com. (Ky. 2006) 199 S.W.3d 132, rehearing denied. Criminal Law 1069(6)

Rule governing appointment of counsel to represent an indigent defendant in connection with an evidentiary hearing on a post-trial motion to vacate, correct, or set aside sentence establishes when a judge must appoint counsel, and statute establishing and funding the Department of Public Advocacy (DPA) establishes when the DPA may provide legal services even without judicial appointment; overruling *Commonwealth v Ivey,* 599 S.W.2d 456. Fraser v. Com. (Ky. 2001) 59 S.W.3d 448. Criminal Law 1602

If an evidentiary hearing is not required on an indigent defendant's post-trial motion to vacate, set aside or correct sentence, counsel need not be appointed, because appointed counsel would be confined to the record. Fraser v. Com. (Ky. 2001) 59 S.W.3d 448. Criminal Law 1602
Where the record shows that an accused's motion for RCr 11.42 relief is without merit, it is harmless error for the trial court to refuse to appoint counsel to search for supplementary grounds for RCr 11.42 relief. Com. v. Stamps (Ky. 1984) 672 S.W.2d 336.

Where defendant did not request counsel to assist with motion to vacate judgment, but, rather, requested counsel to assist “at” or “in” evidentiary hearing on motion, and motion court found that no evidentiary hearing was necessary, request for assistance of counsel was properly denied. Allen v. Com. (Ky.App. 1984) 668 S.W.2d 556. Criminal Law 1602

The duty of a trial court to appoint counsel on its own motion does not automatically exist; therefore, the request for counsel of an indigent defendant must be clear and unambiguous and contained in the body of the RCr 11.42 motion and not just in an affidavit of indigency attached to the motion. Beecham v. Com. (Ky. 1983) 657 S.W.2d 234.

Defendant, a “needy person” within meaning of public advocacy statutes, was entitled to appointment of counsel on request to represent him in postconviction proceedings. Com. v. Ivey (Ky. 1980) 599 S.W.2d 456. Criminal Law 1602

Failure to appoint counsel in proceedings on motion to vacate judgment of conviction, on ground of double jeopardy, was not prejudicial since, appointed counsel would have been confined to trial record. Hemphill v. Com. (Ky. 1969) 448 S.W.2d 60. Criminal Law 1177.7(2)

When the prisoner appears at the hearing without counsel, the court must determine if he is able to secure an attorney, and must make a finding of fact on that question. Coles v. Com. (Ky. 1965) 386 S.W.2d 465.

Motion to vacate judgment of conviction may be dismissed without appointing counsel or granting a hearing, unless it shows upon its face existence of valid ground for providing counsel and affording hearing. Odewahn v. Ropke (Ky. 1964) 385 S.W.2d 163. Criminal Law 1602; Criminal Law 1652

40.Hearing - Appointment of counsel

See Appointment of counsel, hearing

41.Hearing - Petitioner's rights

Also listed as **Petitioner's rights, hearing**
In order for indigent post-conviction petitioner to be eligible for travel expenses of witnesses, a court must find that (1) the petitioner's post-conviction petition raises an issue that cannot be resolved without an evidentiary hearing and (2) the proposed out-of-county witness's live testimony at the evidentiary hearing is necessary for a full presentation of the petitioner's case. Mills v. Messer (Ky. 2008) 254 S.W.3d 814. Criminal Law 1669

Post-conviction movant did not procedurally default his claim that post-conviction court should have recused itself by failing to seek designation of special judge, where seeking designation of special judge was alternative procedure to seeking recusal. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1042.7(2)

Post-conviction movant's claim that trial court's failure to disclose substance of alleged post-verdict conference with jurors constituted judicial misconduct was insufficiently factually supported to entitle movant to evidentiary hearing on his motion to vacate, set aside, or correct sentence, where trial record reflected that after jurors returned verdict, they were excused and left courthouse with police escort, bailiff spoke with police escort via radio several minutes later and notified trial court that jurors had safely made it to their cars, and court then recessed case and left courtroom. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1655(1)

Post-conviction movant was not required to make second request for evidentiary hearing on his motion to vacate, set aside, or correct sentence, following intervening hearing on his separate motion to recuse. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1652
Indigent petitioner in post-conviction proceedings was not entitled to funds to retain an expert to support his motion for relief from his intentional murder conviction, overruling *Foley v. Commonwealth*, 17 S.W.3d 878. Stopher v. Conliffe (Ky. 2005) 170 S.W.3d 307, rehearing denied, certiorari denied 126 S.Ct. 1787, 547 U.S. 1077, 164 L.Ed.2d 529. Criminal Law 1669
Trial judge was not material witness in postconviction proceeding, and thus he was not required to recuse himself from presiding over postconviction relief hearing. Bowling v. Com. (Ky. 2002) 80 S.W.3d 405, rehearing denied, certiorari denied 123 S.Ct. 1587, 538 U.S. 931, 155 L.Ed.2d 327. Judges 47(1)
Trial court did not abuse its discretion in declining postconviction relief petitioner's request for continuance to conduct further investigation, as postconviction proceeding provided forum for known grievances; it did not provide opportunity to search for new grievances. Bowling v. Com. (Ky. 2002) 80 S.W.3d 405, rehearing denied, certiorari denied 123 S.Ct. 1587, 538 U.S. 931, 155 L.Ed.2d 327. Criminal Law 1586

Defendant had no constitutional right to expert assistance in collateral attack proceeding, and the requirement to provide funds to indigent defendants for necessary experts has not been extended to postconviction matters. Foley v. Com. (Ky. 2000) 17 S.W.3d 878, modified on denial of rehearing, certiorari denied 121 S.Ct. 663, 531 U.S. 1055, 148 L.Ed.2d 565. Criminal Law 1669

Defendant was not denied meaningful preparation or presentation of issues raised by motion to vacate his death sentence for intentional murder and consecutive 95-year sentences for kidnapping, first-degree rape, and first-degree sodomy, where defendant was given two-day evidentiary hearing on those issues, and defendant had more than ten

months to prepare for hearing. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1656; Criminal Law 1657

Where a defendant's conviction has already been upheld on appeal, he is not entitled to invoke the privilege against self-incrimination during an RCr 11.42 hearing when questioned about the crime, since he placed the entire question of crime in issue and thus cannot escape the normal consequences of cross-examination. McQueen v. Com. (Ky. 1986) 721 S.W.2d 694, certiorari denied 107 S.Ct. 2203, 481 U.S. 1059, 95 L.Ed.2d 858.

Where expert testimony would not alter the complete lack of unfair prejudice resulting from trial counsel's considered strategy, the defendant is not denied due process of law by the trial court's refusal to order the provision of funds necessary to pay an expert witness to testify at an RCr 11.42 hearing. McQueen v. Com. (Ky. 1986) 721 S.W.2d 694, certiorari denied 107 S.Ct. 2203, 481 U.S. 1059, 95 L.Ed.2d 858.

For purposes of a RCr 11.42 proceeding to determine the effectiveness of counsel it is permissible to introduce polygraph evidence. Gall v. Com. (Ky. 1985) 702 S.W.2d 37, certiorari denied 106 S.Ct. 3311, 478 U.S. 1010, 92 L.Ed.2d 724.

Trial court did not abuse its discretion in denying continuance of postconviction relief proceeding to secure out-of-state witnesses since statute allowing compulsory process applies only to criminal prosecutions and postconviction proceeding was to resolve claims of ineffectiveness of trial counsel. Gall v. Com. (Ky. 1985) 702 S.W.2d 37, certiorari denied 106 S.Ct. 3311, 478 U.S. 1010, 92 L.Ed.2d 724. Criminal Law 1650

When ineffective assistance of counsel is raised via a RCr 11.42 motion, the statutory attorney-client privilege is lost and the attorney may testify on all aspects of the relationship. Harris v. Com. (Ky.App. 1984) 688 S.W.2d 338, certiorari denied 106 S.Ct. 127, 474 U.S. 842, 88 L.Ed.2d 104. Privileged Communications And Confidentiality 168

Defendant convicted of murder did not waive the attorney-client privilege with respect to discussions regarding his mental condition with his first attorney, when he filed petition alleging that the attorney who represented him at trial provided ineffective assistance, where defendant was not alleging that his first attorney, who withdrew 16 months prior to trial, provided ineffective assistance. Cavender v. Fletcher (Ky. 2011) 2011 WL 5880956, Unreported. Privileged Communications and Confidentiality 168

Defendant, who pled guilty to murder and was sentenced to death, was entitled to a hearing before a special judge on his post-conviction claim alleging that his guilty plea should be set aside as involuntary because he pled under the belief that the trial judge had agreed to sentence him to life without parole for twenty-five years; there was an alleged off-the-record conversation, which defendant and a portion of his defense team attested was influential in their decision about whether and how defendant should enter his plea, and defendant's declaration in open court that there were no promises made to him or threats made against him was contradicted by his claim that his counsel required him to plead in order to obtain the alleged secret bargain. Johnson v. Com. (Ky. 2008) 2008 WL 4270731, Unreported. Criminal Law 1655(3)
Indigent capital murder defendant was not entitled to investigative funding for expert witnesses in connection with his request for post-conviction relief. Willoughby v. Com. (Ky. 2006) 2006 WL 3751392, Unreported, rehearing denied, certiorari denied 128 S.Ct. 650, 552 U.S. 1043, 169 L.Ed.2d 517. Costs 302.3

41.Petitioner's rights, hearing

See Hearing - Petitioner's rights

Also listed as **Order, hearing**
Rule regarding collateral attacks on convictions did not suspend a trial court's order in a collateral attack proceeding until the direct appeal of the conviction was finally disposed of, but rather suspended the effectiveness of the court's order in the collateral proceeding until an appeal of the order itself was disposed of. Wilson v. Com. (Ky.App. 1988) 761 S.W.2d 182. Criminal Law 1083

When a motion, filed by a prisoner without counsel, is ruled on, a copy of the order should be sent to the movant. Kraus v. Ropke (Ky. 1964) 385 S.W.2d 162.

42.Order, hearing

See Hearing - Order

43.Findings

Trial court was required to rule on all of the issues raised in defendant's motion to vacate his convictions for murder, kidnapping, first-degree rape, first-degree robbery, and criminal conspiracy to commit robbery, even though defendant was not allowed to proceed on each of those issues at the evidentiary hearing. Wilson v. Com. (Ky. 1998) 975 S.W.2d 901, rehearing denied, certiorari denied 119 S.Ct. 1263, 526 U.S. 1023, 143 L.Ed.2d 359. Criminal Law 1656

Where the trial court makes no findings concerning the issue of denial of effective assistance of counsel to a criminal defendant whose counsel failed to appeal his convictions, the court of appeals is unable to review the claim; the matter must be remanded to the circuit court, which will make factual findings and report them to the court of appeals. Jones v. Com. (Ky.App. 1986) 714 S.W.2d 490.

Evidence in postconviction proceeding established that appointed counsel adequately represented movant and that movant voluntarily pled guilty to charge of storehouse breaking. Stanfield v. Com. (Ky. 1972) 487 S.W.2d 949. Criminal Law 1618(3); Criminal Law 1618(10)

44.Transcripts

Defendant who filed motion to vacate, amend or correct sentence alleging ineffective assistance of counsel was entitled only to transcript of that limited portion of evidence that would afford him adequate review of allegations contained in his motion. Sullivan v. Com. (Ky. 1983) 655 S.W.2d 487. Costs 302.1(1)

An indigent prisoner is not entitled to a free transcript of evidence when the prisoner has not yet filed a motion under this rule. Gilliam v. Com. (Ky. 1983) 652 S.W.2d 856.

