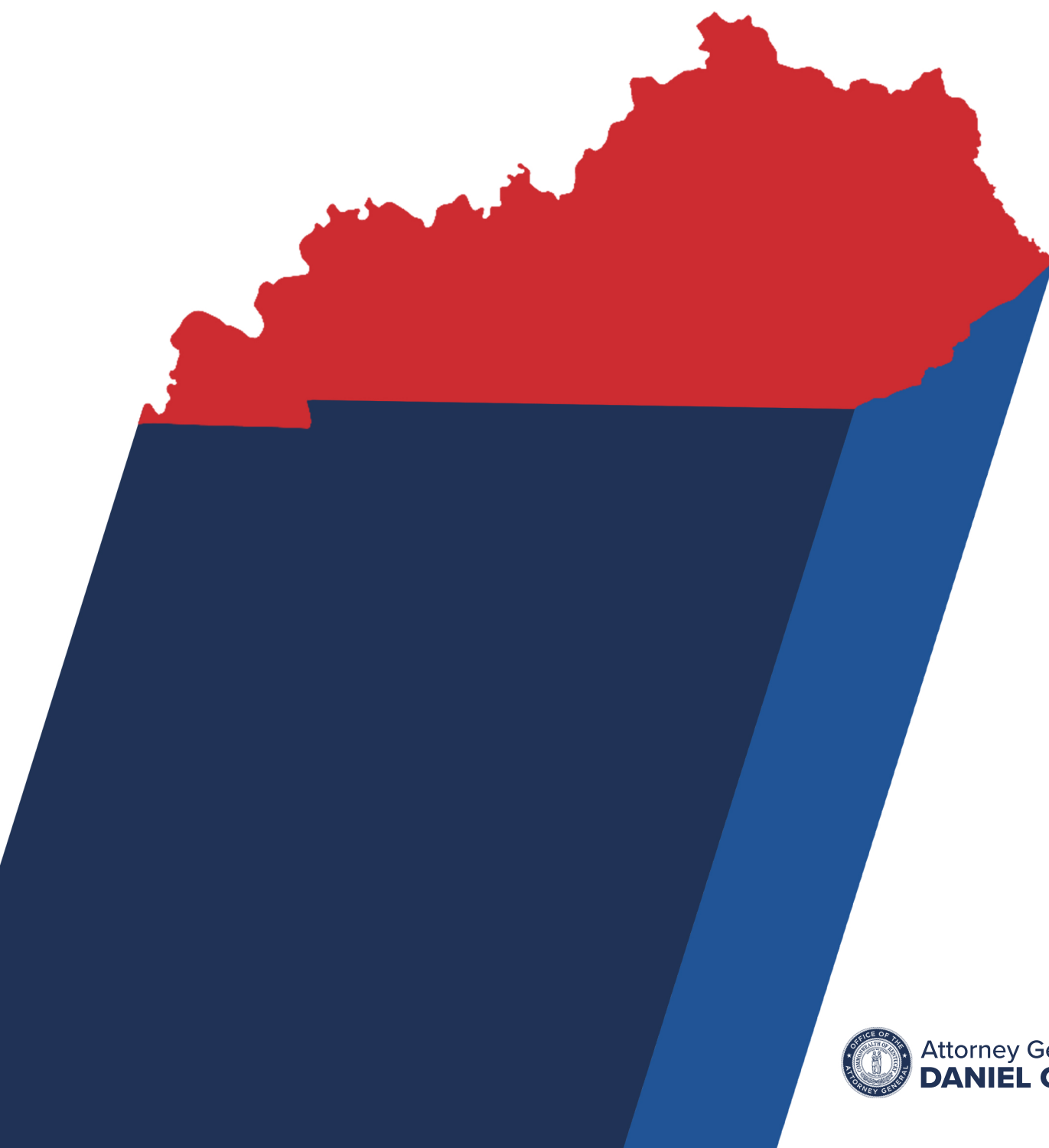


# CHILD ABUSE PROSECUTION TOOLKIT



Attorney General  
**DANIEL CAMERON**



# Attorney General **DANIEL CAMERON**

Dear Kentucky Prosecutors:

I'm pleased to release the Office of the Attorney General's Child Abuse Toolkit to assist with the successful prosecution of child abuse cases in the Commonwealth. Our toolkit is a result of months of work by our dedicated criminal division and provides the most current information on strategies and resources for prosecuting suspected abusers.

Within days of being sworn in to office, I was fortunate to participate in a Child Abuse Roundtable with respected advocates, medical professionals, law enforcement, and prosecutors from across the Commonwealth. This toolkit was a need that this group identified, and I was determined to deliver.

I recognize the incredible challenges that are presented in the prosecution of child abuse cases, and I hope that this toolkit will become a valuable resource and guide as you pursue justice on behalf of Kentucky's children.

Kentucky currently leads the nation in incidences of child abuse and neglect, a reality that we can no longer accept. We must chart a path forward for our children in this new decade, and your work to hold abusers accountable to the law is essential to this endeavor.

Thank you for your commitment to children across the Commonwealth, and please reach out to our office if we can be of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Cameron".

Daniel Cameron  
Attorney General



## Prologue

Child abuse is uniquely difficult to prosecute. No other type of case consistently presents such complex psychological and social dynamics. No other type of case so often requires the prosecutor to go to trial with a child as its crucial witness. The pressure on victims is also uniquely painful. In addition to the devastating effects of the abuse itself, the discovery of the crime frequently results in the child of the offender being removed from the home, leaving families sometimes permanently disrupted and often chaotic throughout the adjudicative process. In the vast majority of cases, the offenders are trusted authority figures such as family members, neighbors, babysitters, members of the clergy, scoutmasters, or teachers who physically or sexually abuse or neglect the children in their care. Unlike victims of most other crimes, child victims of abuse are sometimes castigated as villains by the family members and friends who hold them responsible for the breakup of the family.

Victims of child abuse include boys and girls of all ages, from infancy through adolescence. They come from all ethnic and cultural groups, social and economic classes, and rural and urban areas and they have varying levels of intellectual and physical abilities. They are abused and neglected in a variety of ways, from single incidents of brutal discipline to multiple physical assaults, from a single act of sexual fondling to years of forced intercourse, and from a single instance of dangerously inadequate supervision to prolonged ignoring of serious medical problems.

Excerpt from: American Prosecutors Research Institute (2004). *Investigation and Prosecution of Child Abuse, Dynamics of Victimization*. Sage Publications, Inc.

## Acknowledgements

This child abuse prosecution toolkit is based upon the work of many amazing and dedicated prosecutors throughout this Commonwealth.

The Office of the Attorney General would like to dedicate this kit to each and every prosecutor in our great Commonwealth. Your hard work and dedication oftentimes goes unappreciated, but always remember that your efforts are vitally important to the overall well-being and protection of our fellow Kentuckians.

The Office of Attorney General would like to take the time to thank personally the following individuals who graciously lent their time, expertise, and work product so that we all can work harder and smarter toward eradicating child abuse within our Commonwealth.

- David Blankenship, Lead Attorney, Special Victim's Team, Office of the Commonwealth's Attorney, 24<sup>th</sup> Judicial Circuit
- Emily Arnzen, Assistant Commonwealth's Attorney, 16<sup>th</sup> Judicial Circuit
- Kimberly Baird, First Assistant, Fayette County Commonwealth's Attorney Office
- Leanne R. Beck, Assistant Commonwealth's Attorney, 54<sup>th</sup> Judicial Circuit
- Lou Anna Red Corn, Commonwealth's Attorney, 22<sup>nd</sup> Judicial Circuit, Fayette County, Kentucky. Lou Anna researched and produced a child sexual abuse manual in 2003 for the Office of the Attorney General. She graciously provided a copy to us. Much of the excellent information provided to you is based upon her hard work and excellent work product.
- Maria Schletker, Assistant Commonwealth's Attorney, 16<sup>th</sup> Judicial Circuit
- Stacy Tapke, Kenton County Attorney

The Office of Attorney General would also like to thank the following amazing partners, all working toward the eradication of child abuse in the Commonwealth:

- Aequitas, the Prosecutor's Resource on Violence Against Women
- Children's Advocacy Center of the Bluegrass
- Children's Advocacy Centers of Kentucky
- Cincinnati Children's Hospital Medical Center, Mayerson Center for Healthy Children
- Jacqueline M. Sugarman, M.D., F.A.A.P., Associate Professor of Pediatrics, Department of Pediatrics, University of Kentucky
- Face It® Movement
- Kentucky Association of Sexual Assault Programs
- Kentucky Cabinet for Health and Family Services, Department of Community Based Services

- Kentucky CASA network, Court Appointed Special Advocates for Children
- Kentucky Youth Advocates
- Kosair Charities
- Midwest Regional Children’s Advocacy Center
- Norton Children’s Hospital, Louisville, Kentucky
- Prevent Child Abuse Kentucky
- The National Sexual Violence Resource Center
- University of Kentucky, UK Health Care
- Zero Abuse Project

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## I. INTRODUCTION

The idea for the child abuse prosecution toolkit began with a challenge to Kentuckians from Attorney General Cameron that we must do all that we can to eradicate the scourge of child abuse. This is the first step toward Attorney General Cameron's commitment to protect and advocate on behalf of some of Kentucky's most vulnerable citizens, children.

Kentucky has the highest rate of child abuse and neglect in the nation.<sup>1</sup> Our hope is that this toolkit will provide prosecutors with the basic information needed to handle child abuse cases in their jurisdictions. In discussions with other professionals and advocates involved in the fight to end child abuse in the Commonwealth, it became clear that child abuse prosecutions are among the toughest cases that prosecutors handle.

Child abuse cases are very different than most other cases. While some offices around the state have specially trained prosecutors who handle only issues related to family court and child abuse cases, many do not. Prosecutors in smaller jurisdictions are tasked with handling every type of case, and they must act much like a utility baseball player who has to adapt to different challenges and positions *on the fly*. All prosecutorial offices deal with crushing workloads and limited resources. But, they are all tasked with keeping up with best practices and trends in every facet of criminal law for themselves as well as the assistant county and Commonwealth's attorneys who serve in their offices.

Our hope is that this toolkit will assist prosecutors in holding accountable all those who neglect and abuse children. We also hope that it will encourage all stakeholders, whether county or Commonwealth's attorneys, social workers, physicians, or advocates, to develop lines of communication and cooperation in the fight against child abuse and neglect. We cannot compartmentalize our specific actions and responsibilities. We must work collaboratively.

More than anything else, the goal of this toolkit is to get all of us talking about issues surrounding child neglect and abuse cases and to consider what we can improve upon or do better. How can we move forward as a community of professionals to lead the way in strengthening our responses to child neglect and abuse? How can we help one another? How can we collaborate more often with other allied professionals? How can we share our successes with one another, and

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<sup>1</sup> *Kentucky still ranks No. 1 in the nation in rates of child abuse and neglect.* Deborah Yetter, Courier Journal, March 3, 2020, (available at <https://www.courier-journal.com/story/news/politics/ky-legislature/2020/03/03/kentucky-still-number-one-us-rates-child-abuse-and-neglect/4930842002/>).

how can we learn from some outcomes? Where can we take the fight against neglect and abuse?

The Office of the Attorney General is here to assist you in this endeavor, and we are happy to consult with you on child abuse and neglect cases. And, if requested, we can take over very difficult and time consuming prosecutions that your office does not have the staff to handle.

We can serve as a link between child abuse experts and prosecutorial offices across the Commonwealth. The Attorney General's office also employs subject-matter experts on cyber-crimes against children, human trafficking, and other topics. All of our experts are available to all of you.