Pauper was entitled to free transcript of record of proceeding on motion for postconviction relief; to deny such transcript would constitute a denial of equal protection of the law. Richardson v. Cannon (Ky. 1974) 506 S.W.2d 509. Constitutional Law 3228; Criminal Law 1669

Claim that transcript of evidence in 1944 murder prosecution did not accurately reflect proceedings and that bill of exceptions was suppressed could not be asserted for first time in postconviction proceeding. Wooten v. Com. (Ky. 1971) 473 S.W.2d 116. Criminal Law 1429(1)

Petitioner is not entitled to a transcript, at public expense, to appeal from an order overruling his second motion for relief. Gregory v. Knuckles (Ky. 1971) 471 S.W.2d 306.

On appeal from order overruling motion for relief from judgments of conviction, pauper would be entitled to be furnished with only such portion of transcript of evidence on the hearing as related to issues on which he was entitled to a hearing. Stinnett v. Com. (Ky. 1970) 452 S.W.2d 613. Criminal Law 1077.2(2)

A prisoner as an indigent person was entitled to a free transcript of proceedings on his motion to vacate judgment of conviction in order to perfect his appeal from denial of relief on such motion. Davenport v. Winn (Ky. 1964) 385 S.W.2d 185. Criminal Law 1077.2(2)

When an indigent prisoner was denied opportunity to perfect his appeal from denial of a motion to vacate judgment of conviction in time because of failure to receive a transcript of the record, time for filing record on appeal would not commence until he received a copy of the record. Davenport v. Winn (Ky. 1964) 385 S.W.2d 185. Criminal Law 1106(2)

A prisoner is not entitled to a transcript of the evidence or other records from his trial for the purpose of filing a motion under RCr 11.42. (See also Jones v Breslin, 385 SW(2d) 71 (Ky 1964).) Allen v. Wolfinbarger (Ky. 1964) 385 S.W.2d 160.

Under procedure provided as to motion to vacate judgment, records and witnesses are readily available and state is not obliged to furnish an indigent prisoner with a copy of the record. Jones v. Breslin (Ky. 1964) 385 S.W.2d 71. Criminal Law 1669

A prisoner is not entitled to a record before or at the time he makes his motion. Oakes v. Gentry (Ky. 1964) 380 S.W.2d 237.

45.Costs

County pays court reporter in forma pauperis appeal of RCr 11.42 proceeding; clerk is not paid costs in RCr 11.42 proceeding where defendant is without funds. OAG 64-345.

46. Subsequent motions to vacate

Court of Appeals' recharacterization of pro se prisoners' unlabeled postconviction motions, which trial courts left ambiguous, as motions to vacate, set aside, or correct sentences was not warranted, and thus prisoners' motions could not be used against them as bar to "subsequent" motions to vacate; at appellate stage, prisoners could not withdraw or recast their motions, and without that opportunity it would be unfair to require prisoners to show justification for filing successive motions to vacate. McDaniel v. Commonwealth (Ky. 2016) 495 S.W.3d 115. Criminal Law 1576

Before a trial court characterizes a pro se litigant's unlabeled motion as a motion to vacate, set aside, or correct a sentence or recharacterizes a motion the pro se litigant has labeled some other way as a motion to vacate it must advise the litigant that it is doing so, must warn the litigant about the possible subsequent-motion consequences, and must give the litigant an opportunity to withdraw or to amend his or her motion; if pro se litigants are not so admonished, the subject motion cannot later be used against them as a bar to a "subsequent" motion to vacate. McDaniel v. Commonwealth (Ky. 2016) 495 S.W.3d 115. Criminal Law 1578

Where a trial court determines that regardless of how a postconviction motion is characterized it could not give rise to any sort of relief, the legal theory being patently off the mark, the court is not obliged to engage in recharacterization of the motion as a motion to vacate, set aside, or correct a sentence; in that instance, unless the litigant himself has expressly invoked motion to vacate rule, the motion will not count as an initial motion to vacate so as to limit the litigant's subsequent resort to that rule. McDaniel v. Commonwealth (Ky. 2016) 495 S.W.3d 115. Criminal Law 1578

Court of Appeals' error in recharacterizing pro se prisoners' unlabeled postconviction motions, which trial courts left ambiguous, as motions to vacate, set aside, or correct sentences was harmless aside from possible "successive motion" consequence, and thus error did not entitle prisoners to any additional relief; prisoners made no attempt to argue to Court of Appeals that trial courts erred in their assessment of prisoners' original motions, prisoners argued that they were entitled to relief on grounds never before raised or addressed, and prisoners made no attempt to show how they were prejudiced by the error. McDaniel v. Commonwealth (Ky. 2016) 495 S.W.3d 115. Criminal Law 1177.7(2)

Capital murder defendant's motion for relief from judgment was, in practical effect, an impermissible successive motion to vacate, set aside, or correct sentence, as claims set forth in the motion for relief from judgment were of the type ordinarily raised in a motion to vacate, set aside, or correct sentence. Sanders v. Com. (Ky. 2011) 339 S.W.3d 427, certiorari denied 132 S.Ct. 1792, 566 U.S. 907, 182 L.Ed.2d 620, rehearing denied 132 S.Ct. 2451, 566 U.S. 1017, 182 L.Ed.2d 1077. Criminal Law 1668(3)

Defendant's claim, that venue for his capital murder trial was improper, could have been raised on direct appeal or in defendant's prior motions for postconviction relief, and thus, defendant was not entitled to raise such claim in a motion, under the Civil Rules, to vacate judgment. Baze v. Com. (Ky. 2008) 276 S.W.3d 761, rehearing denied. Criminal Law 1495

Trial court did not abuse its discretion by declining to permit belated verification of unverified motion that was a supplement to previous postconviction motion to vacate which had been filed only after protracted litigation in death penalty case, in light of trial court's serious review and consideration of voluminous pleadings in case before deciding to strike the unauthorized pleadings. Bowling v. Com. (Ky. 1998) 981 S.W.2d 545, rehearing denied, certiorari denied 119 S.Ct. 2375, 527 U.S. 1026, 144 L.Ed.2d 778. Criminal Law 1581

Crim R 11.42 cannot be used as a vehicle for relief from the ineffectiveness of appellate counsel, and where a defendant files his second RCr 11.42 motion to vacate his conviction seeking to overturn previous adverse decisions on the ground that his appellate counsel was ineffective in raising the ineffectiveness of his trial counsel, and the Court of Appeals has already decided the motion after thoroughly reviewing and considering all issues including whether the ineffectiveness of his counsel on his first appeal prevented him from having a meaningful appeal, the effectiveness of the RCr 11.42 counsel will not be reviewed a second time. Vunetich v. Com. (Ky. 1990) 847 S.W.2d 51.

Rule in *Ivey* providing movant with legal assistance in preparing and presenting grievances does not preclude a subsequent motion for postconviction relief upon a ground which was not known, or reasonably discoverable, at time initial motion was made. Gilliam v. Com. (Ky. 1983) 652 S.W.2d 856. Criminal Law 1668(5)

Failure to question validity of juvenile court waiver of jurisdiction in first motion to vacate precludes raising question in second or subsequent motions to vacate. Crick v. Com. (Ky. 1977) 550 S.W.2d 534.

Where record did not show affirmatively that no attorney was present when accused was sentenced, where there was only accused's allegation that no attorney was present at sentencing, and where accused had made false statements in prior motions to vacate, accused was not entitled to have sentence vacated. Reams v. Com. (Ky. 1975) 522 S.W.2d 853. Criminal Law 1618(10)

When prisoner fails to appeal from an order overruling his motion to vacate judgment or when his appeal is not perfected or is dismissed, he is not entitled to file a subsequent motion to vacate; overruling Schroader v. Thomas, 387 S.W.2d 312. Lycans v. Com. (Ky. 1974) 511 S.W.2d 232. Criminal Law 1668(1)

Defendant whose first motion to vacate judgment was overruled without evidentiary hearing because his conviction was being directly appealed and because any question he might raise under motion could be answered in course of his appeal, but whose appeal was dismissed because it was untimely and who at time he sought original motion to vacate did not know that his court-appointed counsel had filed untimely notice of appeal, was entitled to evidentiary hearing on second motion to vacate judgment. Smith v. Com. (Ky. 1973) 502 S.W.2d 516. Criminal Law 1652

Defendant's fourth motion to vacate sentence should have been dismissed where it asserted grounds of relief which could have been raised in earlier proceedings and advanced no reason why matters could not have been asserted earlier. Shepherd v. Com. (Ky. 1972) 477 S.W.2d 798. Criminal Law 1668(3)

Claim of inadequate assistance of counsel not made in first application for postconviction relief could not properly be made in second application. Butler v. Com. (Ky. 1971) 473 S.W.2d 108. Criminal Law 1168(3)

Petitioner was not entitled, at public expense, to a transcript of record in order that he might appeal order overruling his second motion for postconviction relief, since final disposition of first motion concluded all issues that could reasonably have been presented in the same proceeding. Gregory v. Knuckles (Ky. 1971) 471 S.W.2d 306. Criminal Law 1077.2(1)

Petitioner, whose initial postconviction relief petition was denied, was not entitled to bring second such petition where nothing in such second proceeding was not or could not have been presented originally. Case v. Com. (Ky. 1971) 467 S.W.2d 367. Criminal Law 1668(3)

Even though there had never been an appellate postconviction review of defendant's case, defendant who had abandoned appeal from prior order overruling motion to vacate conviction was not entitled, on appeal from overruling of subsequent motion to vacate, to review of record of his original trial. Szabo v. Com. (Ky. 1970) 458 S.W.2d 167. Criminal Law 1134.90

Courts will not consider successive motions to vacate judgment of conviction stating grounds that have or should have been presented earlier. Hampton v. Com. (Ky. 1970) 454 S.W.2d 672. Criminal Law 1668(1)

Where previous motion to vacate rape conviction was overruled and no appeal was taken therefrom and grounds asserted in second motion to vacate either were stated in or could have reasonably been presented in first motion, court properly overruled second motion. Milner v. Com. (Ky. 1966) 408 S.W.2d 646. Criminal Law 1668(3)

Where defendant had had his conviction previously reviewed on motion to vacate and no appeal was taken from judgment refusing to vacate, court was not required to entertain a successive motion for the same relief and for same generic reasons. Reado v. Com. (Ky. 1966) 408 S.W.2d 438, certiorari denied 87 S.Ct. 1380, 386 U.S. 1024, 18 L.Ed.2d 463. Criminal Law 1668(3)

A subsequent motion raising issues that could have been raised on the first motion is an effort to trifle with the courts. Kinmon v. Com. (Ky. 1965) 396 S.W.2d 331, certiorari denied 86 S.Ct. 938, 383 U.S. 930, 15 L.Ed.2d 848.

A subsequent motion will be denied after a prior motion has been heard and denied. Crochrell v. Warren (Ky. 1964) 383 S.W.2d 377.