While this toolkit is an important first step toward ending child abuse and neglect in the Commonwealth, there is still much work to be done. Please join with us and let us know how we can best serve you.

## II. TRAUMA-INFORMED AND VICTIM-CENTERED PROSECUTION

When prosecuting child sexual or physical abuse cases, the entire prosecution team should employ trauma-informed and victim-centered practices. These tenants of prosecution philosophy are even more important when the crime victims are children and adolescents.

AEquitas, a national prosecution resource organization, defines “trauma-informed” as:

Fully acknowledging that trauma is an individual response to physically or emotionally harmful events, we interact with victims in a manner that minimizes re-traumatization and maximizes their engagement with the criminal justice system. This approach recognizes the offender’s responsibility for the victim’s trauma, aids in identifying and interpreting of evidence, and assists juries in understanding the effects of trauma.<sup>2</sup>

Taking a trauma-informed approach to prosecution decreases the likelihood of re-traumatization. Victim-centered prosecution, as a different, but related concept, is ensuring that the victim is central to the decision-making and process. While holding the offender accountable is always a priority, “victim-centered” means that the victim’s needs, wishes, experiences, and perspectives are taken into account. The Office of Victims of Crime defines the approach “as the systemic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a nonjudgmental manner.”<sup>3</sup>

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*The detective I worked with on my case helped me heal by being victim-centered. He let me speak, told me how sorry he was that this happened and that I was so strong for coming forward. He made me feel protected and safe. By listening to the victim and remaining calm and quiet you allow them to tell their story and to heal from the trauma they have encountered. By being victim-centered you can make all the difference to a survivor and how the rest of their life plays out.*

-Hilary, Member, Attorney General’s Survivors’ Council

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<sup>2</sup> AEquitas, Justice Management Institute, & Urban Institute. Model Response To Sexual Violence For Prosecutors (RSVP Model) Volume I, 9.

<sup>3</sup> Office of Victims of Crime, Training and Technical Assistance Center, *Human Trafficking Task Force E-Guide*, Subsection 1.3 Victim-Centered Approach (available at <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/>, last visited October 23, 2020).

What does trauma-informed and victim-centered practices look like in a child sexual or physical abuse investigation and prosecution? It's taking a non-egocentric approach to the path through prosecution, while understanding how trauma affects children and adolescents. Some concrete examples of trauma-informed and victim-centered approaches include:

- Taking time to explain to child victims, in a developmentally appropriate fashion, what the criminal process looks like
- Creating an environment that is emotionally and physically safe<sup>4</sup>
- Learning about how trauma impacts memory, willingness to testify, and interaction with the investigation and prosecution team
- Putting forth genuine effort to build rapport with child victims
- Discussing the children's fears, anxieties, and concerns and exploring ways with them to help alleviate those concerns
- Validating their concerns and recognizing that testifying in front of their abusers is a terrifying experience for most children and adolescents
- Being friendly and compassionate – children do not connect well with unapproachable adults
- Being honest with them, especially including lack of confidentiality and what must be shared with the defense
- Allowing pre-adolescent and adolescent victims to decide (privately) whether or not parents should accompany them into the room during trial preparation interviews (if parent is a potential witness, parent should not be present in the room)
- Reviewing pleadings filed by defense and ensuring that publicly filed documents do not contain the child's name or other identifiers
- Asking the child victims how they envision seeing their abusers and take into consideration the victims' own self-projection
- Avoiding unnecessary topics or documentary evidence, like visual depictions of the abuse, unless it's absolutely necessary for trial preparation
- Referring to trauma-specific services, especially mental health service providers who have trained therapists in Trauma Focused Cognitive Behavioral Therapy
- Being respectful and courteous to the child victim – this includes speaking directly to the victim and not exclusively to the parent/guardian
- Providing support to child victims and their families by employing a trained system- or community-based victim advocate

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<sup>4</sup> Canaff, R., J., Archambault, J., Lonsway, K.A (2020). *Trauma-Informed Interviewing and the Criminal Sexual Assault Case: Where Investigative Technique Meets Evidentiary Value*. End Violence Against Women International (available at <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=1387>, last visited July 21, 2020).

A portion of being victim-centered as a prosecutor is also recognizing roles. Prosecutors are not the victims' legal advocates. While prosecutors may be seeking justice for child victims, their duty is to the Commonwealth. Establishing this dynamic early on is necessary. In certain cases of child abuse, especially when the perpetrator is a family member or family friend, victim-centered prosecutors should request the trial court to appoint guardians *ad litem* for the victims. Kentucky Revised Statute 26A.140 states that "trained guardians ad litem or special advocates, if available, shall be appointed for all child victims and shall serve in Circuit and District Courts to offer consistency and support to the child and to represent the child's interests where needed." In Kentucky, guardians *ad litem* must be licensed attorneys and ideally, versed in the representation of abused children. Often times, the Commonwealth's interests and the child victims' interests are not aligned – these are the cases where a guardian *ad litem* should be requested in order to protect the rights of the child victims.

Trauma-informed and victim-centered prosecution are the moral and compassionate approaches to all types of crimes, but most especially, crimes against children. Crime victims who are treated with compassion are more likely to trust the prosecution team and therefore, more likely to stay engaged throughout the long process.

### III. OFFENDER-FOCUSED PROSECUTION

While prioritizing the safety, concerns, and experiences of the victim are best practices, keeping an “offender-focused” approach in child abuse cases is equally as important. Common defense tactics include shifting focus from the defendants’ intentional behaviors to the often unappealing characteristics of the victims. The public may refer to this tactic as “victim blaming,” but that is only a small portion of this strategy. AEquitas, a prosecution resource combatting violence against women, lists “offender-focused” as one of their guiding principles in sexual assault prosecutions. In one of their manuals for prosecutors, AEquitas defined “offender-focus” as:

Recognizing that offenders purposefully, knowingly, and intentionally target victims whom they believe they can assault and impugn in an effort to avoid the consequences of their conduct, we persistently focus on the offender’s actions and intent and oppose defense tactics to deflect the focus onto the victim. An offender-focused approach is driven by an accurate and unbiased analysis of a case and applicable law, and a thorough understanding of offender conduct and offender-victim dynamics. The rights of crime victims are always protected to the best of the prosecutor’s ability.<sup>5</sup>

Offenders themselves often employ tactics against their victims to encourage the victims’ loved ones to disbelieve disclosures of abuse. “You’re going to believe *that* misbehaving child?” “That boy gets in trouble in school all of the time! He’s just mad I punished him for his bad grades!” “Who are you going to believe, your step-father or your lying teenage daughter? These tactics are purposely designed to discredit and discount the child victim. These same methods are used in the perpetrator’s defense and are often successful with jurors.

By using an “offender-focused” approach, the spotlight is repositioned to shine the light on the *perpetrator’s* actions. The perpetrator’s deliberate, methodical, purposeful conduct is the cause of the crime, not the victim’s vulnerabilities. Keeping the attention and concentration on the perpetrator’s chosen behavior underscores the concept that the offender’s choices caused the victimization, not the attributes of the victim.

It is appropriate to accept that some child victims have certain qualities that make them more vulnerable – lack of adult supervision, lack of healthy boundaries

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<sup>5</sup> AEquitas, Justice Management Institute, & Urban Institute. *Model Response To Sexual Violence For Prosecutors (Rsvp Model) Volume I*, 9.

with others, behavioral challenges, and intellectual disabilities, to name a few. But unlike what the defense team wants the jurors to believe, these children become victims not because of their own faults and behaviors, but because perpetrators exploit these characteristics with their predatory conduct.

Consider this excerpt written by Cory Jewell Jensen, Co-Director for Center for Behavioral Intervention, who is an expert on sex offenders and their behaviors:

Offenders report that these [grooming] strategies accomplish several goals by helping them “weed out” children who might “resist, reject or report,” while at the same time, allowing for the gradual desensitization necessary to advance to more intimate and intrusive touching. Offenders say they slowly violate boundaries by “getting them comfortable with me touching them by tickling and wrestling with them,” “having them sit on my lap,” “walking in on them while they are changing or using the bathroom,” “kissing and hugging them extra” or “touching their private parts ‘accidentally.’” Next, they talk to children about sex and normalize abuse by telling them, “everybody does it,” “it feels good,” “I’ll show you how to be a man” or “it’s just a game.” Because of the brainwashing, children adopt the mistaken belief that they can’t tell anyone what’s happening to them because “it’s a secret” plus it doesn’t feel threatening or abusive at first.<sup>6</sup>

Reading this excerpt, Jensen hones in on the *perpetrator’s* actions, not the victim’s. This paragraph makes it apparent that the proper focus is on a calculating and deliberate actor, not a vulnerable victim.

Remember, accountability means placing the offender’s choices and behaviors under the microscope, not the innocent victims.

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<sup>6</sup> Cory Jewell Jensen, *Sex Offenders: Keeping Children, Schools, and Churches Safe*, Part 2, Adventist Risk Management, Inc. [http://www.pcsda.org/wp-content/uploads/2014/08/Child\\_Protection\\_Plan\\_-\\_Prevention.pdf](http://www.pcsda.org/wp-content/uploads/2014/08/Child_Protection_Plan_-_Prevention.pdf).



#### **IV. UNDERSERVED COMMUNITIES**

Underserved populations refer to any group of people that typically do not receive the same level of care in systemic settings or who, at no fault of their own, are more at risk of becoming a victim of crime due to vulnerability or prejudice. Underserved populations may carry unique aspects of their victimization due to being a part of a marginalized group. When working with these populations, be open to working with all parts of a victim, and be aware that there may be factors that you are not aware of, due to marginalization.

As a prosecutor working with underserved populations, it is important to remember that the victims you will be working with may have compound trauma, not only the trauma of the crime they have experienced, but also historical trauma and possibly micro and macroaggressions from being part of an underserved group.<sup>7</sup> It will be important for you to navigate how you work with these populations to create the best case that you can, and to keep these particular victims and witnesses engaged. Their anxieties may be exhibited in a number of ways: increased anxiety, distrust of law enforcement and/or the legal system, specific reservations about testifying, difficulties in physically navigating the courtroom, worry that they are damaging their already small communities, and other ways not listed here.

Things become even more intricate when working with young victims. Choosing how to involve children and adolescents within a prosecutorial setting is already complex, and including a marginalized status only furthers the complexity, especially if there is already historical trauma or Adverse Childhood Experiences (ACE's) to consider. Marginalized children have many of the same fears as marginalized adults, however they have less resources in which to handle traumatic events. In children, these feelings are often more difficult to regulate and may cause behaviors that come across as an unwillingness to participate in the criminal justice system.

Working with a child from a marginalized community may create unique challenges for a prosecutor. It is important to keep an open mind and attempt to look beyond the apparent to truly understand extenuating factors that come with working with marginalized children, or children who identify as part of an underserved population. If they don't feel respected, seen, and heard, it will be much more difficult for you to create a solid case around these victims and witnesses, and they will disengage from the system.

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<sup>7</sup> <https://www.apa.org/pubs/books/Microaggressions-and-Traumatic-Stress-Series-Forward-and-Intro-Sample.pdf>

## **V. PROSECUTION OF CHILD ABUSE: CONSIDERATIONS AND A ROAD MAP TO FOLLOW**

### **A. THE TEAM**

The investigative team in cases of child abuse should be made up of your Multidisciplinary Team Members. You should also be a part of your investigative team, which does separate these types of cases from other areas of prosecution. We recommend that the prosecutor coordinate and collaborate with the following professionals:

- Law Enforcement
- Social Worker/ DCBS worker
- CAC interviewer
- Other MDT members including but not limited to child's therapist or medical examination provider.
- Medical expert (could include the actual physician or one chosen to review findings)

### **B. BEING PART OF THE INVESTIGATION**

To effectively handle child abuse cases, you need input and collaboration from all partners. To that end, best practices mandate that you, the prosecutor, are involved in the case in the investigative phase. This means a sort of paradigm shift away from what currently happens in many jurisdictions. How many offices are contacted by law enforcement and asked, "Can I run a case past you to see if charges would be accepted?" In some offices, it is quite common for prosecutors to only become involved in the case in order to determine, based upon an investigation that has likely been going on for some time already, whether your office would accept charges.

Get away from this practice! It is likely that you are declining prosecutions that otherwise could be accepted if there had been more collaboration between your MDT partners during the investigation phase. Child abuse cases are different. To be successful in protecting children and holding offenders accountable, you must become involved early on in the case. Remember that all the members of your MDT must share the same common goals:

- End the abuse.
- Reduce trauma to the child.

- Assess if something has occurred, and if so, what has occurred.
- Work as a team to assist the child in becoming a survivor.

### **C. FIRST RESPONDER INTERVIEWS AND IMPORTANT CONSIDERATIONS**

YOU, as the prosecutor, must be aware of and understand all that occurs during the investigation of an abuse case. This understanding will allow you to strengthen your and your team's responses to child abuse. You will be able to train and work together to bring stronger and stronger cases before the courts in your jurisdiction. Keep in mind several things that commonly impede our investigations:

- Lack of knowledge of child abuse dynamics
- Lack of preparation or training in child abuse investigations
- Lack of notification or delay in investigators' involvement
- Lack of collaboration between disciplines

Who is the "first responder?" This is the person who is tasked with making the first response to a report of child abuse. Typically, it is a member of law enforcement or a social worker.

You may want to work with your MDT to develop a first responder protocol, and at the very least, you will want to monitor your cases to ensure that both social workers and law enforcement are appropriately handling first responses. Here are some best practices to keep in mind:

#### Medical Care

First and foremost, you must seek medical care for any subjects that need it. It is not different with these cases. So the very first question should be, "Does the child need medical care?" Always keep in mind these guidelines:

- If there was alleged sexual abuse within the past 72 hours then ensure that the child receives a medical exam.
- If there is alleged physical assault get the child to medical care, but also remember to take along any mechanism by which the child is reporting caused the abuse. If the child discloses while receiving medical care that they were hit, slapped, burned, or anything else, with a particular object or thing then go and get that evidence before it is lost. Use a search warrant

where required, but get that evidence. This will always help your medical expert down the road and is important!

Initial Interview (this is NOT the full forensic CAC interview.)

In the initial interview you should limit questions to only what you need. **The first question should always be whether the child is in imminent danger.** This will guide you on how much the child may have to be interviewed, and whether DCBS will need to remove the child for safety concerns. Even in the initial interview, you can take steps to make sure that it is done with a view towards making the child as comfortable as possible.

Here are some other items to keep in mind:

1. What must be known to make decisions about further actions? If information is not necessary for actions required at that time, then do not ask the child! Wait for the later forensic interview at the CAC.
2. Is there another source for information? If so ask the adult or source rather than the child. The example to think of is this. What if a child discloses sexual abuse to a friend while at school, and the child tells their story to their friend. The friend then gets concerned and tells the teacher. The teacher then goes to the school therapist who then interviews the child (or the teacher interviews the child). Then the therapist or teacher usually goes to a principal who may also then talk to the child and all of this will occur before law enforcement or DCBS are ever notified. At this point, the child may have been interviewed several times. Do not subject the child to another interview and let that wait for the CAC. Simply, if the child has already disclosed DO NOT ASK THEM ANY QUESTIONS, just set up the CAC interview.
3. Is the child developmentally able to give the information needed and what can be done to assist in this? For example, if the child has Autism and you do not feel comfortable or educated enough about Autism to make initial inquiries, then seek assistance from someone who is. If the child is hearing impaired do so as well. Always ask only what is needed and no more than that. Make sure that the CAC is aware of special needs the child may have, and let them handle the more in-depth forensic interview.
4. So what, at a minimum, needs to be covered in the initial interview?
  - a. Alleged abuse
  - b. Jurisdiction (where did it occur)
  - c. Time frame of allegations or when was last event
  - d. Identification of perpetrator
  - e. Any witnesses or other victims

- f. Safety steps for the child (Remember to always cross notify between DCBS and law enforcement)
- g. Need for an emergency response

Here are a few reasons why it is crucial to limit the amount of times the child is interviewed:

1. Recantation
2. Child starts to believe that no one believes him or her and that is why they are being asked about it so many times
3. Child changes their story to please professionals or adults involved (and this creates discrepancies for no good reason)
4. Increases trauma to the child
5. Problems with those not having training causing suggestibility in the child.

Here are some good tips for the “First Responder” to follow with the initial interview:

1. Talk to child alone and in the most child-friendly place available.
2. Show interest in what the child is saying. Build rapport but avoid “list questions” like how old are you? Who all lives in the house with you? What grade are you in? Try to invest in the child. For example, ask, “Tell me about you?” After some rapport building, find a good way to transition into questions about the disclosure.
3. Use open-ended questioning and avoid leading questions.
4. Don’t go farther than you need to with the initial interview.
5. Record your questions and the child’s responses verbatim or as closely as possible.
6. Thank the child for speaking to you. Make no promises to the child and avoid thanking the child for reporting abuse- you do not want to set up defense attorney strategies! Just thank the child for talking to you.

#### **D. THE INTERVIEW**

The first concern in most, if not all, child sexual abuse cases is whether or not the child has had a thorough interview. You can also think about having the child or children interviewed in cases of physical abuse. It is a good rule to always have the child and siblings or other children in the home interviewed at your local CAC. When your time allows, and as much as you can make it a priority, always try to

attend the CAC interview of your victim. Here are a few tips for a successful interview:

1. KRS 620.040(6) mandates the use of the Children's Advocacy Center interview whenever possible.
2. It is important to use a trained forensic interviewer. Watch and listen to the types of open-ended questions used by trained forensic interviewers. These are the exact types of questions that you will need to use in your subsequent meetings with child victims, and you can learn a lot from your CAC partners.
3. Avoid multiple interviews.
4. Use recorded interviews. There are pros to using recorded interviews, including: Give the most accurate memorialization of the interview, you can see the *way* the child answered the questions including mannerisms and movement; eliminate defense strategy of coaching or leading; may be used to refresh the child's memory before trial; can be used at trial for impeachment or to show consistent prior statement; memorialize the child's age and level of maturity at the time of the interview. There are also cons to conducting recorded interviews, including: Could be a bad interview or a complete non-disclosure; memorializes a bad disclosure.

KRS 620.050(10)(a) dictates that the CAC interview provided to the prosecution shall not be duplicated, except that the prosecutor may:

1. Make and retain one copy of the interview
2. Make one copy for the defendant's counsel that the defendant's counsel shall not duplicate
3. KRS 620.050(10)(b) mandates that the defense attorney shall file the copy with the court clerk at the close of the case

You and your team should have a protocol in place for all CAC interviews in cases related to both criminal prosecution and family court prosecution. It may be a good idea to have a handout clearly stating your protocol. Upon receiving their copy of the CAC interview, have defense counsel review and sign a copy of said protocol. You may consider having all family court attorneys view the CAC video at your office as multiple copies are not allowed (per statute). Always make sure to have any and all copies of CAC interviews turned into the court or turned back into the CAC at the close of your case.

### Resources for Success:

1. **Midwest Regional Children’s Advocacy Center. Child Interviewing 2020: Update of Research and Practice,**  
<https://www.mrcac.org/course/child-interviewing-updates2020/>
2. **National Children’s Advocacy Center Virtual Training Center,**  
<https://www.nationalcac.org/online-training-catalog/>
3. **Zero Abuse Project,**  
[https://www.zeroabuseproject.org/trainings/?\\_training\\_audience=forensic-interviewers](https://www.zeroabuseproject.org/trainings/?_training_audience=forensic-interviewers)

### E. INTERVIEW FOLLOW UP

It is crucial to the investigation to follow up on information gleaned from the CAC interview. You should review the interview line by line in order to follow up on all the valuable information contained therein. Remember that most experts in child abuse prosecution state that you should have at least twenty-five (25) corroborating facts from one child’s interview!

Here are some examples and things to consider:

1. All witnesses identified from the child’s statement. This includes who the child told or discussed the disclosure or abuse with or other witnesses present during abuse.
2. All locations where abuse occurred. This may include different locations within communities or different locations within the same home. Remember to go and photograph these locations! Always look for items that the child may remember like pictures on walls or other things specific to the location. This may not be possible in delayed disclosures but certainly it is worth the effort to corroborate even the smallest details of the child’s disclosure.
3. Use of search warrants to retrieve items discussed like sex toys, technology, or other items involved.
4. Use of search warrants or investigation to photograph all rooms/locations of any abuse.
5. Development and discussion of theme of your case and also perceived weaknesses or defense themes.
  - a. Circumstances like active custody battles?
  - b. Is the child mentally ill or developmentally disabled or presents with some other issue that needs to be explored? Will you need an expert to explain certain issues regarding this?

- c. Is there a crisis in the child's life that led to the disclosure? Can you corroborate the crisis to match that same period?
6. In family court cases where a petition had already been filed, you may need to go back and amend a prior complaint to include new information or correct inconsistencies.
7. Make sure there is investigative follow up of all witnesses and other issues and evidence discovered during CAC interview.
8. Are there items that may corroborate parts of the victim's account?
  - a. Phone records
  - b. Internet provider records
  - c. School records
  - d. Employment records, like time sheets
  - e. Credit card receipts/ ticket stubs/ establishing that certain movie was playing on date, or that a show or concert was in town.
  - f. Items in the home, especially in abuse cases- Get the item that resulted in the injury!

## **F. DEFENDANT'S INTERVIEW OR STATEMENTS**

Make sure to consider not only what may have been said to witnesses, but also the law enforcement interview and also the interview with a social worker (if not done along with law enforcement). Also, if a defendant is in custody, always make sure to monitor jail visits and jail phone calls. Always share this information with the family court prosecutor if it bears on the child's safety.

Make sure to check that all *Miranda* considerations and other issues are taken into account. Start to develop what defenses or statements the defendant has locked himself/herself into. Start the process of removing all excuses that the defendant may use!

## **G. MEDICAL EVIDENCE**

In order to best understand how to prosecute child abuse and maltreatment cases, we first need to understand how medical professionals approach these cases. As a prelude to the actual outline for investigation and prosecution, it is important to have a working knowledge of how doctors and nurses are taught to identify child abuse cases.

The Office of the Attorney General strongly recommends that you visit the Midwest Regional Children's Advocacy Center's (MRCAC) website for additional resources, which can be found at: <https://www.mrcac.org/>



While there are a tremendous amount of free trainings and webinars located on the internet, the most comprehensive and valuable free training can be located on this site. You are strongly urged to register with the MRCAC and take the training entitled, Medical Aspects of Child Abuse for the MDT. The MRCAC explains this tremendous training as, "...a set of independent lessons that can be viewed individually or in conjunction with the other lessons to give the participant a general understanding of the medical aspects of different forms of child abuse. By understanding what is needed medically to diagnose and treat children for suspected child abuse and neglect, the multidisciplinary team can work together for the best outcome of the child."

You should also encourage all members of your multi-disciplinary team to sign up with MRCAC and take the course as well. The training covers child abuse ranging from sexual abuse, burns, abdominal trauma, and fractures to abusive head trauma.