47-51.Appeal from conviction

47.Appeal from conviction - In general

Post-conviction motion to vacate cannot be used as a vehicle for relief from ineffective assistance of appellate counsel. Harper v. Com. (Ky. 1998) 978 S.W.2d 311, rehearing denied, certiorari denied 119 S.Ct. 1367, 526 U.S. 1056, 143 L.Ed.2d 527. Criminal Law 1519(15)

As merits of issue of Commonwealth's comment on defendant's silence following his arrest could not be reached on direct appeal from voluntary manslaughter conviction, since no timely objection was made and it did not constitute

palpable error, defendant was not foreclosed from raising issue in further proceedings under criminal rule in which the trial court would, for first time, have opportunity to determine whether there had been valid waiver of defendant's constitutional objection. Salisbury v. Com. (Ky.App. 1977) 556 S.W.2d 922. Criminal Law 1436

Court of Appeals, in considering motion to vacate judgment of conviction, will not retry issues that have been before it on a direct appeal and will not permit a convicted defendant to employ such a proceeding as a means of trying or retrying issues which could and should have been raised in the original proceedings when the competency, adequacy and effectiveness of his own counsel are not in good faith questioned and where grounds of his motion are matters which must have been known to him at time of trial. Bronston v. Com. (Ky. 1972) 481 S.W.2d 666. Criminal Law 1429(2); Criminal Law 1433(2)

Motion to vacate conviction is not substitute for appeal and does not permit a review of all trial errors. Clay v. Com. (Ky. 1970) 454 S.W.2d 109, certiorari denied 91 S.Ct. 245, 400 U.S. 943, 27 L.Ed.2d 247. Criminal Law 1429(2); Criminal Law 1508

Where prisoner had been sentenced in second court while he was free pending appeal from conviction in another court and second court imposed sentence to run concurrently with any sentence imposed by first court, attack against first court sentence which was imposed with provision that it should not run concurrent with any other sentence was "collateral attack" upon judgment within rule providing remedy for collateral attack upon sentence. Richardson v. Howard (Ky. 1969) 448 S.W.2d 49. Criminal Law 1556

48.Appeal from conviction - Before, during, or after motion to vacate

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Also listed as **Before, during, or after motion to vacate, appeal from conviction**
Appellate review of direct errors by a trial court does not preclude a collateral attack by motion to vacate conviction based on claim of ineffective assistance of trial counsel. Com. v. Robertson (Ky.App. 2013) 431 S.W.3d 430. Criminal Law 1433(1)

Rule allowing trial court to rule on motion filed while case was pending on appeal if motion raised new issues, as exception to general rule that filing notice of appeal divests trial court of jurisdiction, did not apply to permit trial court to enter order denying defendant's motion for new trial or judgment notwithstanding the verdict (JNOV) in arson trial, and thus order was nullity, where defendant's post-trial motions were all filed before attempted appeal. Johnson v. Com. (Ky. 2000) 17 S.W.3d 109. Criminal Law 1081(1)
Proper way to challenge prior convictions for driving on suspended license arising from driving under the influence (DUI), on which charge of driving on suspended sentence (third or more offense arising from DUI) was based, was motion to vacate judgment or motion for relief from judgment made in court in which previous convictions were obtained rather than by asserting ineffective assistance of counsel claim made in court in which charges against defendant were pending. Lovett v. Com. (Ky.App. 1993) 858 S.W.2d 205. Automobiles 359.1

RCr 11.42(8) suspends the effectiveness of a trial court's order in a collateral attack proceeding until an appeal of the order itself is disposed of, but does not suspend the order until the direct appeal of the conviction is finally disposed of. Wilson v. Com. (Ky.App. 1988) 761 S.W.2d 182. Criminal Law 1083

It is proper for a trial court to consider a motion to vacate a judgment made under RCr 10.02 or 11.42 while a direct appeal from the same judgment is pending; the independent attack may render the direct appeal unnecessary, and where a question such as ineffective assistance of counsel is raised, it would be better to dispose of the question promptly without waiting for the direct appeal to conclude, and if counsel is found ineffective, a new trial may be granted promptly while witnesses are more likely to be available and able to recall events with some clarity. Wilson v. Com. (Ky.App. 1988) 761 S.W.2d 182.

Where a defendant convicted of a felony files a motion to vacate the judgment on the ground that his attorney was permitted to withdraw from the case and never filed a notice of appeal, the denial of such motion does not preclude the defendant from asserting that he has been denied his right of appeal due to ineffective assistance of counsel, but his claim must be presented to the appellate court with jurisdiction to hear the appeal by an original proceeding seeking the right to prosecute the appeal belatedly. Ewing v. Com. (Ky. 1987) 734 S.W.2d 475.

A defendant convicted of armed robbery in 1975 and, by operation of KRS 532.080, the persistent felony offender statute, of first degree theft in 1982 is not precluded by an unsuccessful RCr 11.42 proceeding from subsequently attempting to file a motion to reinstate his appeal from the 1975 judgment based on an ineffective assistance of counsel argument on the authority of Evitts v Lucey, 105 SCt 830, 83 LEd(2d) 821 (1985). Com. v. Jones (Ky. 1986) 704 S.W.2d 203.

Contention that defendant was denied adequate assistance of counsel by reason of failure of trial counsel to perfect appeal following trial was cured when defendant by means of postconviction proceeding secured belated appeal. McHenry v. Com. (Ky. 1972) 490 S.W.2d 766. Criminal Law 1519(15)

Testimony of appointed trial counsel established that allegedly inexperienced, semiliterate 19-year-old defendant was given a full, fair explanation of his right to appeal from life sentence and a full opportunity to avail himself of counsel's offer to take the appeal; defendant was not entitled to postconviction relief upon ground of appointed counsel's alleged refusal to take appeal. Vice v. Com. (Ky. 1970) 459 S.W.2d 613. Criminal Law 1618(14)

48. Before, during, or after motion to vacate, appeal from conviction

See Appeal from conviction - Before, during, or after motion to vacate

49. Appeal from conviction - Postconviction review of issues previously appealed

Also listed as **Postconviction review of issues previously appealed, appeal from conviction**

Defendant was procedurally barred from challenging jury instructions administered in his prosecution for drug and illegal firearm possession, in motion for postconviction relief, as complaints had already been addressed on direct appeal. Johnson v. Com. (Ky.App. 2005) 180 S.W.3d 494. Criminal Law 1433(2)

Post-conviction movant's claims that various experts would have helped his trial counsel in pursuing various aspects of his defense, including whether he was competent to stand trial, whether he was intoxicated at time of crime, whether his intoxication affected voluntariness of his confession and his consent to search his house, and whether he was mentally retarded, and thus not subject to death penalty, were procedurally barred, where such claims were raised and rejected on movant's direct appeal from his capital murder conviction. Mills v. Com. (Ky. 2005) 170 S.W.3d 310, rehearing denied, certiorari denied 126 S.Ct. 1466, 547 U.S. 1005, 164 L.Ed.2d 251. Criminal Law 1433(2)

Claims that co-defendants' trial counsel were ineffective at capital murder trial in failing to adequately voir dire the jury, failing to adequately prepare for testimony of two witnesses, and failing to adequately cross-examine those witnesses, that Commonwealth's Attorney failed to disclose exculpatory material to the defense, and that conflict of interest between co-defendants' respective trial counsel rendered their assistance ineffective, could not be raised in post-conviction motion to vacate the judgments, where those claims had been addressed and resolved on direct appeal from the convictions. Hodge v. Com. (Ky. 2001) 68 S.W.3d 338, modified on denial of rehearing. Criminal Law 1433(2)

Supreme Court's ruling on direct appeal that confession of capital murder defendant's accomplice was admissible at defendant's trial as having sufficient particularized guarantees of trustworthiness was law of the case with respect to defendant's post-appeal motion to set aside judgment, absent any showing that former decision was clearly and palpably erroneous or reached wrong result under applicable case law. Taylor v. Com. (Ky. 2001) 63 S.W.3d 151, modified on denial of rehearing, certiorari denied 122 S.Ct. 2632, 536 U.S. 945, 153 L.Ed.2d 813. Criminal Law 1180

Issues dismissed by Supreme Court on capital murder defendant's direct appeal as being “without merit” were, for purposes of defendant's post-appeal motion to set aside judgment, considered and resolved against defendant, and could not serve as bases for ineffective assistance claims; such issues included trial counsel's alleged failure to timely request second change of venue, to request additional psychological testing, and to object to prosecutor's closing remarks. Taylor v. Com. (Ky. 2001) 63 S.W.3d 151, modified on denial of rehearing, certiorari denied 122 S.Ct. 2632, 536 U.S. 945, 153 L.Ed.2d 813. Criminal Law 1427

Review of claims raised in a collateral attack by a postconviction relief motion is limited to the issues that were not and could not be raised on direct appeal, and an issue raised and rejected on direct appeal may not be relitigated in postconviction relief proceedings by simply claiming that it amounts to ineffective assistance of counsel. Haight v. Com. (Ky. 2001) 41 S.W.3d 436, certiorari denied 122 S.Ct. 471, 534 U.S. 998, 151 L.Ed.2d 386. Criminal Law 1427; Criminal Law 1440(1)

Issues of rebuttal evidence, impeachment of defendant, victim evidence, and fact victims' father testified while in wheelchair, were rejected on direct appeal, and thus were without merit on defendant's motion for postconviction relief following double murder conviction. Foley v. Com. (Ky. 2000) 17 S.W.3d 878, modified on denial of rehearing, certiorari denied 121 S.Ct. 663, 531 U.S. 1055, 148 L.Ed.2d 565. Criminal Law 1433(2)

Defendant could not use postconviction motion to vacate to relitigate claims of ineffective assistance of trial counsel which previously had been raised and rejected on direct appeal. Bowling v. Com. (Ky. 1998) 981 S.W.2d 545, rehearing denied, certiorari denied 119 S.Ct. 2375, 527 U.S. 1026, 144 L.Ed.2d 778. Criminal Law 1433(2)

Allegation that prosecution sought death penalty based on defendant's race was raised and rejected on direct appeal and could not be reconsidered in connection with defendant's motion to vacate his sentences for intentional murder, kidnapping, first-degree rape, and first-degree sodomy. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1433(2)

Defendant's complaint that members of the jury, the judge, and the prosecutor were unrelated to the county in which the offense was committed was raised on direct appeal and could not be asserted on appeal from denial of defendant's motion to vacate his sentences for intentional murder, kidnapping, first-degree rape, and first-degree sodomy. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1433(2)

In a proceeding brought under criminal rule governing motions to vacate, set aside, or correct sentence, the movant cannot raise issues that were raised and decided on direct appeal. Wilson v. Com. (Ky. 1998) 975 S.W.2d 901, rehearing denied, certiorari denied 119 S.Ct. 1263, 526 U.S. 1023, 143 L.Ed.2d 359. Criminal Law 1433(2)

Law of the case doctrine applied to preclude Supreme Court's review of ineffective assistance of counsel claim raised on appeal by defendant following denial of his motion to vacate his convictions for murder, kidnapping, first-degree rape, first-degree robbery, and criminal conspiracy to commit robbery, even if evidence at hearing on motion supplemented the record to some extent, where issues raised on instant appeal were simply a repeat of those decided against defendant on direct appeal. Wilson v. Com. (Ky. 1998) 975 S.W.2d 901, rehearing denied, certiorari denied 119 S.Ct. 1263, 526 U.S. 1023, 143 L.Ed.2d 359. Criminal Law 1180

Movant's failure to assert, on prior motion to vacate, set aside or correct sentence, claim that litigation staff of Department of Public Advocacy (DPA) conspired to deprive him of statutorily required assistance precluded him from raising that issue in successive motion, despite claim that he lacked knowledge of alleged conspiracy; it was undeniable that motion counsel, an alleged coconspirator, was aware of it, and if purpose of conspiracy was to create issue of ineffective assistance, issue could as easily have been raised in first motion. McQueen v. Commonwealth of Kentucky (Ky. 1997) 949 S.W.2d 70, certiorari denied 117 S.Ct. 2536, 521 U.S. 1130, 138 L.Ed.2d 1035. Criminal Law 1668(6)