These are questions to consider regarding medical evidence in cases:

1. Is there medical evidence from your CAC?
2. Where can I get the child's medical records and what releases do I need for these?
3. Do I choose to get all DCBS records or not? Remember that if you take the DCBS records into your custody then they must be turned over to the defense counsel.
4. Do I need to follow up with search warrants in cases where child has a sexually transmitted disease?
5. Are there any abnormalities or issues I need to follow up with like an injury- or whether the child has had any other sexual partners?

Search for Evidence. What should law enforcement be documenting and collecting in your case?

1. Photographs of the defendant's genital area
2. Scene photographs and diagrams
3. Bedding, towels, and victim's clothing
4. Defendant's DNA sample
5. Pornography the defendant may have showed the victim
6. Sex toys
7. Cameras and/or photographs of the victim
8. Computers including social media
9. Cell phones

Remember to use search warrants where the defendant has a privacy interest in the items you are seeking.

If you only have the child's disclosure and statement, you can move forward with an indictment or charges. Legally, a victim's statement is sufficient to withstand a motion for directed verdict if "the victim's testimony taken as a whole could induce a reasonable belief by the jury that the crime occurred." *Bussey v. Commonwealth*, 797 S.W.2d 483, 484 (Ky. 1990).

This is a concern that should be examined with your MDT to discuss any inconsistencies in a child's statement. Remember that there is almost always evidence to corroborate a child's statement, and you need to actively make sure to get it.

### **Resources for Success:**

1. **National Child Advocacy Center**, <https://www.nationalcac.org/online-training-catalog/>
2. **Midwest Regional Child Advocacy Center**, <https://www.mrcac.org/course/abuse-investigations/>
3. **Zero Abuse Project, Law Enforcement Trainings**, [https://www.zeroabuseproject.org/trainings/?\\_training\\_audience=law-enforcement](https://www.zeroabuseproject.org/trainings/?_training_audience=law-enforcement)

## **H. MEETINGS WITH VICTIMS**

Children interviewed by more than one person sometimes provide different or conflicting information. These differences do not necessarily diminish the credibility of the child. It is important to understand when meeting with your victim, or at any time that you speak to your victim, that children of different ages have different capabilities in exchanging information. Here are some important concerns to keep in mind when reviewing interviews or when speaking with the child victim.

### **1. Factors That Can Alter Information Disclosed By Children and Adolescents:**

- **Interviewer Characteristics**
  - Gender
  - Experience
  - Types of questions asked
  - Appropriate to child's development
  - Non-leading, not suggestive
  - Knowledge of abuse dynamics and family factors

- Knowledge of child language skills
- **Child Characteristics**
  - Gender
  - Age
  - Memory of abusive events, including traumatic amnesia
  - Degree of guilt and self-blame for abuse
  - Protectiveness of abuser
  - Perceived degree of belief by non-abusive parent
  - Comfort level with interviewer
  - Relationship with adults and authority figures
  - Accommodation to abuse/acceptance of severe corporal punishment as “norm”
- **Abuse-Related Factors**
  - Threats by abuser
  - Continued presence or absence of abuser
  - Intimate partner violence in the child’s home
  - Disruption of family integrity
  - Victim knowledge of (or concern for) other victims

## 2. Language and Development of Children and Adolescents

- **Preschool Children (Ages 3-5) might be able to state:**
  - First name, age, and family members
  - Who hurt or touched them
  - Where they were hurt or touched
  - Where they were when they were hurt or touched
  - Whether event occurred “one time” or “more than one time”
  - May give graphic, age-appropriate descriptions of body parts
- **Preschool Children (Ages 3-5) usually cannot state:**
  - Colors, or names for all body parts
  - How many times event(s) occurred
  - Reliably sequence events or tell you when an event occurred
- **Challenges specific to this age group:**
  - Language skills are widely variable and achieved at rapid rates
  - Attention span is short, so interviews should be completed within 20 minutes and should focus on the “here and now”; yesterday is “a long time ago”
  - Demonstrative gestures are frequent and sometimes more detailed than verbal accounts

- Are reluctant to say “I don’t know” or “I don’t understand your question”
- Able to recognize type of question (yes/no, “who” questions, etc.) and will sometimes try to “guess” the answer accordingly; for this reason, “yes/no” questions should be avoided
- Speech is often unintelligible
- **School-Age Children (Ages 6-11) Will be able to state everything that preschool children can plus:**
  - Full name, ages, and members of family
  - Colors, names for all body parts
  - More details regarding type of abusive contact (bruising, bleeding, pain, etc.)
  - Idiosyncratic details: what abuse felt like (conversations, smells, taste, etc.)
  - Relative frequency of abusive events (daily, weekly, monthly, etc.)
  - Age abuse began and ended
  - Physical and behavioral symptoms
- **Might not be able to state/understand:**
  - Exact dates or abusive events in the correct sequence, if chronic
  - Precise time frames for physical and behavioral symptoms
  - Abstract concepts such as (such as “what is truth?”), relations of time, speed, size, duration
- **Challenges specific to this age group:**
  - Family responses and degree of belief are most important and can modify willingness to talk
  - May not understand why they are not to blame for the abuse or family reactions
- **Adolescents (Ages 12-17) Will be able to state everything that school-age children can plus:**
  - More idiosyncratic/experiential details
  - Usually understand relations of time, speed, size, duration
  - Might not understand abstract concepts consistently
- **Challenges specific to this age group:**
  - Will sometimes provide excessive/extraneous details
  - Are generally unaware of adverse consequences of abuse (such as STIs) and might sensationalize information (“I may never get pregnant”)
  - Embarrassment more common and can compromise willingness to talk

- Still very concrete, so terms such as “spank” and “rape” still need to be clarified
- Very focused on peer approval and whether or not they are “normal” (physically and otherwise)
- Concern about parental repercussions can compromise history about sexual activity

### **3. Sample Questions**

#### **Possible Questions for Sexual Abuse Inquiry**

##### **• General Inquiry Questions**

- “Tell me what happened when....”
- “Have you had any touches you didn’t like or made you feel uncomfortable?”
- “How did the touching start? What happened next?”
- “What did (suspect’s name) touch you with?”
- “You said (suspect’s name) touched with his (child’s name for suspect’s body part). Did (suspect’s name) touch you with anything else?”
- “What did (suspect’s name)’s hand/finger/(child’s word for penis) do?”
- “What part of your body did (suspect’s name) touch?”
- “How did the touching feel?”
- “How did it feel when (suspect’s name) put his (child’s word for penis) in your private spot?”
- “Did (suspect’s name) touch you somewhere else on your body?”
- “Did you ever see (suspect’s name) touch anyone else’s private spot?”
- “Did anyone see (suspect’s name) touch your private spot?”
- “Where were you when (suspect’s name) touched your private spot?”
- “Did (suspect’s name) touch your private spot?”
- “Did (suspect’s name) touch your private spot when you were at any other places?”
- “Did (suspect’s name) touch your private part once or more than once?”
- “Did (suspect’s name) have you touch any parts of his body?”
- “How did your clothes come off?”
- “What did you see when you were in that room?”
- “What did you hear when (suspect’s name) was touching your private spot?”

- **Penetration Questions**

- “Where was (suspect’s name)’s (child’s term for penis)?”
- “Did (suspect’s name)’s (child’s word for penis) touch you anywhere?”
- “What part of your body did (suspect’s name)’s (child’s word for penis) touch?”
- “Did your (child’s word for own genitals) hurt? What made it hurt?”
- “Did” (suspect’s name)’s (child’s name for penis) touch inside or outside your (child’s word for own genitals)? How did you know? How did that feel?”
- “Did (suspect’s name) ever put anything else inside that part of your body? Did (suspect’s name) ever put anything on that part of your body?”
- “Did (suspect’s name)’s (child’s word for penis) touch you on your clothing or on your skin?”
- “Did (suspect’s name) put anything on his (child’s word for penis)? What did it look like?”

- **Erection/ Masturbation Questions**

- “What did (suspect’s name)’s (child’s word for penis) look like?”
- “Were there any marks on (suspect’s name)’s (child’s word for penis)?”
- “Tell me more about what (suspect’s name)’s (child’s word for penis) looked like.”
- “Did (suspect’s name) want you to touch him anywhere? How did he want you to touch him?”
- “Did (suspect’s name) want you to touch his (child’s word for penis) in a certain way?”
- “What did (suspect’s name) do while he made you do that?”
- “What did (suspect’s name) say when he made you do that?”
- “How did (suspect’s name)’s (child’s word for penis) feel when you touched it?”
- “What did you hear when you were touching (child’s word for penis)?”

- **Ejaculation Questions**

- “What happened to (suspect’s name)’s (child’s word for penis) after he made you touch it?”
- “What did he call the (child’s word for semen)?”

- “What do you call that stuff?”
- “Where did (child’s word for semen) come from?”
- “After (child’s word for semen) came out of (child’s word for penis) where was the (child’s word for semen)?”
- “What did (child’s word for semen) look like?”
- “What did (child’s word for semen) feel like?”
- “What did (child’s word for semen) taste like?”
- “Did (suspect’s name) say anything when (child’s word for semen) came out? Did (suspect’s name) make any noises/sounds?”
- “Did (suspect’s name) ask you to do anything after (child’s word for semen) came out?”
- “What did (suspect’s name) do after (child’s word for semen) came out?”

- **Nudity Questions**

- “What were you wearing when...?”
- “What was (suspect’s name) wearing when...?”
- “Was there anything special about (suspect’s name)’s clothes?”
- “How did your clothes come off?”
- “How did (suspect’s name)’s clothes come off?”
- “Were all of your clothes off?”
- To clarify confusion about conflicting reports that her/his clothes were on but penetration occurred ask: “You said your clothes were on. You said he put his (penis name) in your private spot. I don’t understand that part. Tell me more about that?”

- **Oral Contact/ French Kissing Questions**

- “Did (suspect’s name)’s mouth touch you anywhere?”
- “What did (suspect’s name) do with his mouth?”
- “Did (suspect’s name)’s mouth touch any other parts of your body?”
- “Did (suspect’s name) want you to kiss him anywhere? Did (suspect’s name) want you to suck him anywhere else? Did (suspect’s name) want you to lick him anywhere else?”
- “What did (suspect’s name)’s mouth do? What did (suspect’s name)’s lips do? What did (suspect’s name)’s tongue do?”
- “How did (suspect’s name)’s mouth feel? How did (suspect’s name)’s lips feel? How did (suspect’s name)’s tongue feel?”
- How did (suspect’s name)’s kisses feel?”

- **Pornography Questions**
  - “Did (suspect’s name) show you any pictures/books/magazines/movies/videos/shows?”
  - “What were the pictures/books/magazine/movies/videos/shows about?”
  - “What did you see in the pictures/books/magazines/movies/videos/shows?”
  - “Did (suspect’s name) show you anything when he (child’s word for abuse) you?”
  - “Did (suspect’s name) take any pictures/videos/tik toks/snapchats? What did he take pictures/videos/tik toks/snapchats of?”
  - “Where does (suspect’s name) keep the pictures/videos/tik toks/snapchats?”
  - “Did (suspect’s name) show the pictures/books/magazines/movies/videos to anyone else?”
  - “What were the movies/videos about?”
  - “Where was the camera/phone when (suspect’s name) took pictures/videos?”
  
- **Possible Questions About the Child’s Fears for Reasons for Secrecy**
  - “Did someone tell you not to tell? Who? What did he/she say would happen if you told?”
  - “Did you ever tell anyone besides (name of person child most recently disclosed to)? What happened after you told him/her?”
  - “What made you decide to tell what happened?”
  - “Do you know what a secret is? Tell me what it is.”
  - “Has someone asked you to keep a secret?” What was the secret?”
  - “Did (suspect’s name) tell you he would do something for you if you didn’t tell? What did he say?”
  - If child appears scared or you believe they have been threatened you may say: “Sometimes kids are really scared to tell what happened to them. You seem scared to talk to me. Tell me about that.”
  
- **Possible Questions About Physical Abuse**
  - “What happens if you do something you’re not supposed to?”
  - “What else happens when you do something you’re not supposed to?”
  - “Who punishes you?”



- “What does (the person named) do?”
  - “When was the last time (suspect’s name) (child’s word for abuse) you?”
  - “What does (suspect’s name) use to (child’s word for abuse) you with?”
  - “Where on your body does (suspect’s name) (child’s word for abuse) you? Any other places?”
  - “How does that feel?”
  - “What did you think about?”
  - “What does (suspect’s name) do when your brother/sister does something he/she is not supposed to?”
  - “What was the worst punishment you ever got? What had you done to get that punishment? What did (suspect’s name) say you did to get that punishment?”
  - “Does (suspect’s name) ever say anything when he does that? What does he say?”
  - “Did anyone see (suspect’s name) do that to you? How do you know?”
  - “What happened after (suspect’s name) did that to you? Did you go to the doctor/hospital?”
  - “Has anyone else done (child’s word for abuse) to you?”
  - “Who spanks you? What does he/she spank you with? Where on your body does he/she spank you? How does it feel?”
  - (If the child used the word *hurt*) “Have you been hurt in any other way?”
  - (If the child has injuries such as bruises or scars, you may ask directly) “How did that happen? or Tell me everything you remember about how you got that bruise.”
- **Possible Questions about Witnessed Abuse**
    - “Tell me what you saw when...?”
    - “Tell me what you heard when...?”
    - “Tell me about the other the times you saw...?”
    - “Where were you when...?”
    - “When (suspect’s name) did that, how did he/she look? What did he/she say?”
    - “Right after (suspect’s name) did that, what happened?”
    - “Did anyone else see (suspect’s name) do that?”
    - “Has (suspect’s name) ever done that to anyone else? Tell me all about that.”
    - “Have the police ever come to your house? Why did they come?”

- **Possible Questions About the Child’s Fears for Reasons for Secrecy**
  - “Did someone tell you not to tell? Who? What did he/she say would happen if you told?”
  - “Did you ever tell anyone besides (name of person child most recently disclosed to)? What happened after you told him/her?”
  - “What made you decide to tell what happened?”
  - “Do you know what a secret is? Tell me what it is.”
  - “Has someone asked you to keep a secret?” What was the secret?”
  - “Did (suspect’s name) tell you he would do something for you if you didn’t tell? What did he say?”
  - If child appears scared or you believe they have been threatened you may say: “Sometimes kids are really scared to tell what happened to them. You seem scared to talk to me. Tell me about that.”
  
- **Discovering the Offender and Determining Who Was Involved**
  - “Did (suspect’s name) ever do anything else you didn’t like?”
  - “Does anyone else know about (child’s word for abuse)? Who? How does he/she know?”
  - “Who was the first person you told? Who was the first person you tried to tell? What happened after you told him/her?”
  - “What did that person say/do?”
  - “Was anyone else there when (child’s word for abuse) happened? What was/were he/she/they doing while (suspect’s name) (child’s word for abuse) you?”
  - “Do you know if (suspect’s name) has done this to anyone else? Who? How do you know?”
  - “Has anyone else ever (child’s word for abuse) to you?”
  - “Has anything like (child’s word for abuse) ever happened to you before?”

## VI. CHARGING STRATEGIES AND CONCERNS

### **A. IDENTITY OF PERPETRATOR**

Most child sexual abuse is perpetrated by someone who is either a family member or well known to the child and family. Surveys indicate that only about 10%-30% of abusers are strangers.

### **B. DETERMINATION OF WHAT HAPPENED**

It can take patience and time in order to determine what has happened to a child victim. It is extremely important that all interviews with children proceed slowly and cautiously to make sure the child is understood. Failure to do so will create an appearance that the child is inconsistent, when it could be that it is you who is failing to understand the child.

### **C. WHAT CRIME WAS COMMITTED?**

In making a decision whether to file charges, you must make an objective evaluation of all existing evidence. It is also recommended that you have a basic knowledge of the dynamics of victimization and common behavioral patterns of offenders and victims.

You must consider all available evidence (whether admissible or inadmissible) including:

- a. All statements made by the child, including but not limited to:
  - i. Statements made to family, friends, teachers, therapists, counselors, or any other person; and
  - ii. Statements made in formal interviews with DCBS/CHFS and criminal investigators, such as CAC interview(s);
- b. The age appropriateness of the child's statements;
- c. Evidence of the Defendant's opportunity to commit the crime(s);
- d. Evidence of the Defendant's history of sexual acts, even if uncharged;
- e. Evidence of the Defendant's history of violence and violent acts, even if uncharged;
- f. Family dynamics;
- g. Therapist evaluations of the victim and the Defendant;
- h. Any admissions or confessions, including partial admissions such as, "I touched her, but I had no sexual intent";
- i. Prior DCBS/CHFS history;
- j. Polygraph or psychosexual evaluations of the Defendant;

- k. Evidence of the child's behavior and symptoms following the abuse; and
- l. Any and all corroborative medical evidence.

**D. DOES YOUR ADMISSIBLE EVIDENCE MEET THE STANDARD ESTABLISHED BY PROSECUTORIAL GUIDELINES, OFFICE PROTOCOL, AND ETHICAL OBLIGATIONS FOR FILING A CHARGE OF SEXUAL ABUSE OF A CHILD?**

- a. Look to your office protocol.
- b. Look to national standards (NDAA model codes).
- c. Look to Kentucky guidelines and ethical rules.
- d. If you are unsatisfied with quality or quantity of investigative work, then ensure that additional investigative steps are taken. An MDT approach/ team approach is the best approach.

Remember, achieving justice for children demands that the prosecutor ensure the quality of the investigation, including obtaining specialized training for criminal investigators and providing professional guidance on the standards expected prior to filing charges in a case. Remember that the Office of Attorney General wants to assist, partner, and support these efforts in any way possible! You can ask for help from OAG staff, MDT team members, CAC workers, DCBS workers, and other partners in order to ensure quality investigation and review of cases involving the abuse of children.

**E. WHAT CRIME SHOULD BE CHARGED?**

The overriding principle should be to charge the crime that most accurately reflects both the nature and seriousness of the alleged criminal conduct, including the required mental state to sustain a conviction. Always seek to file the most serious charge that the credible evidence supports, while also refraining from overreach and adhering to all ethical standards. Make sure to consider:

- a. The age of the child. Many offenses specify the age of the child, with the most serious charges involving children 12 and under;
- b. Statutes of limitation;
- c. The number of counts to be charged;
- d. Avoiding overcharging to gain leverage in plea negotiations. It is unethical;
- e. Avoiding the undercharging of sexually based offenses into crimes for which sexual conduct is not a required element. Remember that, for treatment purposes, the offender will ONLY be treated based upon the facts and the elements of the charges to which he/she pleaded; and

- f. The Crime Victim's Bill of Rights and your obligation to seek input and to advise the victim(s) of charges.

For the number of counts to be charged, remember:

- a. Separation of counts for each victim. It's a good practice to file a separate count naming each victim. In plea negotiations you may be able to amend charges later and combine several victims into a single count (especially for acts occurring during a single incident). Keep multiple victims in mind and seek justice for each victim;
- b. Multiple acts with a single victim;
- c. Look for ways to distinguish one incident from another by establishing different behaviors, different times, or different locations;
- d. Keep in mind the nature and progression of acts recalled by the child. Like the progression from fondling or grooming to oral sex to vaginal sex;
- e. You may also consider different acts during different ages. If a child was abused from ages 6 to 10, for example, then you may be able to charge a count for each year of abuse;
- f. You could further separate counts by the location where separate instances of abuse occurred;
- g. Consider perhaps different homes where the abuse occurred or significant occasions such as birthdays, holidays, vacations or visits; and
- h. For physical abuse cases, you could distinguish counts by injuries deemed by a medical expert to have been inflicted at different times or by different methods.

Remember, no child abuse prosecution should be commenced until the investigation is complete. The prosecutor must be satisfied that the investigation has produced sufficient admissible and credible evidence to justify a reasonable fact finding to convict the defendant. Child sexual or physical abuse charges should never be filed in order to strengthen any parent's standing in a separate proceeding. These cases are not for strategic advantage in custody or other matters. These types of crimes should never be charged with the assumption that additional facts will be discovered during preparation for a preliminary hearing or trial that will make the case stronger. Also, keep in mind that these investigations must be pursued expeditiously. Justice delayed is justice denied in these cases.

Declining to bring criminal charges is, in some instances, more difficult than the decision to file criminal charges. Many times, the prosecutor believes that a form of abuse has occurred but lacks the sufficient admissible evidence or the availability of necessary witnesses. These cases are extremely tough on all parties involved. For that reason, let victims and their families know of your decision as soon as possible. It is often best to advise them of your decision in person and in

writing. An explanation as to why a case cannot be prosecuted is the right thing to do and can provide a resolution to a traumatic situation for the victim and the family. It creates unnecessary stress for victims and their families if they feel ignored or uninformed. Prompt communication is legally required, and it is the right thing to do.

Remember that, even when declining prosecution, you should make suitable referrals and encourage the victim to seek additional support resources. The prosecutor might also indicate other options available to the victim or family, such as a civil lawsuit or an action in family court, where there are lesser burdens of proof. It is important that you do not counsel them on the feasibility of these options, but just that they may be available.

You should take steps to work with your local MDT and fellow prosecutors to ensure the safety of the child. Coordination between fellow prosecutors and partners is key.

#### **F. DIRECT INDICTMENT?**

There could be some benefit to charging the defendant by way of a direct indictment. Remember, the defendant has no constitutional right to a preliminary hearing. *Edwards v. Commonwealth*, 500 S.W.2d 396, 398 (Ky. 1973); *Commonwealth vs. Yelder*, 88 S.W.3d 435, 437-38 (Ky. App. 2002).

Ask yourself these questions: Which may lead to better bond or better bond conditions? Could the use of the direct indictment keep the defense attorney from calling the victim as a witness and possibly keep from creating unnecessary inconsistencies?

#### **Resources for Success:**

1. **Zero Abuse Project**,  
[https://www.zeroabuseproject.org/trainings/?training\\_categories=trial-strategies](https://www.zeroabuseproject.org/trainings/?training_categories=trial-strategies)
2. **National Children's Advocacy Center Virtual Training Center**,  
<https://www.nationalcac.org/online-training-catalog/>

#### **G. ARRAIGNMENT**

Always make sure all bond conditions and “no contact” provisions are clearly addressed. It is a good idea to do a formal order for bond conditions so that the

defendant can be held accountable if he/she violates pretrial conditions of release under KRS 431.064.

Before charging a Violation of Pretrial Order of Release, the defendant must be provided with a written copy of orders upon release; OR must have actual notice of the conditions of release. Due to thoroughness of calendar orders or pretrial release sheets, you may want to do a separate order out of an abundance of caution. If there are violations of the no contact order, you can consider:

- Contempt of Court Motion;
- Motion to revoke or increase bond;
- Bond forfeiture;
- Further criminal prosecution (tampering with a participant in the legal process);
- Loss of phone privileges at jail;
- Use of facilities that monitor and supervise child visitation sessions (family court).