Issue of whether movant's trial counsel rendered effective assistance was litigated extensively on both his previous motion to vacate, set aside or correct sentence and on appellate review thereof, and it could not be relitigated in present motion. McQueen v. Commonwealth of Kentucky (Ky. 1997) 949 S.W.2d 70, certiorari denied 117 S.Ct. 2536, 521 U.S. 1130, 138 L.Ed.2d 1035. Criminal Law 1433(2); Criminal Law 1668(3)

Motion under civil rules for relief from judgment is not separate avenue of appeal to be pursued in addition to other remedies in criminal cases, but is available only to raise issues which cannot be raised in other proceedings. McQueen v. Com. (Ky. 1997) 948 S.W.2d 415, certiorari denied 117 S.Ct. 2535, 521 U.S. 1130, 138 L.Ed.2d 1035. Criminal Law 1407; Criminal Law 1426(1)

Where issue of whether capital murder defendant was prejudiced by joint trial with codefendant who had been exempted from death penalty had been vigorously litigated and rejected on direct appeal, defendant was not entitled to evidentiary hearing on postconviction relief claim that defense counsel had conflict of interest which prevented him from attacking trial court's erroneous interpretation of law, as prohibiting application of death penalty to codefendant, to defendant's alleged prejudice. Stanford v. Com. (Ky. 1993) 854 S.W.2d 742, certiorari denied 114 S.Ct. 703, 510 U.S. 1049, 126 L.Ed.2d 669. Criminal Law 1655(6)

Movant did not have right to challenge effectiveness of appellate counsel in motion to vacate conviction which had already been reviewed, considered and decided by appellate court. Vunetich v. Com. (Ky. 1990) 847 S.W.2d 51. Criminal Law 1668(3)

A substantial difference exists in the situation of a convicted defendant for whom no appeal was even taken or one whose appeal was dismissed solely due to neglect of counsel and the situation of a defendant whose appeal was completely processed and the judgment affirmed; therefore, in the latter situation where the defendant claims his attorney's alleged ineffective assistance on an appeal and the appellate court has considered and decided the merits of the appeal, the defendant is not entitled to an examination of the appeal anew or to a vacation of his sentence. Hicks v. Com. (Ky. 1992) 825 S.W.2d 280.

RCr 11.42 does not permit a convicted defendant to retry issues raised and considered on direct appeal, and therefore a convicted rapist may not raise, in his petition for postconviction relief, the issue of a juror's failure to truthfully answer a question on voir dire about whether he knew members of the victim's family, where that issue has been raised and considered by the Kentucky Supreme Court on direct appeal. Brown v. Com. (Ky. 1990) 788 S.W.2d 500.

A convicted rapist may not raise in a postconviction petition the claim that his lawyer was ineffective in failing to discover the alleged dishonesty and bias on the part of a juror where that issue has already been raised and considered by the Kentucky Supreme Court on direct appeal. Brown v. Com. (Ky. 1990) 788 S.W.2d 500.
A ruling of the Kentucky Supreme Court on appeal of a conviction that a witness' excluded testimony did not impeach another witness' testimony is the law of the case and is not subject to further review by the court of appeals in a proceeding pursuant to RCr 11.42. Com. v. Basnight (Ky.App. 1989) 770 S.W.2d 231. Criminal Law 1180
Where defendant pursued, and court rejected on direct appeal, defendant's persistent felony offender conviction, merits of persistent felony offender conviction would not be considered pursuant to defendant's motion to vacate judgment. Eggerson v. Com. (Ky.App. 1983) 656 S.W.2d 744. Criminal Law 1433(2)

Juvenile who appealed to circuit court from juvenile court order waiving jurisdiction, without raising issue that reasons for waiver were not set forth and without taking further appeal to Court of Appeals could not raise question in proceeding for postconviction relief. Holt v. Com. (Ky. 1975) 525 S.W.2d 660. Criminal Law 1429(2)
Issues that could have been presented on an appeal cannot be raised by a motion. Bronston v. Com. (Ky. 1972) 481 S.W.2d 666.

49. Postconviction review of issues previously appealed, appeal from conviction

See Appeal from conviction - Postconviction review of issues previously appealed

50. Appeal from conviction - Postconviction review of issues that should have been raised on appeal

Also listed as **Postconviction review of issues that should have been raised on appeal, appeal from conviction**

Defendant's claim that his counsel in proceedings for revocation of pretrial release had been ineffective for failure to request that he be sentenced under subsequently enacted version of statute defining his underlying offense which reduced his underlying offense to misdemeanor could and should have been raised on direct appeal, and could not be raised by way of motion to vacate sentence. Teague v. Com. (Ky.App. 2014) 428 S.W.3d 630, modified on denial of rehearing. Criminal Law 1429(2)
Defendant's allegation in postconviction motion to vacate sentence, that trial counsel rendered ineffective assistance by failing to adequately investigate competency of codefendant who testified against defendant, was an issue that should have been raised on direct appeal. Bratcher v. Com. (Ky.App. 2012) 406 S.W.3d 865, rehearing denied, review denied. Criminal Law 1429(2)

A defendant attacking a criminal conviction must first directly appeal the judgment of conviction, stating every ground of error of which he or his counsel should be aware, and if unsuccessful on direct appeal, defendant is required to file a motion to vacate, set aside or correct sentence for all grounds for holding the sentence invalid of which the defendant has knowledge; thereafter, defendant may move for post-conviction relief. Lucas v. Com. (Ky.App. 2012) 380 S.W.3d 554. Criminal Law 1007

Murder defendant could not raise claim that forensic expert's testimony regarding bullet fragments was inadmissible in postconviction proceeding, where claim could have been raised on direct appeal, even though defendant's attorney did not object to evidence. Bowling v. Com. (Ky. 2002) 80 S.W.3d 405, rehearing denied, certiorari denied 123 S.Ct. 1587, 538 U.S. 931, 155 L.Ed.2d 327. Criminal Law 1427

Constitutionally guaranteed right of appeal, rather than motion to vacate, set aside, or correct sentence, is appropriate procedure to follow in cases where state attempts to repudiate written plea agreement signed by both parties and performed by defendant. Shanklin v. Com. (Ky.App. 1987) 730 S.W.2d 535. Criminal Law 1426(3); Criminal Law 1483

Conviction as a persistent felony offender cannot be attacked by a motion, but only on direct appeal. Eggerson v. Com. (Ky.App. 1983) 656 S.W.2d 744.

CR 60.02 is intended to provide for relief that is not available by direct appeal and not available under RCr 11.42; therefore, any grounds for relief that the defendant could have raised by direct appeal or in an RCr 11.42 motion may not be raised in a CR 60.02 motion. Gross v. Com. (Ky. 1983) 648 S.W.2d 853.

Claims that city attorney appointed to represent defendant at his trial was hostile, that some members of jury were present prior to his trial when he was testifying at trial of person who was arrested with him for same offense, and that he was improperly denied continuance which would have enabled him to secure a witness did not constitute sufficient grounds on which to base collateral attack on convictions where defendant failed to raise such claims on direct

appeal. Cole v. Com. (Ky. 1969) 441 S.W.2d 160. Criminal Law 1440(1); Criminal Law 1499; Criminal Law 1554

Any error in consolidating indictments charging uttering worthless check, uttering forged instrument, and uttering forged check did not deny due process, and was reviewable upon appeal and was not ground for postconviction relief. Trodglen v. Com. (Ky. 1968) 427 S.W.2d 577. Constitutional Law 4607; Criminal Law 619; Criminal Law 1455

Post-conviction relief afforded by rule is not a substitute for appeal process and does not permit review of alleged trial errors which fall short of denial of due process. Smith v. Com. (Ky. 1967) 412 S.W.2d 256, certiorari denied 88 S.Ct. 162, 389 U.S. 873, 19 L.Ed.2d 155. Criminal Law 1429(2); Criminal Law 1508

Alleged errors that could have been raised by an appeal cannot be raised by a motion under RCr 11.42. Brown v. Com. (Ky. 1965) 396 S.W.2d 773.

Claim that evidence was insufficient to sustain conviction could have been raised on direct appeal from conviction for possession of burglary tools and storehouse breaking and could not be raised on subsequent motion to vacate conviction. Henry v. Com. (Ky. 1965) 391 S.W.2d 355. Criminal Law 1429(2)

Alleged errors that were susceptible of appellate review and do not raise any issue of due process cannot be reviewed by a motion. Lee v. Com. (Ky. 1965) 389 S.W.2d 241.

Defendant was not entitled to relief against judgment of conviction on grounds that evidence procured by reason of allegedly illegal search and seizure was introduced in prosecution over his objection, that other incompetent and irrelevant evidence was introduced over his objection, that instructions given were improper and failed to give the whole law of the case, and that his attorney was not present with him when sentence was pronounced, since such grounds were available to him on original appeal from conviction. Hamm v. Mansfield (Ky. 1958) 317 S.W.2d 172, certiorari denied 79 S.Ct. 611, 359 U.S. 928, 3 L.Ed.2d 630. Criminal Law 1429(2)
Capital defendant's argument that the jurors considered improper outside information in deliberating his sentence was not a proper ground for a motion to vacate, set aside, or correct sentence; issue should have been raised on direct appeal. Thompson v. Com. (Ky. 2010) 2010 WL 4156756, Unreported, modified on denial of rehearing. Criminal Law 1429(2)

Defendant's argument, in her motion for relief of judgment, that illicit sexual relationship between her and former circuit judge who was not trial judge during her trial for capital kidnapping and facilitation of murder destroyed her attorney/client relationship with trial counsel, rendering her convictions unreliable, could have been previously raised during her hearing on her prior motion to vacate her convictions and, therefore, was procedurally barred, where defendant was not prevented from bringing the claims earlier because of duress, fear or any other cause since judge had been dead for many years. Humphrey v. Com. (Ky. 2005) 2005 WL 924188, Unreported. Criminal Law 1661

Trial counsel's failure to object when trial court assigned defendant and codefendant an insufficient number of peremptory challenges, nine instead of 13 as required under criminal procedural rule governing peremptory challenges, was ineffective assistance of counsel, warranting automatic reversal of conviction for arson and burglary; on direct appeal, Supreme Court did not consider issue of peremptory challenges since it was waived due to counsel's failure to object, and assignment of insufficient number of peremptory challenges was error warranting automatic reversal, thus satisfying both prongs of *Strickland*. Brown v. Com. (Ky.App. 2005) 2005 WL 736263, review granted, not to be published pursuant to operation of cr 76.28(4), opinion after remand from supreme court 2008 WL 1837292. Criminal Law 1035(7)

50.Postconviction review of issues that should have been raised on appeal, appeal from conviction

See Appeal from conviction - Postconviction review of issues that should have been raised on appeal

51.Appeal from conviction - Use of motion to vacate to reinstate appeal

Also listed as **Use of motion to vacate to reinstate appeal, appeal from conviction**
The proper remedy where a defendant's appeal has been dismissed solely due to neglect of counsel does not lie in RCr 11.42, which is designed to allow a trial court to review its judgment and sentence for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself, but in a motion to the court which had

jurisdiction to hear the appeal, that it grant a belated appeal or that it reinstate an appeal which has been dismissed. Hicks v. Com. (Ky. 1992) 825 S.W.2d 280.

A trial court has no authority under RCr 11.42 to vacate a judgment and enter a new judgment for the purpose of permitting an appeal. Thompson v. Com. (Ky. 1987) 736 S.W.2d 319. Criminal Law 1069(5)

When an appeal has been dismissed by an appellate court, the vacation of the judgment by the trial court, pursuant to R.Cr. 11.42 on the ground that the appeal was lost because of ineffective assistance of counsel, and the entry of a new judgment from which a new appeal may be taken is not, in fact, distinguishable from the reinstatement of the appeal and is not, therefore, authorized; overruling *Hammershoy v. Commonwealth*, 398 S.W.2d 883, and *Stahl v. Commonwealth*, 613 S.W.2d 617. Com. v. Wine (Ky. 1985) 694 S.W.2d 689. Criminal Law 1131(7)

Where no appeal from defendant's murder conviction had been dismissed, defendant could seek to obtain a belated appeal via rule relating to motions to vacate, set aside or correct sentence, and Court of Appeals had jurisdiction to entertain appeal from denial of motion for late appeal. Jones v. Com. (Ky.App. 1979) 593 S.W.2d 869. Criminal Law 1069(6)

Neither the circuit court nor the Court of Appeals had jurisdiction to reinstate defendant's appeal of his 1976 conviction on charges of murder, rape and sodomy after the appeal had been dismissed by the Supreme Court; only the Supreme Court had the power to grant a new appeal. Amburgey v. Com. (Ky.App. 1979) 579 S.W.2d 376. Criminal Law 1131(7)

Circuit court, in which defendant was convicted of murder, had no jurisdiction to reinstate defendant's right to direct appeal from conviction, but, rather, such prerogative was with the Supreme Court. Gregory v. Com. (Ky. 1978) 574 S.W.2d 308. Criminal Law 1131(7)

Proceeding on motion to vacate, set aside or correct sentence is primarily an attack on a sentence or judgment that has been entered by the trial court; such a proceeding is not primarily a motion to gain the right to appeal and does not confer jurisdiction on the trial court to reinstate a right of appeal which has been dismissed by the Supreme Court. Cleaver v. Com. (Ky. 1978) 569 S.W.2d 166. Criminal Law 1407; Criminal Law 1433(2)

Although Commonwealth suggested that Court of Appeals should, by order, either reinstate original appeal or reverse order of trial court denying motion to vacate judgment and remand case to trial court for an evidentiary hearing on specific point of deprivation of right to direct appeal, where Court of Appeals did not err in dismissing defendant's direct appeal and had benefit of entire record and proceedings in case and briefs of defense counsel, Court of Appeals was constrained to pass on merits of attempted appeal the same as if the case were on direct appeal. Rake v. Com. (Ky. 1971) 468 S.W.2d 788. Criminal Law 1068.5

If a defendant has been deprived unconstitutionally of a right to appeal, the Court of Appeals has the power to right the wrong by reviewing his case. Tipton v. Com. (Ky. 1970) 456 S.W.2d 681.

If it should appear that an accused has been unconstitutionally deprived of his right of appeal, his prior judgment of conviction and sentence should be set aside and a new judgment and sentence entered from which a timely appeal may be taken. Hines v Com (Ky App 1980) 617 SW(2d) 52.

51. Use of motion to vacate to reinstate appeal, appeal from conviction

See Appeal from conviction - Use of motion to vacate to reinstate appeal

52. Presumptions and burden of proof

In proceeding on motion for postconviction relief, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. Farmer v. Com. (Ky.App. 2012) 2012 WL 5042119, reversed 2014 WL 5410235. Criminal Law 1613

Movant claiming ineffective assistance of counsel must show that his counsel's representation fell below an objective standard of reasonableness, and the movant bears the burden of proof; in doing so, the movant must overcome a strong presumption that counsel's performance was adequate. Cherry v. Commonwealth (Ky.App. 2018) 545 S.W.3d 318, rehearing denied. Criminal Law 1871; Criminal Law 1884

When considering a motion for ineffective assistance of counsel, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must

overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Cherry v. Commonwealth (Ky.App. 2018) 545 S.W.3d 318, rehearing denied. Criminal Law 1883

On a motion to vacate a sentence, the movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided. Ky. R. Crim. P. 11.42. Skaggs v. Commonwealth (Ky.App. 2016) 488 S.W.3d 10, rehearing denied. Criminal Law 1450; Criminal Law 1613

Post-conviction movant must carry the burden of establishing both deficient performance and resulting prejudice in order to succeed with an ineffective assistance of counsel argument. Com. v. Searight (Ky. 2014) 423 S.W.3d 226. Criminal Law 1519(4); Criminal Law 1613

Party seeking post-conviction relief for ineffective assistance of counsel has the burden of proving: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. Com. v. Searight (Ky. 2014) 423 S.W.3d 226. Criminal Law 1519(4); Criminal Law 1613

To prevail on a motion to vacate, set aside or correct sentence, the movant must convincingly establish he was deprived of some substantial right justifying the extraordinary relief afforded by the post-conviction proceeding. Bratcher v. Com. (Ky.App. 2012) 406 S.W.3d 865, rehearing denied, review denied. Criminal Law 1450; Criminal Law 1613

To prevail on a motion for postconviction relief, a movant must convincingly establish that he was deprived of a substantial right justifying the extraordinary relief afforded by post conviction proceedings. Halvorsen v. Com. (Ky. 2007) 258 S.W.3d 1, rehearing denied. Criminal Law 1450

Homicide defendant, who waived right to counsel and represented himself at trial, was given a full and fair evidentiary hearing on motion to vacate his convictions, even though motion court refused to consider remaining issues raised by defendant after he failed to meet threshold burden of showing that his choice to proceed pro se was involuntary, where hearing lasted nine days, and court was able to resolve remaining issues from face of the record or court made determination that defendant's other allegations, even if true, were insufficient to invalidate the convictions. Wilson v. Com. (Ky. 1998) 975 S.W.2d 901, rehearing denied, certiorari denied 119 S.Ct. 1263, 526 U.S. 1023, 143 L.Ed.2d 359. Criminal Law 1656

In a petition to vacate conviction the movant must show that there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack. Lay v. Com. (Ky. 1974) 506 S.W.2d 507. Criminal Law 1451; Criminal Law 1493

Petitioner, who did not seek postconviction relief until approximately 16 years after conviction occurred, had heavy burden to convince fact finder that he had ineffective assistance of counsel or that his appointed counsel improperly refused to take an appeal on his behalf, but should be afforded an evidentiary hearing. Prater v. Com. (Ky. 1971) 474 S.W.2d 383. Criminal Law 1655(6)

Overruling without a hearing of second motion to vacate judgment of conviction, which stated same grounds as prior motion, was not error where there was no indication that hearing granted pursuant to first motion did not afford movant an adequate and reasonable opportunity to sustain burden of proving his allegations. Kennedy v. Com. (Ky. 1970) 451 S.W.2d 158. Criminal Law 1668(3)

Defendant who appealed from order overruling his motion to set aside his judgment of conviction had burden of proving that he was not adequately represented by appointed counsel. Jordan v. Com. (Ky. 1969) 445 S.W.2d 878. Criminal Law 1613

Burden is upon accused to establish convincingly that he was deprived of some substantial rights which would justify extraordinary relief afforded by postconviction proceedings. Dorton v. Com. (Ky. 1968) 433 S.W.2d 117. Criminal Law 1615

Movant for post-conviction relief has heavy burden and must do more than raise doubt about regularity of proceedings under which he was convicted and must establish convincingly that he has been deprived of some substantial right which would justify relief. Com. v. Campbell (Ky. 1967) 415 S.W.2d 614. Criminal Law 1613; Criminal Law 1615

53. Mandamus and prohibition

Petitioner for postconviction relief who had been denied an order releasing expert witness funds for evidentiary hearing regarding his ineffective assistance of counsel claim failed to show that he lacked an adequate remedy by appeal, as required to obtain writ of mandamus; rather, any claim that trial court erred by not ordering expert funding was claim of legal error that could be corrected in due course on appeal. Jones v. Costanzo (Ky. 2012) 393 S.W.3d 1. Criminal Law 1023(15); Mandamus 4(4)

In the interest of judicial economy, Supreme Court would grant defendant's petition for writ of mandamus ordering circuit court to conduct an evidentiary hearing to determine whether he was entitled to state funds for expert assistance on his motion to vacate, set aside or correct sentence of death, even though there was no showing of irreparable harm; evidentiary hearing was necessary to develop claims of ineffective assistance of counsel and prosecutorial misconduct, and it would be inefficient to raise the funding issue for the first time on appeal after the post-conviction proceeding, requiring entire proceeding to be held again. Mills v. Messer (Ky. 2008) 268 S.W.3d 366. Mandamus 4(4); Mandamus 61

Defendant did not have adequate remedy at law, as element for mandamus relief, from trial judge's refusal to order legal aid attorney to produce attorney's file for representation of defendant in murder prosecution, which file defendant was seeking as support for post-conviction motion to vacate, which motion alleged ineffective assistance of counsel; attorney was claiming that parts of file were protected from disclosure as work product, and if post-conviction relief was ultimately denied, then, in absence of disclosure, defendant, on direct appeal to Court of Appeals, would be unable to present Court of Appeals with a record of the alleged work product. Hiatt v. Clark (Ky. 2006) 194 S.W.3d 324, corrected. Mandamus 4(4)

Defendant would suffer irreparable injury, as element for mandamus relief, from trial judge's refusal to order legal aid attorney to produce attorney's file for representation of defendant in murder prosecution, which file defendant was seeking as support for post-conviction motion to vacate, which motion alleged ineffective assistance of counsel; attorney was claiming that parts of file were protected from disclosure as work product, and if post-conviction relief was ultimately denied, then, in absence of disclosure, defendant, on direct appeal to Court of Appeals, would be unable to present Court of Appeals with a record of the alleged work product. Hiatt v. Clark (Ky. 2006) 194 S.W.3d 324, corrected. Mandamus 61

Writ of mandamus directing circuit judge to set aside order granting probation to defendant, on ground that the order was invalid because time requirements of statute governing probation were not complied with, was denied, even though probation order was invalid, in view of facts that defendant had pending an appeal which raised serious question of correctness of judgment and motion to set aside judgment of conviction, that order of probation was granted according to agreement whereby defendant would, and subsequently did, dismiss appeal and motion, and that defendant had only three months before he was eligible for parole; potential injury to be suffered by Commonwealth by letting probation order stand was not of such proportion as to warrant invoking extraordinary remedy of mandamus. Com. ex rel. Hancock v. Melton (Ky. 1974) 510 S.W.2d 250. Mandamus 61
Where petitioner sought mandamus to compel circuit court to allow him to appeal in forma pauperis from an order made in proceeding on motion to vacate judgment of conviction and sought a copy of transcript of record made on his original trial, entry of order allowing him to appeal in forma pauperis was directed, copy of record on proceeding on motion was ordered to be furnished to him, but no order allowing him transcript of record made on original trial was rendered since he gave no reason why any part of that transcript was necessary. Moore v. Simpson (Ky. 1967) 411 S.W.2d 325. Mandamus 61

Pauper who sought to obtain record of proceedings had pursuant to his motion to vacate judgment for purposes of appeal could compel production by mandamus, notwithstanding trial court's assertion that pauper had fair trial and that his motion to vacate was meritless. Bingham v. Stivers (Ky. 1965) 396 S.W.2d 800. Mandamus 61

Petitioner was not entitled to order of mandamus requiring Circuit Court to furnish portions of record of trial at which petitioner was convicted and sentenced, where no motion had been filed to vacate judgment though he was assertedly planning to file one. Harden v. Turner (Ky. 1965) 394 S.W.2d 749. Mandamus 16(1)

A mandamus may be granted directing the court to hear the motion. Moore v. Pound (Ky. 1965) 390 S.W.2d 159.
Where the circuit court does not rule on the motion and notify the movant, mandamus will lie against the circuit judge. Collier v. Conley (Ky. 1965) 386 S.W.2d 270.