## H. COMPETENCY ISSUES

**KRE 601 controls competency.** Every person is presumed competent to be a witness. This includes children, if they have the capacity to accurately perceive the matters they will be testifying about, are able to recollect facts, can express themselves so as to be understood, and are under an obligation to tell the truth.

Age is not determinative of competency, and there is no minimum age for testimonial capacity. *Humphrey v. Commonwealth*, 962 S.W.2d 870, 874 (Ky. 1998).

The bar is low for a child's competency, depending on her level of development and upon the subject matter at hand. *Jarvis v. Commonwealth*, 960 S.W.2d 466, 469 (Ky. 1998).

Because KRE 601 presumes competency, remember that the burden of proving otherwise is on the party challenging the witnesses' competency. You can ask that the Defendant be excluded from the competency evaluation under *Kentucky v. Stincer*, 482 U.S. 730, 740 (1987).

Also consider when the competency hearing should be scheduled in relation to your trial date. What questions should you ask? What questions should you keep the defense attorney from asking?

Remember that all questions must be appropriate for the child's age and abilities.

**Sample Questions for competency may include:**

- “Here you are in the courtroom (or back office). Tell me what it looks like; tell me what you see.” These questions test a child's ability to accurately perceive and testify.
- You could also ask, “What did you do this morning? What did you have for breakfast this morning?”
- “What is your favorite class at school? What do you like most about it? Do you have a favorite teacher at school? Did you go to the same school last year?”
- “What is your favorite game to play? Tell me how that game is played? What are the rules of that game?”
- “What is your favorite television program? Tell me about it? Who are the characters in it?”
- “What is your name? How old are you? When is your birthday? Did you have a party on your last birthday? What kind of cake or treat did you have? Did you get any presents? What did you get?”
- “Do you have any friends who you play with? What are their names?”
- “Do you remember last Christmas? Where were you living? What was your favorite present? What did Santa Clause bring you?”
- “Do you promise to tell the truth today?”
- “Do you know your colors? What color is my top? If I told you my top was Pink (or some color that it is not), would that be the truth or a lie?”

Refrain from asking philosophical questions like, “explain the difference between a truth and a lie,” or “What is the difference between right and wrong?”



## VII. APPLICABLE CASE LAW AND STATUTES ON CHILD ABUSE

### **A. REPORTING REQUIREMENTS**

#### **1. Who Must Report**

Everyone is a mandated reporter.

KRS 620.030(1) requires that ANY PERSON who knows or has reasonable cause to believe a child is dependent, neglected, or abused shall immediately cause an oral or written report to be made. It is required that such report be made to law enforcement agencies, social services, or to the Commonwealth's Attorney's or County Attorney's Office by telephone or otherwise.

Any person, including but not limited to a physician, osteopathic physician, nurse, teacher, school personnel, social worker, coroner, medical examiner, child-caring personnel, resident, intern, chiropractor, dentist, optometrist, emergency medical technician, paramedic, health professional, mental health professional, peace officer, or any organization or agency for any of the above, who knows or has reasonable cause to believe that a child is dependent, neglected, or abused, regardless of whether the person believed to have caused the dependency, neglect, or abuse is a parent, guardian, fictive kin, person in a position of authority, person in a position of special trust, person exercising custodial control or supervision, or another person, or who has attended such child as a part of his or her professional duties shall, if requested, in addition to the report required in subsection (1) or (3) of this section, file with the local law enforcement agency or the Department of Kentucky State Police, the cabinet or its designated representative, the Commonwealth's attorney, or county attorney within forty-eight (48) hours of the original report a written report containing:

- a. The names and addresses of the child and his or her parents or other persons exercising custodial control or supervision;
- b. The child's age;
- c. The nature and extent of the child's alleged dependency, neglect, or abuse, including any previous charges of dependency, neglect, or abuse, to this child or his or her siblings;
- d. The name and address of the person allegedly responsible for the abuse or neglect; and
- e. Any other information that the person making the report believes may be helpful in the furtherance of the purpose of this section.

(3) Any person who knows or has reasonable cause to believe that a child is a victim of human trafficking as defined in KRS 529.010 shall immediately cause an oral or written report to be made to a local law enforcement agency or the

Department of Kentucky State Police; or the cabinet or its designated representative; or the Commonwealth's attorney or the county attorney, by telephone or otherwise. This subsection shall apply regardless of whether the person believed to have caused the human trafficking of the child is a parent, guardian, fictive kin, person in a position of authority, person in a position of special trust, or person exercising custodial control or supervision.

(4) Any person who knows or has reasonable cause to believe that a child is a victim of female genital mutilation as defined in Section 1 of this Act [2020 c. 74, § 1] shall immediately cause an oral or written report to be made by telephone or otherwise to:

- (a) A local law enforcement agency or the Department of Kentucky State Police;
- (b) The cabinet or its designated representative; or
- (c) The Commonwealth's attorney or the county attorney.

This subsection shall apply regardless of whether the person believed to have caused the female genital mutilation of the child is a parent, guardian, or person exercising custodial control or supervision.

Failure to report pursuant to KRS 620.030 is a class B misdemeanor for the first offense, Class A misdemeanor for the second offense and a Class D felony for any subsequent offense.

*Fugate v. Fugate*, 896 S.W.2d 621 (Ky. App. 1995)

Testimony was presented during a hearing to modify custody that indicated the child in question was abused and the child's well-being was at issue. However, no one notified the Cabinet for Families and Children to do an investigation. The duty to report possible abuse of a child under KRS 620.030 does not exclude a trial judge from those reporting requirements.

Exception to reporting requirement

KRS 620.030(5) states that the only privilege that allows a person to refuse to report is the attorney-client privilege and the clergy-penitent privilege. See also the issue of privilege under Preliminary Issues.

## **2. Immunity Issues**

### **For reporters:**

KRS 620.050(1) provides immunity for any person who reports child abuse so long as there was reasonable cause to report and the person acted in good faith.

However, a person who knowingly makes a false report with malice is guilty of a Class A misdemeanor.

*J.S. v. Berla*, 456 S.W.3d 19 (Ky. App. 2015)

Good faith in making a report of suspected child abuse or neglect, for which report the reporter is immune from any criminal or civil liability, is subjective; it is a determination of the state of mind of the reporter.

**Application of KRS 620.050:**

*A.A. by and through Lewis v. Shutts*, 516 S.W.3d 343 (Ky. App. 2017)

Mother, as administrator of child's estate and as next friend for her three remaining children, filed a complaint against physician who treated child, who was later murdered by his foster father, for failure to report abuse. The Circuit Court, granted physician immunity from lawsuit. Mother appealed.

The Court of Appeals rules that KRS 620.050, which granted immunity from civil or criminal liability to anyone acting upon reasonable cause in the making of a report that a child was suspected to be dependent, neglected, or abused, did not apply to include immunity from civil liability when a physician acted in good faith in declining to report suspected child abuse, and a genuine issue of material fact existed as to whether physician had reasonable cause to believe that abuse was occurring when she treated the child's injuries, which would trigger physician's duty to report suspected child neglect or abuse.

*Hazlett v. Evans*, 943 F. Supp. 785 (E.D. Ky. 1996)

A doctor examined a one-month old child who was having seizures. After examining CT scan, doctor determined that child could be suffering from Shaken Baby Syndrome. The doctor reported the suspected abuse to the Cabinet for Families and Children and the Cabinet for Families and Children in turn investigated and the child's father was arrested. Father sued the doctor stating he wrongfully misdiagnosed the child and improperly reported to the Cabinet. The doctor did have qualified immunity under KRS 620.050. Pursuant to the statute, the plaintiff must show that the doctor acted in bad faith when he reported that the baby's injuries could be consistent with Shaken Baby Syndrome. Therefore, the doctor was not liable.

*Norton Hospitals, Inc. v. Peyton*, 381 S.W.3d 286 (Ky. 2012)

Pursuant to statute requiring mandatory reporting of child abuse, reporter's good faith belief is a determination of the state of mind of the actor, and therefore, a reporter's good faith belief that he or she is discharging the lawful duty to report, even if such a belief is ultimately determined to be erroneous, is all that is required under statute, providing that any person acting upon reasonable cause in the

making of a report or acting in good faith shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed.

### **For employees of Child Advocacy Centers:**

The Kentucky General Assembly in the 2002 session provided in KRS 620.050(2) for immunity from civil liability for employees or designated agents of Children's Advocacy Center employees within the scope of their duties. But, liability will not be limited for negligence on the part of Children Advocacy Center employees or the designated agents.

### **For Social Workers:**

*Edwards v. Williams*, 170 F. Supp.2d 727 (E.D. Ky. 2001)

Social workers were not entitled in a Section 1983 action to absolute immunity regarding the investigation into alleged sexual abuse by the alleged perpetrator (father) against employees of the cabinet. However, the social workers would be entitled to qualified immunity if their actions did not violate a statutory or constitutional right. The Court determined that cabinet employees did not violate the alleged perpetrator's constitutional rights and therefore those employees have qualified immunity.

### **No immunity if reporting is improper:**

KRS 620.050 does not provide immunity from liability when the individual fails to properly report under KRS 620.030 to KRS 620.050 because the threshold requirement of KRS 620.050 to be immune from liability is not met.

*Commonwealth v. Allen*, 980 S.W.2d 278 (Ky. 1998)

A teacher and counselor reported to the principal of their school that students had told them about abuse by another teacher. This reporting, however, did not relieve the teacher and counselor from their duty to report suspected child abuse to law enforcement, social services or the Commonwealth's Attorney.

## **3. Multidisciplinary Teams**

KRS 620.040 requires that multidisciplinary teams may be established in one county or group of contiguous counties. Membership of the multidisciplinary team shall include but shall not be limited to social service workers employed by the Cabinet for Health and Family Services and law enforcement officers. Additional team members may include Commonwealth's and county attorneys, children's advocacy center staff, mental health professionals, medical professionals, victim advocates including advocates for victims of human trafficking, educators, and other related professionals, as deemed appropriate.

The multidisciplinary team shall review child sexual abuse cases and child human trafficking cases involving commercial sexual activity referred by participating professionals, including those in which the alleged perpetrator does not have custodial control or supervision of the child or is not responsible for the child's welfare. The purpose of the multidisciplinary team shall be to review investigations, assess service delivery, and to facilitate efficient and appropriate disposition of cases through the criminal justice system.

Regularly scheduled meetings should be held to take reports of new cases as well as review active cases. The team shall operate under the local protocol approved by the Kentucky Multidisciplinary Commission on Child Sexual Abuse.

Pursuant to KRS 15.727, the Commonwealth's Attorney and county attorney shall help establish a multidisciplinary team in his/her jurisdiction unless the Prosecutor's Advisory Council has relieve him/her of this duty.

KRS 431.600: If adequate personnel are available, each Commonwealth's Attorney's office and each county attorney's office shall have a child sexual abuse specialist. Further, Commonwealth's Attorneys and county attorneys, or their assistants, shall take an active part in (a) interviewing and familiarizing the child alleged to have been abused, or who is testifying as a witness, with the proceedings throughout the case, beginning as early as practicable in the case; (b) Commonwealth's Attorneys and county attorneys shall provide for an arrangement which allows one (1) lead prosecutor to handle the case from inception to completion to reduce the number of persons involved with the child victim; (c) Commonwealth's Attorneys and county attorneys and the Cabinet for Health and Family Services and other team members shall minimize the involvement of the child in legal proceedings, avoiding appearances at preliminary hearings, grand jury hearings, and other proceedings when possible; and (d) They shall make appropriate referrals for counseling, private legal services, and other appropriate services to ensure the future protection of the child when a decision is made not to prosecute the case. The Commonwealth's Attorney or county attorney shall explain the decision not to prosecute to the family or guardian, as appropriate, and to the child victim. To the extent practicable and when in the best interest of a child alleged to have been abused, interviews with a child shall be conducted at a children's advocacy center.