It is imperative that prompt action be taken on motions under RCr 11.42, or a petition for mandamus will be sustained. (See also Helton v Stivers, 385 SW(2d) 172 (Ky 1964).) Wahl v. Simpson (Ky. 1964) 385 S.W.2d 171.
Criminal Law 1585

On mandamus to compel hearing of application for post-conviction relief, Court of Appeals would not assume that allegations of motion were insufficient to entitle defendant to hearing, although defendant, who was without counsel, had failed to include motion for presentation to Court of Appeals. Wilson v. Jefferson Circuit Court (Ky. 1964) 384 S.W.2d 305. Mandamus 168(2)

Court of Appeals denied petition for mandamus by prisoner to compel judge of Circuit Court to vacate judgment of conviction, where Circuit Court passed on motion to vacate judgment of conviction, and petition in Court of Appeals failed to state specific ground which would entitle prisoner to relief. Bell v. Gentry (Ky. 1964) 380 S.W.2d 259. Mandamus 61; Mandamus 154(4)

A proceeding on a petition for mandamus before the Court of Appeals or on a motion pursuant to the criminal rules reciting in general terms the violation of a constitutional or statutory right, or the want of jurisdiction in the trial court does not present anything for determination and in absence of a specific ground which on its face would entitle the petitioner or movant to relief, the proceedings will be dismissed. Oakes v. Gentry (Ky. 1964) 380 S.W.2d 237. Criminal Law 1575; Mandamus 154(4)

A prisoner seeking mandamus directing the trial court to provide him with the records of his conviction for the purpose of filing a motion to vacate sentence must specify with particularity some violation of a substantial right which would entitle him to relief under RCr 11.42. (See also Schroader v Bratcher, 380 SW(2d) 249 (Ky 1964).) Oakes v. Gentry (Ky. 1964) 380 S.W.2d 237.

Where petitioner failed to use or exhaust remedies available to him in Circuit Court, and had an adequate remedy at law by appeal, he was not entitled to extraordinary remedy of mandamus. Hampton v. Judge of Jefferson Circuit Court, Chancery Branch, Third Division (Ky. 1964) 375 S.W.2d 276. Mandamus 4(1)

Writ of mandamus would issue on application of prisoner to compel judge of circuit court by which he was convicted and committed to rule on his motion to vacate judgment of conviction which the response indicated was insufficient on its face, and, if so, it was to be summarily overruled so that petitioner would not be deprived of right of testing its sufficiency on appeal. Benson v. Iler (Ky. 1963) 371 S.W.2d 15. Mandamus 61

In proceeding on motion by defendant convicted of murder alleging ineffective assistance of counsel, defendant satisfied threshold requirements for a writ of prohibition, when he petitioned for a writ on the basis that trial court's questioning of his first defense counsel regarding discussions with defendant on defendant's psychological defenses violated the attorney-client privilege, as privileged information, once disclosed, could not be retrieved. Cavender v. Fletcher (Ky. 2011) 2011 WL 5880956, Unreported. Prohibition 5(4)

54. Sanctions

Defendant's appeal from denial of his fourth pro se motion for postconviction relief on plea-based convictions was frivolous and warranted a sanction barring prospective pro se filings collaterally attacking convictions in question; defendant's one-page response to show-cause order to avoid dismissal and sanctions briefly recounted details of guilty plea, claimed a lack of legal knowledge, and asked Court of Appeals to tell him “if my case has merit,” and that court had advised defendant over a decade earlier in on a prior postconviction appeals that rule governing motions to vacate, set aside, or correct a sentence prohibited successive motions for postconviction relief. Cardwell v. Com. (Ky.App. 2011) 354 S.W.3d 582. Injunction 1207

55. Habeas corpus

Habeas corpus petition was properly dismissed where there was no showing that remedy by motion to vacate or correct sentence was inadequate to test legality of prisoner's detention. Cravens v. Wingo (Ky. 1969) 446 S.W.2d 557; Harris v. Wingo (Ky. 1965) 396 S.W.2d 46.

Prisoner's habeas corpus petition to set aside judgment of conviction on constitutional grounds was properly dismissed in absence of showing of inadequacy of remedy by motion to vacate, set aside or correct sentence. Warner v. Davis (Ky. 1964) 377 S.W.2d 881; Coles v. Thomas (Ky. 1964) 377 S.W.2d 157, certiorari denied 85 S.Ct. 89, 379 U.S. 848, 13 L.Ed.2d 52; Pryor v. Thomas (Ky. 1964) 377 S.W.2d 156; Burton v. Thomas (Ky. 1964) 377 S.W.2d 155, certiorari denied 85 S.Ct. 93, 379 U.S. 850, 13 L.Ed.2d 53.

Motion to vacate, set aside, or correct sentence can be broader “collateral attack” than use of habeas corpus to attack void judgment; it encompasses every issue that suffices as reason to vacate judgment which could not have been addressed by direct appeal. Com. v. Marcum (Ky. 1994) 873 S.W.2d 207. Criminal Law 1450

Where trial court judgment under which prisoner was held was nullity, it could be established that judgment was void in summary hearing, and thus, habeas corpus was appropriate remedy, and rule providing for motion in court imposing sentence to vacate, set aside or correct it was inadequate. Com. v. Marcum (Ky. 1994) 873 S.W.2d 207. Habeas Corpus 285.1; Habeas Corpus 445

Accused's failure to include issue as to propriety of imposition of life sentence without intervention of a jury in his previous postconviction relief proceeding foreclosed his right to seek it by means of habeas corpus. Debose v. Cowan (Ky. 1973) 490 S.W.2d 480. Habeas Corpus 285.1

Contentions that petitioner had been denied effective assistance of counsel because counsel erred in waiving jury and in refusing to appeal or move for new trial, to subpoena witnesses, to move for continuance or to object to hearsay testimony could have been presented by prior petition for post-conviction relief and did not constitute basis for writ of habeas corpus. Gray v. Wingo (Ky. 1968) 423 S.W.2d 517. Habeas Corpus 285.1

Where the remedy provided in RCr 11.42 is adequate, the circuit court should not entertain a motion for a habeas corpus. Wingo v. Ringo (Ky. 1966) 408 S.W.2d 469, certiorari denied 87 S.Ct. 983, 386 U.S. 946, 17 L.Ed.2d 876.

Where petitioner, in habeas corpus proceedings, claimed right to be released upon ground that state effectively forfeited its jurisdiction of him by failure to comply with extradition statute when releasing him to sister state and not on ground that sentence was subject to collateral attack, proceeding was not within purview of rule concerned with motions to vacate, set aside, or correct sentences and habeas corpus was appropriate remedy. Herndon v. Wingo (Ky. 1966) 399 S.W.2d 486. Habeas Corpus 526

An issue that could have been, but was not raised in a motion under RCr 11.42, cannot be raised by a habeas corpus motion after an adverse ruling on the motion. Walker v. Wingo (Ky. 1966) 398 S.W.2d 885.

Habeas corpus will not be granted if relief can be secured under RCr 11.42. Brown v. Wingo (Ky. 1965) 396 S.W.2d 785.

A habeas corpus action instituted while a motion to vacate is pending raising the same issues should be dismissed. Schroader v. Thomas (Ky. 1964) 387 S.W.2d 312.

Where a motion under RCr 11.42 is adequate, a petition for a writ of habeas corpus should be dismissed. (See also Nicholas v Thomas, 382 SW(2d) 871 (Ky 1964).) Short v. Thomas (Ky. 1964) 383 S.W.2d 126.
Petition for habeas corpus was properly dismissed for lack of showing that motion for vacation or correction of sentence would not have been an adequate procedural avenue. Nicholas v. Thomas (Ky. 1964) 382 S.W.2d 871. Habeas Corpus 285.1

In the absence of a showing that the remedy by motion under RCr 11.42 is inadequate to test the legality of a prisoner's detention, the petition for a writ of habeas corpus should be dismissed. (See also Jones v Thomas, 377 SW(2d) 155 (Ky 1964); Burton v Thomas, 377 SW(2d) 155 (Ky 1964); Pryor v Thomas, 377 SW(2d) 156 (Ky 1964); Brown v Thomas, 377 SW(2d) 156 (Ky 1964); Coles v Thomas, 377 SW(2d) 157 (Ky 1964).) Ayers v. Davis (Ky. 1964) 377 S.W.2d 154.

A state prisoner who made application for habeas corpus prior to effective date of the Rules of Criminal Procedure was entitled to a hearing, but it is not incumbent on trial court to provide him various protections available by virtue of rule providing for a direct attack upon any conviction otherwise subject to collateral attack. Higbee v. Thomas (Ky. 1963) 376 S.W.2d 305. Habeas Corpus 745.1
Court determining that judgment under which defendant was committed was void, would not grant writ of habeas corpus directing immediate discharge of defendant from prison but prosecuting authorities would be given reasonable time to proceed against defendant in due and proper manner. Beach v. Lady (Ky. 1953) 262 S.W.2d 837. Habeas Corpus 792.1

56-58.Review

56.Review - In general

Defendant's appeal from denial of motion to vacate sentence was moot, where probation expired while appeal was pending. Parrish v. Com. (Ky. 2009) 283 S.W.3d 675, rehearing denied. Criminal Law 1134.26

Trial judge's refusal to recuse himself from hearing two prisoners' post-conviction motions to vacate the judgments was not an abuse of discretion, though prosecutor's son worked for the judge as the judge's law clerk at some point while the motions were pending, the prisoners' motions alleged that prosecutor and jury foreman were good friends and that they had ex parte communications during trial, and alleged that prosecutor and jury foreman's stepdaughter were dating during trial, trial judge acknowledged a former romantic involvement with the stepdaughter, and jury foreman died after trial, which could have made it necessary for stepdaughter to testify to “fill in the blanks” regarding

prosecutor's relationship with jury foreman. Hodge v. Com. (Ky. 2001) 68 S.W.3d 338, modified on denial of rehearing. Judges 45; Judges 46

Fifty-page limitation placed on Supreme Court briefs by court rule did not deprive defendant of a full and fair hearing on the issues or deny defendant the effective assistance of counsel, since defendant set forth all of the relevant facts and legal arguments in motion to vacate his sentences for intentional murder, kidnapping, first-degree rape, and first-degree sodomy. Sanborn v. Com. (Ky. 1998) 975 S.W.2d 905, modified on denial of rehearing, certiorari denied 119 S.Ct. 1266, 526 U.S. 1025, 143 L.Ed.2d 361. Criminal Law 1130(3)

The granting of a belated appeal on a motion for post-conviction relief under this rule is permissible in those instances where there has been no prior appeal. Jones v. Com. (Ky.App. 1979) 593 S.W.2d 869.