For additional information regarding investigations see the State Multidisciplinary Team Model Protocol.

#### 4. Polygraph

##### **Of the Victim:**

Governed by 502 KAR 20:020 Section 4. Detection of Deception Examinations of Victims of Sex Crimes.

(1) The victim of a sex crime has the right to refuse examination and shall be informed of this right.

(2) An examination shall not be requested, required, or conducted of a sex crime victim as a condition for proceeding with the investigation of the crime.

(3) Except as provided by subsection (4) of this section, examination of a sex crime victim shall not be conducted unless:

(a) The victim's consent to the examination is in writing and received by the examiner before the examination begins;

(b) 1. The suspect has declined examination, has passed an examination or has been found unsuitable for an examination; or

2. After an investigation, the suspect cannot be identified or located;

(c) There is a clear issue to test on based on:

1. Interviewing the victim, any witnesses, any potential witnesses, and the suspect, if possible;

2. Submitting any evidence to the laboratory if appropriate; and

3. Pursuing any leads identified during the investigation; and

(d) Before the examination, the investigating officer has provided the examiner with a signed, written document:

1. Describing any inconsistencies in the victim's allegation;

2. Stating if any inconsistency can be substantiated by existing physical or testimonial evidence;

3. Listing investigative strategies that have been used in the case;

4. Declaring that the victim has not been told that the investigation would cease if the victim refuses to consent to an examination; and

5. Containing no reference to whether the victim is behaving like a typical sexual assault victim.

(4)(a) A sex crime victim may request examination. The investigator may arrange for the requested examination and the examination may be conducted if:

1. The request is voluntary and at the victim's own initiative;

2. It is documented in writing that the request is by the victim;

3. The written request is signed by the victim;

4. The written request is received by the examiner before the examination begins; and

5. The victim has an opportunity to consult with a victims' advocate prior to the examination.

(b) An examination shall not be considered to be at the victim's request if the victim agrees to the examination in response to a request by the investigator to take an examination.

(5) Every reasonable attempt shall be made to avoid visible and audio contact between the victim and suspect during the examination process. If contact is made, the examination shall be postponed and rescheduled for another date and time.

(6) The victim shall be advised that at the victim's request, a victim's advocate shall be allowed to watch the examination from a two (2) way mirror or by closed circuit television in real time. The examiner and the victim shall be the only two (2) individuals inside the examination room during the entire examination process, except if a language interpreter is required.

(7) At the beginning of the examination, the examiner shall advise the victim that the examination is a stressful experience and that if the victim feels uncomfortable at any time with the polygraph process, it shall be terminated immediately.

(8) The victim shall not be interrogated under any circumstance. A post-examination debriefing shall be conducted to give the victim the opportunity to explain any unresolved responses on the examination. The victim shall be advised that upon the victim's request, a victim's advocate shall be allowed to watch the debriefing session from a two (2) way mirror or closed circuit television.

(9) The testing format utilized shall be a researched comparison/control question format (CQT). The relevant questions shall be answered with a "yes" answer.

(10) An irrelevant/relevant question format shall not be utilized on any sex crime victim.

(11) Past sexual history of the victim shall not be explored by the examiner.

(12) Sex related comparison/control questions shall not be asked of the victim. Lie comparison questions excluding sex shall be used on sex crime victims.

(13) At the end of the examination, the examiner shall advise the victim of the results.

(14) Quality control of the examination shall be conducted in writing and maintained with the polygraph file at least until after adjudication of the case.

(15) The entire examination shall be videotaped with adequate picture and sound from the time the victim walks into the testing room until the victim leaves the testing room for the last time. There shall not be a break in the videotaping of the process. The videotape shall be maintained as evidence until at least the investigation is adjudicated.

### **Of the Accused:**

Polygraphs are used by some police agencies as an investigative tool. Opinions about their reliability differ greatly. Their primary usefulness in an investigation is to encourage an additional statement from the defendant.

#### *United States v. Scheffer*, 523 U.S. 303, 312 n.8 (1998)

In a footnote, the United States Supreme Court noted that governmental agencies do use polygraphs as investigative tools. However, the Court stated in this footnote that “[s]uch limited out of court use of polygraph techniques obviously differ in character from, and carry less severe consequences than the use of polygraphs as evidence in a criminal trial.”

### **In Trial:**

#### *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991)

The polygraph should not be mentioned in the presence of the jury. The polygraph cannot be admitted into evidence even if the parties agree to the admission of the evidence.

#### *Phillips v. Commonwealth*, 17 S.W.3d 870 (Ky. 2000)

Mention of polygraph does not always require mistrial. Defendant not entitled to a mistrial when codefendant mentioned a polygraph because there was no proof that the codefendant underwent a polygraph.

#### *Commonwealth v. Hall*, 14 S.W.3d 30 (Ky. 2000)

The Court stated that admissions of guilt in the context of a polygraph are admissible, but polygraph results cannot be mentioned. The Court held that the defendant may introduce the circumstances under which the confession was taken, namely that the confession was made before a polygraph was to be given. These circumstances may be introduced to challenge the credibility of the statement.



## 5. Search Warrant Issues

### **For a Dependency, Abuse, or Neglect proceeding:**

KRS 620.040 (5)(a) states that if, after receiving the report, the law enforcement officers, the cabinet, or its designated representative cannot gain admission to the location of the child, A SEARCH WARRANT shall be requested from, and may be issued by, the judge to the appropriate law enforcement official upon probable cause that the child is dependent, neglected, or abused. If, pursuant to a search warrant, a child is discovered and appears to be in imminent danger, the child may be removed by the law enforcement officer. (KRS 620.040(5)(a)).

These search warrants are sometimes referred to as “well child warrants” and an example is attached in example docs section.

A thorough child abuse investigation includes identifying and obtaining evidence that corroborates the victim’s statements. A search warrant may be required to seize traditional items of evidence such as physical evidence of abuse, (lotions, instruments of abuse, instruments causing injury like belts and hair straighteners, pornography, clothing, photographs of abuse, cameras, etc.) or personal evidence on the accused (hair, saliva, blood). Also, non-traditional items, such as photographs that corroborate the victim’s statement (description of house, location of abuse, stairs or non-mobile instruments causing physical injury, etc.) are subject to a search warrant.

For cyber-crimes or technology-facilitated child abuse please contact the OAG cyber-crimes unit, within the Division of Criminal Investigations, for assistance including access to search warrant templates. Copies of all law enforcement guides for many social media sites are attached to your materials.

When the alleged offender is suspected to be a pedophile with multiple victims an expertise search warrant may be useful. An expertise search warrant incorporates expert knowledge and opinion by the affiant or third party to justify a broader search than might otherwise be authorized.

### **Requirements of a search warrant:**

#### *Dalia v. United States, 441 U.S. 238 (1979)*

The Fourth Amendment requires that search warrants be issued only upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched and persons or things to be seized. It also requires that a neutral, disinterested magistrate issue search warrants. The person seeking the warrant must demonstrate to the magistrate probable cause to believe that the evidence sought will aid in particular apprehension or conviction for particular

offense. The warrants must also particularly describe the things to be seized as well as the places to be searched.

### **Search warrant on Defendant's person:**

#### *Cupp v. Murphy*, 412 U.S. 291 (1973)

It is permissible to take fingernails scrapings of a defendant without a search warrant. Further, the basis for exception to warrant requirement when search is incident to a valid arrest is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession.

#### *Speers v. Commonwealth*, 828 S.W.2d 638 (Ky. 1992)

When an individual is driving under the influence, the Court recognized that "the state may seize without a warrant evanescent evidence which is likely to disappear before a warrant can be obtained, such as blood samples containing alcohol or fingernail scrapings."

### **Search warrant for Defendant's cell phone:**

#### *Hedgepath v. Commonwealth*, 441 S.W.3d 119 (Ky. 2014)

Kentucky Supreme Court held that incriminating videos on defendant's cell phone were not found as a result of allegedly illegal conduct by which detective discovered the phone's location; detective did not act unreasonably in searching defendant's vehicle; search warrant and supporting affidavit were sufficiently particular to make a search of the phone reasonable; defendant was not prejudiced from the joinder for trial of charges for sexual assaults that occurred on one day from charges for murder and assaults that occurred the next day; and defendant was not entitled to admission of recorded statements of victim's two children that a person with a name other than defendant's name hit their mother.

### **Items found in plain view during execution of search warrant may be seized:**

#### *Hazel v. Commonwealth*, 833 S.W.2d 831 (Ky. 1992)

The police obtained a search warrant to look for marijuana and cocaine in the defendant's home. While searching a dresser drawer, a police officer came across a picture of a nude man. There was an entire stack of pictures that the police officer had to lift to search for more drugs. When he did, he came across a picture of an adult female performing cunnilingus on a young female. The Court held that these pictures were in "plain view" as the officer had a properly executed search warrant to be at the house. Simply because the search warrant did not specify the photos does not render the photos inadmissible because these photos were in plain view.

Clearly, the criminal nature of these photographs was apparent. Therefore, these photos were admissible.

*Deemer v. Commonwealth*, 920 S.W.2d 48 (Ky. 1996)

A search warrant for the defendant's home contained probable cause based on photographs of children in sexually explicit positions found when Walgreen's developed his film. The defendant had no expectation of privacy when he dropped off the roll of film at Walgreens to be developed.

**Staleness:**

*Hause v. Commonwealth*, 83 S.W.3d 1 (Ky. App. 2001)

A defendant was charged with possession of matter portraying a minor in a sexual performance and distribution of matter portraying a minor in a sexual performance. As part of the investigation a search warrant was issued to obtain subscriber information from America On Line (AOL). The Court held that there was no expectation of privacy in materials and information supplied to AOL. The defendant also challenged the staleness of the search warrant obtained by Lexington Police Department because the information used to obtain warrant was 178 days old. However, the search warrant was not stale because there was an ongoing investigation and this type of evidence can be stored and kept in his home for a long period of time.

**An open-ended search warrant violates the Fourth Amendment:**

*Lo-Ji Sales, Inc v. New York*, 442 U.S. 319 (1979)

The town justice signed a generalized search warrant to search a store that was allegedly selling obscene material. However, the search warrant only specified copies of two films. The search warrant did not provide for taking any other items besides the two videos. Other items were taken besides the two videos specified in the warrant. The town justice was also there during the execution of the search warrant and directed which items were to be seized thereby completing the search warrant at the scene, which a supposed impartial judge should not do.

The Court held that the Fourth Amendment did not permit search warrant which, with exception for specification of copies of two films previously purchased by investigator, did not purport to particularly describe things to be seized but instead left it entirely to discretion of officials conducting search to decide which items were likely obscene and to accomplish seizure of such items; nor did Fourth Amendment countenance open-ended warrant to be completed while search was being conducted and items seized or after seizure had been carried out.

Moreover, by allowing himself to become member if not the leader of search party conducting generalized search, town justice did not manifest neutrality and

detachment demanded of judicial officer when presented with warrant application for search and seizure.

## **6. Use of Children's Advocacy Centers**

In areas where Children's Advocacy Center are available, child witness interviews should be conducted at Children's Advocacy Centers when at all possible. KRS 431.600.

### **B. CHARGING ISSUES**

#### **1. Statute of Limitations**

KRS 500.050 provides: (1) Except as otherwise expressly provided, the prosecution of a felony is not subject to a period of limitation and may be commenced at any time.