Where effectiveness of counsel was only issue propounded by defendant on appeal from order denying his motion to vacate sentence, and issue was same as issue involved on direct appeal from conviction, appeals would be consolidated even though it was not recommended that a defendant be permitted to have two appeals at same time in same case. Hibbs v. Com. (Ky.App. 1978) 570 S.W.2d 642. Criminal Law 1015

On appeal from judgment denying motion to vacate sentence, defendant was not entitled to relief because of failure of court-appointed attorney to appeal, where appeal was completely without merit. Renfrow v. Com. (Ky. 1970) 459 S.W.2d 93. Criminal Law 1177.7(1)

Order overruling motion to vacate judgment which recited that appellant was given hearing, that counsel was appointed for him, and that after appearing in court appellant declined to offer any evidence in support of motion, could be taken at face value in absence of attack on order; accordingly, fact that there was no record of hearing did not require reversal of order and judgment. Hamilton v. Com. (Ky. 1970) 458 S.W.2d 166. Criminal Law 1668(3)

Reversal of denial of motion to vacate conviction for storehouse breaking and possession of burglary tools was not warranted on grounds that trial judge who had refused to disqualify himself pursuant to petitioner's motion had previously overruled petitioner's same motion making it necessary for him to appeal to Court of Appeals for reversal, was prosecutor in petitioner's first conviction and judge at his second trial and sentencing and had allegedly refused to give defense counsel time to prepare case and made defense counsel hostile by ordering him into courtroom and bawling him out. McCarthy v. Com. (Ky. 1970) 450 S.W.2d 534. Judges 51(4)

On appeal from an order overruling a motion to vacate judgment, the onus should lie on the appellant to see that circuit court clerk includes in appellate record so much of trial record leading up to and including judgment as is necessary to an adequate review, with same privilege and responsibility on appellee to see that record is complete from his or its standpoint. Fanelli v. Com. (Ky. 1968) 423 S.W.2d 255. Appeal And Error 596

Indigent prisoner was entitled to have a copy of record in his proceeding for vacation of sentence transmitted to Court of Appeals and another sent to him at penitentiary where he was incarcerated so that he might perfect appeal from judgment in the proceeding. Davis v. Knuckles (Ky. 1966) 407 S.W.2d 702. Criminal Law 1077.2(1)
An order of the circuit court setting aside the judgment which is appealed and reversed by the Court of Appeals does not affect the validity of the original judgment or the commitment based on the judgment. Watkins v. Wingo (Ky. 1966) 403 S.W.2d 19.
Where the Court of Appeals has held that the motion to vacate is without merit, it will not order the circuit court to furnish a copy of the record so that one can appeal to the United States Supreme Court. Johnson v. Turner (Ky. 1965) 399 S.W.2d 316.

Appeal from judgment overruling defendant's motion to vacate judgment of conviction would not be dismissed on ground that appeal was not timely where ground stated in motion was that conviction was induced by improper reception of evidence obtained by a search conducted in violation of Fourth Amendment of United States Constitution. Collier v. Com. (Ky. 1965) 387 S.W.2d 858. Criminal Law 1069(6)

Where petitioner failed to show that circumstances of his representation and trial were such as to shock conscience of court and render proceedings a farce and mockery of justice, and petitioner failed to show that counsel was appointed by court, he was estopped from challenging the overruling of his motion to vacate judgment. King v. Com. (Ky. 1965) 387 S.W.2d 582. Criminal Law 1137(2)

When court rules on motion to vacate judgment of conviction, filed by prisoner without counsel, movant should be notified of ruling by being sent copy of the order, and time for appealing from such order would not commence to run until copy has been thus sent. Kraus v. Ropke (Ky. 1964) 385 S.W.2d 162. Criminal Law 1069(5)

Where defendant pled guilty to two indictments simultaneously, his failure to identify both case numbers in notices of appeal from denial of motion to vacate sentence would not preclude appellate court from considering appeals in both cases, as motion to vacate addressed the convictions in both indictments and it could be ascertained that defendant intended to appeal both indictments to which he pled guilty. Turner v. Com. (Ky. 2009) 2009 WL 2707220, Unreported, on remand 2010 WL 2132676. Criminal Law 1081(2)

Because defendant's pro se motion for postconviction relief raised issues of material fact which could not be resolved from the face of the record, he was entitled to an evidentiary hearing and the appointment of counsel on the motion, and, accordingly, he was entitled to a belated appeal of the trial court's denial of his motion; record raised a serious question of fact as to child witness's competency in defendant's rape case, and in spite of numerous red flags, trial counsel did not challenge competency, which raised a question of ineffective assistance of counsel. Hammons v. Com. (Ky. 2008) 2008 WL 5051570, Unreported. Criminal Law 1069(6)

57.Review - Scope of review

Also listed as **Scope of review**

If an evidentiary hearing is held on a motion for postconviction relief alleging ineffective assistance of counsel, then on appeal from the denial of the motion the reviewing court must determine whether the lower court acted erroneously in finding that the defendant below received effective assistance of counsel; if an evidentiary hearing is not held, the appellate court's review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. McGaha v. Commonwealth (Ky.App. 2015) 469 S.W.3d 841. Criminal Law 1134.90; Criminal Law 1158.36

Where no evidentiary hearing is held on a motion to vacate, set aside, or correct sentence, appellate review is limited to determining whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. Com. v. Searight (Ky. 2014) 423 S.W.3d 226. Criminal Law 1134.90

When a trial court denies without an evidentiary hearing a defendant's motion to vacate, set aside, or correct sentence, an appellate court's review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record and that, if true, would invalidate the conviction. Fuston v. Com. (Ky.App. 2007) 217 S.W.3d 892. Criminal Law 1652

On appeal from order overruling without a hearing defendant's motion to set aside conviction and sentence pursuant to his plea of guilty, review was confined to whether motion on its face stated grounds that were not conclusively refuted by the record and which, if true, would invalidate the conviction. Lewis v. Com. (Ky. 1967) 411 S.W.2d 321. Criminal Law 1134.70

57.Scope of review

See Review - Scope of review

58.Review - Standard of review

Also listed as **Standard of review**

In proceeding on motion for postconviction relief, conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because rules of criminal procedure do not require a hearing to serve the function of a discovery deposition; however, when postconviction court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the postconviction judge. Farmer v. Com. (Ky.App. 2012) 2012 WL 5042119, reversed 2014 WL 5410235. Criminal Law 1158.36; Criminal Law 1652

Standard of review in proceedings to vacate, set aside, or correct sentence, when the trial court conducts an evidentiary hearing, requires that the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. Com. v. Robertson (Ky.App. 2013) 431 S.W.3d 430. Criminal Law 1144.17

Trial court's denial of a motion to vacate sentence is reviewed on appeal for an abuse of discretion. Teague v. Com. (Ky.App. 2014) 428 S.W.3d 630, modified on denial of rehearing. Criminal Law 1156.11

Under either rule governing motions to vacate, set aside or correct sentence or rule governing motions to withdraw pleas prior to sentencing, the Supreme Court reviews the trial court's factual findings only for clear error, but its

application of legal standards and precedents the Court reviews de novo. Com. v. Pridham (Ky. 2012) 394 S.W.3d 867, rehearing denied, certiorari denied 134 S.Ct. 312, 571 U.S. 922, 187 L.Ed.2d 221. Criminal Law 1139; Criminal Law 1158.7; Criminal Law 1158.36

Even if the trial judge applied the wrong standard in considering accused's motion to vacate, set aside or correct sentence, by determining that counsel's errors did not cause the jury verdict, application of the correct standard would have led to the same result. Moore v. Com. (Ky. 1998) 983 S.W.2d 479, as amended, rehearing denied, certiorari denied 120 S.Ct. 110, 528 U.S. 842, 145 L.Ed.2d 93. Criminal Law 1177.7(2)

The standard for reviewing an allegation of ineffective assistance of counsel requires a finding of an error in performance by the counsel and a finding of prejudice resulting from that error that had an adverse effect on the judgment. Hopewell v. Com. (Ky.App. 1985) 687 S.W.2d 153. Criminal Law 1881

58.Standard of review

See Review - Standard of review

59-61.Waiver

59.Waiver - In general

Court of Appeals was unable to review merits of defendant's claims that his sentence for conviction by guilty plea to various sex offenses demonstrated failure on part of Commonwealth and trial court to honor oral plea agreements concerning sexual offender sentencing and concurrent sentencing, where, in neither his petition for postconviction relief nor in his brief, did defendant specify details of alleged agreements or explain how parties failed to comply with them. Stacey v. Com. (Ky.App. 2004) 2004 WL 691760, as modified, review granted, reversed 177 S.W.3d 813. Criminal Law 1580(3)

The imposition of fines, court costs, and court facility fees is a true sentencing issue which cannot be waived by failure to object; rather, the imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion. Hall v. Commonwealth (Ky. 2018) 551 S.W.3d 7, rehearing denied. Costs 284; Criminal Law 1023(12); Fines 1.5

Criminal rule precluding reversal of a final order on a motion for relief from sentence based on trial court's failure to make an essential finding of fact “unless such failure is brought to the attention of the court” did not apply to defendant's claim that trial court should have held evidentiary hearing on his allegation that trial counsel misadvised him regarding parole eligibility, and thus defendant's failure to request additional findings did not waive appellate review of the claim; defendant did not allege that trial court failed to make a pertinent finding of fact, and a requirement to raise the lack of a hearing after entry of the final order would serve no rational purpose. Cawl v. Com. (Ky. 2014) 423 S.W.3d 214, on remand 2014 WL 5510795. Criminal Law 1042.7(2)

An unsuccessful movant for relief under rule governing motions to vacate, set aside, or correct sentence is not required to request additional findings of fact in order to preserve his right to appeal a summary denial of his motion unless he is asking the Court of Appeals to reverse or remand a final order because the trial court failed to make a finding of fact on an issue essential to the order. Cawl v. Com. (Ky. 2014) 423 S.W.3d 214, on remand 2014 WL 5510795. Criminal Law 1042.7(2)

Defendant's post-conviction motion to declare him a victim of domestic abuse for purposes of entitling him to an exception from his violent offender status, and defendant's motion to reopen proceedings, were barred; issues raised in defendant's motions were known to him or could have been discovered prior to his direct appeal or prior to his other post-conviction motions, and he did not raise the issue of entitlement to an exception from his violent offender status in the prior appeals and post-conviction proceedings. Taylor v. Com. (Ky.App. 2011) 354 S.W.3d 592. Criminal Law 1429(2); Criminal Law 1668(3)

Defendant did not preserve, for appellate review, a claim that limitations period for bringing postconviction motion to vacate sentence, relating to conviction, pursuant to negotiated *Alford* plea of guilty but mentally ill entered by defendant as youthful offender, was equitably tolled while defendant was a minor, where defendant presented to the postconviction trial court only an argument that tolling of his claim of ineffective assistance of counsel was necessary because he had retained trial counsel until after his 18-year-old hearing, at which point new counsel was retained and he became aware of trial counsel's allegedly ineffective assistance. Com. v. Carneal (Ky. 2008) 274 S.W.3d 420, rehearing denied, certiorari denied 130 S.Ct. 274, 558 U.S. 906, 175 L.Ed.2d 184. Criminal Law 1042.7(2)

Defendant was barred from raising in his motion to vacate, set aside, or correct sentence his claims that his confession was false and that his waiver of Miranda rights was not knowing and intelligent; defendant could have but did not raise those claims on direct appeal. Parrish v. Com. (Ky. 2008) 272 S.W.3d 161, rehearing denied. Criminal Law 1429(2)

Defendant who is in custody under sentence or on probation, parole, or conditional discharge must avail himself of motion for postconviction relief as to any ground of which he is aware, or should be aware, during the period when that remedy is available to him, and may not use civil motion for relief from judgment as additional opportunity to relitigate issues that could "reasonably have been presented" by direct appeal or in postconviction proceedings. McQueen v. Com. (Ky. 1997) 948 S.W.2d 415, certiorari denied 117 S.Ct. 2535, 521 U.S. 1130, 138 L.Ed.2d 1035. Criminal Law 1429(1)

To extent that postconviction movant's arguments on appeal differed from those made at trial, arguments would not be addressed. Shelton v. Com. (Ky.App. 1996) 928 S.W.2d 817, rehearing denied, review denied. Criminal Law 1043(3)

The accused, while in custody under sentence or on probation, parole, or conditional discharge, must avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him; therefore, final disposition of this motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been raised in that proceeding. Gross v. Com. (Ky. 1983) 648 S.W.2d 853. Criminal Law 1447; Criminal Law 1668(3)

On appeal from denial of a motion to vacate persistent felony offender in the first-degree conviction, Court of Appeals would not consider issue of the sufficiency of the evidence to support the conviction, where the issue was not preserved for appeal and was not raised on direct appeal. Williams v. Com. (Ky.App. 1982) 639 S.W.2d 788. Criminal Law 1042.5

Claim of error not raised in motion to vacate judgment of conviction and not brought before trial court in proceeding on such motion could not be raised on appeal from overruling of such motion. Brock v. Com. (Ky. 1972) 479 S.W.2d 644. Criminal Law 1044.1(1)

Failure to reopen postconviction hearing on basis of alleged new evidence consisting of an affidavit from person who claimed to have been in jail with defendant and overheard conversation between prosecutor and defendant in which prosecutor allegedly threatened to ask for death penalty unless defendant entered plea of guilty was not an abuse of discretion in light of fact that alleged new matter was not presented at hearing at which defendant merely alleged that he had had inadequate representation of counsel. Crockett v. Com. (Ky. 1971) 473 S.W.2d 112. Criminal Law 1668(8)

Defendant's contention that he was denied right to subpoena witnesses in his favor at hearing on his motion to vacate conviction could not be considered on appeal where it was not raised in trial court at time of hearing on such motion. Quarles v. Com. (Ky. 1970) 456 S.W.2d 693. Criminal Law 1042.7(2)

The trial court does not have to grant a hearing on a motion stating grounds that have or should have been presented in a earlier motion. Kennedy v. Com. (Ky. 1970) 451 S.W.2d 158. Criminal Law 1652

The final disposition of a motion concludes all grounds that could reasonably have been presented in that proceeding. Deweese v. Com. (Ky. 1966) 407 S.W.2d 402. Criminal Law 1668(1)

Accused could not assert for the first time on appeal from denial of motion to vacate judgment that he had been denied right to effective counsel. Bell v. Com. (Ky. 1965) 395 S.W.2d 784, certiorari denied 86 S.Ct. 640, 382 U.S. 1020, 15 L.Ed.2d 535. Criminal Law 1042.7(2)

Capital defendant, who filed a motion to vacate, set aside, or correct sentence, was not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel; defendant did not raise an issue of fact relating to his claim of ineffective assistance of counsel that could not have been determined on the face of the record, and the record affirmatively refuted defendant's claim. Thompson v. Com. (Ky. 2010) 2010 WL 4156756, Unreported, modified on denial of rehearing. Criminal Law 1655(6)

Defendant who withdrew postconviction motion alleging ineffective assistance of counsel on the day of hearing waived the opportunity to present any issues related to ineffective assistance of trial counsel and was precluded from resurrecting those issues by later attempting to re-file his motion. Cox v. Com. (Ky.App. 2010) 2010 WL 3717237, Unreported. Criminal Law 1575; Criminal Law 1668(3)

Claim that trial counsel was ineffective for failing to call second witness during murder trial of petitioner for post-conviction relief to impeach testimony of first witness was not properly preserved; trial court made no specific mention of the claim or of the second witness in its order denying post-conviction relief. Caudill v. Com. (Ky. 2009) 2009 WL 1110398, Unreported, rehearing denied, certiorari denied 130 S.Ct. 2345, 559 U.S. 1051, 176 L.Ed.2d 565. Criminal Law 1045

60.Resolution in other proceedings, waiver

Also listed as **Waiver - Resolution in other proceedings**
Postconviction court's finding that defendant knowingly waived his right to appeal trial court's erroneous jury instruction given during penalty procedure, that jury could fix defendant's punishment only on charge of being persistent felony offender (PFO), or, that they could fix his sentence only on marijuana trafficking charge, was not clearly erroneous, where trial counsel stated that he conferred with defendant on possibility that new trial on penalty could be obtained, but that, after due consideration, defendant decided not to risk possibility of even greater sentence should new penalty phase be ordered. Com. v. Payton (Ky. 1997) 945 S.W.2d 424. Criminal Law 1618(13)

An accused who fails to attack the validity of a previous felony conviction at the time of his subsequent indictment as a persistent felony offender waives his right to raise the issue post-trial in an RCr 11.42 proceeding attacking the earlier conviction. Com. v. Stamps (Ky. 1984) 672 S.W.2d 336. Criminal Law 1430

Validity of in-court identification of defendant raised only an evidentiary and not a constitutional issue, and since defendant did not object at time of trial, right to raise objection, on motion to vacate judgment of conviction was waived. Butcher v. Com. (Ky. 1971) 473 S.W.2d 114. Criminal Law 1430

Where defendant was advised by his appointed counsel that he could appeal judgment of conviction of armed robbery and knew he could have attempted to get another trial, defendant by determining not to seek new trial or appeal at conclusion of his trial, in which he was sentenced to life imprisonment instead of maximum penalty of death, intelligently, understandingly, and competently waived his right to direct appeal. Brown v. Com. (Ky. 1971) 465 S.W.2d 270. Criminal Law 1026.10(1)

The issue of an unsound mind at the time the crime was committed cannot be raised for the first time by a motion. Mullins v. Com. (Ky. 1970) 454 S.W.2d 689.

Failure of movant seeking postconviction relief to file affidavits in support of petition for change of venue, and failure to raise the question on original appeal constituted waiver of any claimed right to change of venue and precluded any postconviction relief. Yager v. Com. (Ky. 1968) 436 S.W.2d 527, certiorari denied 89 S.Ct. 2006, 395 U.S. 939, 23 L.Ed.2d 454. Criminal Law 134(2); Criminal Law 1430
An allegation that publicity resulted in an unfair trial will not be considered on a motion where the same matter was considered in ruling on a motion for a change of venue. Wolfe v. Com. (Ky. 1968) 431 S.W.2d 859.
Relief cannot be given on matters that were objected to during the trial or could have been raised during the trial. Yates v. Com. (Ky. 1964) 375 S.W.2d 271, certiorari denied 84 S.Ct. 1343, 377 U.S. 937, 12 L.Ed.2d 300.
Defendant was barred under law of the case doctrine from raising in motion for relief from judgment claim that he was entitled to expert witness funding to retain a ballistics expert and a social worker expert, where claim was raised in prior post-conviction petition and denied; although there had been intervening developments in the standard for the granting of funding for expert witnesses in post-conviction proceedings, change in the standard was de minimis and would not affect the prior conclusion, change was not an aggravated case involving strong equities in favor of defendant, and change in expert funding rules was not retroactive. Fole v. Com. (Ky. 2010) 2010 WL 1005873, Unreported, rehearing denied. Criminal Law 1668(3)

60.Waiver - Resolution in other proceedings

See Resolution in other proceedings, waiver

61.Guilty pleas - Waiver

Also listed as **Waiver - Guilty pleas**

Judicial holding, that defendant must raise validity of prior convictions for purposes of persistent felony offender (PFO) statute no later than time of PFO trial and that defendant's failure to do so precludes defendant from any other collateral attack involving those prior convictions, applies to PFO guilty pleas. Graham v. Com. (Ky. 1997) 952 S.W.2d 206. Sentencing And Punishment 1327

Defendant was not entitled to postconviction relief on ground that guilty pleas were neither knowing nor voluntary where trial court conducted complete guilty plea proceedings which included apparent concessions by defendant that he was guilty of at least some charges. Jones v. Com. (Ky.App. 1986) 714 S.W.2d 490. Criminal Law 1481

Where an accused pleads guilty to a persistent felony offender charge and does not raise any questions about the validity of the underlying conviction, he waives the right to raise any such questions in any subsequent post-conviction proceeding. Alvey v. Com. (Ky. 1983) 648 S.W.2d 858.

Record on motion to vacate judgment of conviction refuted claim that guilty plea was involuntary and was improperly accepted, where record disclosed that defendant before acceptance of his plea affirmed that plea was his personal decision and was voluntary, that he felt he had been properly and efficiently represented by counsel and knew he had right to trial by jury with assistance of counsel. Glass v. Com. (Ky. 1971) 474 S.W.2d 400. Criminal Law 1618(3)

Defendant was not entitled to evidentiary hearing on motion to vacate judgment of conviction since plea of guilty rendered his allegation of ineffective assistance of counsel unavailing. Cox v. Com. (Ky. 1971) 465 S.W.2d 76. Criminal Law 1434; Criminal Law 1655(6)

Evidence in proceeding for postconviction relief supported hearing court's finding that defendant's pleas of guilty to storehouse breaking, possession of burglary tools, burglary of a safe and malicious striking and wounding with intent to kill were intelligently and understandingly made after all constitutional requirements had been fulfilled. Bennett v. Com. (Ky. 1971) 463 S.W.2d 331. Criminal Law 1618(3)

Petitioner, who, with advice of counsel, pleaded guilty to armed robbery, was not entitled to evidentiary hearing on his motion to vacate conviction on ground that guilty plea was coerced by illegal, involuntary confession as petitioner waived his right to challenge admissibility of confession, which could have been tested at trial, when he entered plea of guilty. Wheeler v. Com. (Ky. 1971) 462 S.W.2d 921. Criminal Law 1434; Criminal Law 1655(3)

Record established that petitioner, seeking to vacate judgment convicting him of armed robbery, voluntarily entered guilty plea, notwithstanding that after attempted jail break while awaiting trial defendant was placed in solitary confinement and given starvation diet. Ellis v. Com. (Ky. 1971) 462 S.W.2d 914. Criminal Law 1618(3)

Petitioner, who had retained counsel, who did not object to continuances, and who was released on bond a good part of time, was not entitled to postconviction relief on ground that his guilty plea to voluntary manslaughter was coerced by delay in bringing his case to trial. Boffman v. Com. (Ky. 1970) 459 S.W.2d 603. Criminal Law 1481; Criminal Law 1500

Where defendant pleaded guilty to robbery charge, his complaint that he did not have assistance of counsel or advice as to his constitutional rights during some preliminary stages of investigation and proceedings, and was beaten by officers at such time in an attempt to extract a confession from him, was foreclosed from review. Harris v. Com. (Ky. 1970) 456 S.W.2d 690. Criminal Law 1513

Where petitioner was represented in trial court by retained counsel and was afforded timely opportunity to appeal, claim that guilty plea applied only to felony count and not to misdemeanor counts, precluding imposition of sentence on misdemeanor counts, was not reviewable in postconviction proceeding. Cinnamon v. Com. (Ky. 1970) 455 S.W.2d 583, certiorari denied 91 S.Ct. 942, 401 U.S. 941, 28 L.Ed.2d 221. Criminal Law 1480

The fact that principal prosecuting witness visited defendant, charged with rape of his stepdaughter, and offered to withdraw charges upon payment of $75 was not basis for vacating sentence where visit occurred before trial at which defendant pleaded guilty. Messer v. Com. (Ky. 1970) 454 S.W.2d 694. Criminal Law 1541

Record in postconviction relief proceeding established that defendant's plea of guilty to offense for which he was convicted was not involuntary. Angelo v. Com. (Ky. 1970) 451 S.W.2d 646. Criminal Law 1618(3)

Plea of guilty to charge of rape destroyed right of petitioner to claim alibi in postconviction relief proceeding. McKinney v. Com. (Ky. 1969) 445 S.W.2d 874. Criminal Law 273.4(1)

Petitioner who alleged that police took his confession to armed robberies without informing him of his right to remain silent and his right to counsel was not entitled to relief upon his motion to vacate sentence since he had pleaded guilty on counts and illegality of a confession is not ground for motion to vacate judgment rendered on conviction entered pursuant to a plea of guilty. Cox v. Com. (Ky. 1967) 411 S.W.2d 320, certiorari denied 87 S.Ct. 2084, 387 U.S. 946, 18 L.Ed.2d 1336. Criminal Law 1434; Criminal Law 1530(3)

61.Waiver - Guilty pleas

See Guilty pleas - Waiver