(2) Except as otherwise expressly provided, the prosecution of an offense other than a felony must be commenced within one (1) year after it is committed.

(3) For a misdemeanor offense under KRS Chapter 510 when the victim is under the age of eighteen (18) at the time of the offense, the prosecution of the offense shall be commenced within five (5) years after the victim attains the age of eighteen (18) years.

(4) For purposes of this section, an offense is committed either when every element occurs, or if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated.

#### **Application of KRS 500.050:**

##### **Reed v. Commonwealth, 738 S.W.2d 818 (Ky. 1987)**

A challenge was made to KRS 500.050. The Supreme Court of Kentucky refused to overrule the statute and further stated that the fact that charges were not brought until eight years after the victim was raped was not prejudicial to the defendant or a violation of his right to a speedy trial.

##### **Berry v. Commonwealth, 84 S.W.3d 82, 85-86 (Ky. App. 2001)**

The Kentucky Court of Appeals held there is no statute of limitations to bar prosecution. "Dismissal of the indictment is required only where the accused shows substantial prejudice to the ability to present a defense and where the prosecutorial delay was intentional in order to gain a tactical advantage."

## 2. Number of Counts

The number of counts should accurately portray the relative culpability of a defendant's conduct. However there must be sufficient evidence to prove each count.

Miller v. Commonwealth, 77 S.W.3d 566 (Ky. 2002)

The only testimony presented at trial was that sexual abuse occurred "almost every other weekend," "about ten weeks per year," or "every other time." This was not specific enough to charge for each separate event.

## 3. Delayed Prosecution

### **Delay in Reporting:**

Reed v. Commonwealth, 738 S.W.2d 818, 820 (Ky. 1987)

In a prosecution for rape first degree, it was not error to bring a charge many years later when the reporting was delayed. "[T]he interest of the Commonwealth in the prosecution of crime outweighs the benefits normally associated with statutes of limitation; and that there is no right to be free of felony prosecution by the mere passage of time."

### **Pre-Code Abuse:**

Abuse occurring prior to 1975 is prosecuted under KRS 435.105.

KRS 435.105 Indecent or immoral practices with another

(1) Any person of the age of seventeen years or over who carnally abuses the body, or indulges in any indecent or immoral practices with the body or organs of any child under the age of fifteen years, or who induces, procures, or permits a child under the age of fifteen years to indulge in immoral, sexual or indecent practices with himself or any person shall be guilty of a felony, punishable on conviction thereof by imprisonment in the penitentiary for not less than one year nor more than ten years.

(2) Any person of the age of seventeen years or over who carnally abuses the body, or indulges in any indecent or immoral practices with the body or organs of any other person of the age of fifteen year or over or who induces, procures or permits any person of the age of fifteen years or older to indulge in immoral sexual or indecent practices with himself or any other person, not otherwise denounced in this chapter, shall be guilty of a felony, punishable on conviction thereof by an imprisonment in the penitentiary for not less than one nor more than five years.

### **Overlap of some statutes:**

*Hale v. Commonwealth*, 396 S.W.3d 841 (Ky. 2013).

The legislature's choice not to refer specifically to a "crime" by the minor, but to use the much more general expression "engage in illegal sexual activities" persuades us again, as in *Young*, that the narrow reading Hale proposes was not intended and that the overlap with KRS Chapter 510 was intended, the General Assembly deliberately affording grand juries and prosecutors an important option when minors have been induced to engage in sex for which they are too young to consent. See also *Quist v. Commonwealth*, 338 S.W.3d 778 (Ky. App. 2010) (rejecting claim that KRS 530.064 does not apply unless the minor is induced to commit a crime).

Unlawful transaction with a minor pursuant to KRS 530.064 is not limited to instances where the defendant has induced a minor to commit a crime, but applies as well to inducements to engage in sexual activity made illegal by the minor's incapacity to consent to it.

## **4. Speedy Trial Issues**

### **Defendant's Right to a Speedy Trial:**

Defendant is entitled to a speedy trial. RCr 9.02 provides that when a defendant is in custody a trial will be conducted as soon as reasonably possible.

### **The Right Begins When Charges Are Filed:**

*Reed v. Commonwealth*, 738 S.W.2d 818 (Ky. 1987)

The fact that charges are not brought until many years after the alleged sexual abuse occurred does not violate a defendant's right to a speedy trial.

*Berry v. Commonwealth*, 84 S.W.3d 82 (Ky. App. 2001)

The Court held that a twenty-year delay in bringing charges against the defendant and seeking an indictment was not a violation of the defendant's right to a speedy trial. The analysis to be used is set forth in *United States v. Marion*, 404 U.S. 307, 324 (1971). The questions the court must ask are whether the defendant was prejudiced by the delay and whether there was intentional prosecutorial delay to gain a tactical advantage. The Court determined that the defendant was not prejudiced by the delay and that there was no intentional prosecutorial delay.

### **KRS 500.110**

A prisoner incarcerated in a Kentucky state prison may request that he be brought to court for final disposition on any untried indictment. The trial must

occur within 180 days. However, this time period may be extended for good cause shown to the trial court.

*Gabow v. Commonwealth*, 34 S.W.3d 63 (Ky. 2000)

KRS 500.110 does not apply to offenses for which a person is being held on pre-trial incarceration.

(*Gabow* was overturned on other grounds by *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177 (2004); overruling was recognized by *McLemore v. Commonwealth*, 590 S.W.3d 229 (Ky. 2019).

### **Violation of Right:**

*Baker v. Wingo*, 407 U.S. 514, 532 (1972)

The United States Supreme Court set forth factors to consider whether the defendant's right to a speedy trial has been violated:

- 1) Length of delay;
- 2) The reason given by the government for delay;
- 3) The defendant's responsibility to assert his right, when and how vigorously he asserts his right;
- 4) Prejudice to the defendant;

"We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather they are related facts and must be considered together with such other circumstances as may be relevant."

Prejudice to the defendant should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests

- 5) To prevent oppressive pre-trial incarceration;
- 6) To minimize anxiety and concern of the accused; and
- 7) To limit the possibility that defense will be impaired.

### **Interstate Agreement on Detainers:**

KRS 440.450

Interstate Agreement on Detainers places time limits on the trial of a defendant when they are brought to Kentucky from another state prison or federal prison. There are specific requirements to trigger the Interstate Agreement on Detainers (IAD).

*Clutter v. Commonwealth*, 322 S.W.3d 59 (Ky. 2010)

Whether to initiate mechanism for securing custody of a prisoner under the IAD is within the discretion of the prosecuting state, and the prisoner's attempt to invoke the provisions of the IAD does not shift the burden to the prosecuting state to secure custody of the prisoner.

A detainer must be lodged before provisions of IAD are triggered.

Ward v. Commonwealth, 62 S.W.3d 399, 403 (Ky. App. 2001)

“It is a settled precedent that an inmate cannot invoke the protections of the Interstate Agreement on Detainers and commence the running of the time limitations until a detainer has been filed in the jurisdiction where he is incarcerated.”

Johnson v. Commonwealth, 450 S.W.3d 696 (Ky. 2014)

Because it is the detainee who “shall have caused” the delivery of the forms under the IAD to the proper prosecuting officer, to trigger the 180 day period, the IAD clearly placed the responsibility for the accuracy of the notice upon the detainee. The 180-day time period governing a detainee's trial established by the IAD does not commence until a detainee's request for final disposition of the charges against him has actually been delivered to the appropriate court and to the prosecuting officer that lodged the detainer against him.

Defendant's right to be tried within the time limits of the statute can be waived.

Ward v. Commonwealth, 62 S.W.2d 399, 403-404 (Ky. App. 2001)

It has also been held that a defendant waives his rights to be tried within the IAD's time limits when he agrees to a trial date outside of those time limits.

There are specific time limits under the IAD.

Once a defendant is brought to Kentucky from another jurisdiction a trial must be held on the charges in Kentucky before the defendant is returned to the other jurisdiction or the charges in Kentucky will be dismissed. If a prisoner requests disposition of a detainer lodged against him, the case must be tried within 180 days. If Kentucky requests a prisoner on a detainer, the case must be tried within 120 days. These time periods may only be extended for good cause.

### **In Child Sexual Assault Cases:**

KRS 421.510 (Effective until November 3, 2020, if contingency met -- See LRC Note below) (Note: Section effective until 11-3-20. See also section 421.510 effective 11-3-20, if contingency is met.)



(1) Where the victim is less than sixteen (16) years old and the crime is a sexual offense including violations of KRS 510.040 to 510.150, 530.020, 530.064(1)(a), 530.070, 531.310, 531.320, and 531.370, a speedy trial may be scheduled as provided in subsection (2) of this section.

(2) The court, upon motion by the attorney for the Commonwealth for a speedy trial, shall set a hearing date on the motion within ten (10) days of the date of the motion. If the motion is granted, the trial shall be scheduled within ninety (90) days from the hearing date.

(3) In ruling on any motion or other request for a delay or continuance of the proceedings, the court shall consider and give weight to any adverse impact the delay or continuance may have on the well-being of a child victim or witness.

*Legislative Research Commission Note (6-13-19): 2018 Ky. Acts ch. 19, sec. 8, provides that the repeal and reenactment of this statute in that Act "shall take effect only upon the ratification, in the general election of November 6, 2018, of a Constitutional amendment providing for the protection of crime victims' rights. If such an amendment is not ratified, this Act shall be void." On June 13, 2019, the Kentucky Supreme Court ruled that the language of the proposed amendment was not properly submitted to the voters at that election and, therefore, its ratification was void under Section 256 of the Kentucky Constitution. Consequently, the repeal and reenactment of this statute in 2019 Ky. Acts ch. 19, sec. 3, was not given effect.*

KRS 421.510 sets out the procedure to be followed for the Commonwealth to request a speedy trial. The Commonwealth must make a motion for a speedy trial and the court must set a hearing within ten days as to the necessity of a speedy trial. If the court determines that a speedy trial is necessary, the trial must be set within ninety days. If a delay or continuance is requested, the court must consider whether the delay will have an impact on the child. In child sexual abuse cases, a victim is also entitled to a speedy trial when the victim is younger than sixteen and the defendant has been charged with a sexual offense. Please see KRS 421.510 for contingencies dependent upon ratification of Marsy's law.

## 5. Double Jeopardy – Charging Multiple Offenses

### **Federal Standard:**

#### *Blockburger v. United States*, 284 U.S. 299 (1932)

The United States Supreme Court has set forth the standard by which courts are to determine whether there is a double jeopardy violation; the “Blockburger” or “same elements” test reaffirmed in *United States v. Dixon*, 509 U.S. 688 (1993).

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

### **Kentucky Standard:**

#### *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996)

The Supreme Court of Kentucky has adopted the standard set forth by the United States Supreme Court. “Double Jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute ‘requires proof of an additional fact which the other does not.’” The standard adopted by Kentucky is the federal standard set forth in *Blockburger*.

In double jeopardy analysis, the court must determine whether the act or transaction complained of constitutes violation of two distinct statutes and, if it does, whether each statute requires proof of an act that other does not.

#### KRS 505.020(1)

"When a single course of conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense."

#### *King v. Commonwealth*, 554 S.W.3d 343 (Ky. 2018)

Duplicious instructions on separate counts for sexual abuse violated defendant's right to unanimous verdict; separate convictions for first-degree sexual abuse and sodomy did not violate prohibition against double jeopardy; trial court did not abuse its discretion in not allowing defense to contemporaneously impeach child victim with recorded interview at child advocacy center; defendant attacked victim's credibility, thus permitting state to present rebuttal evidence in form of video recording of prior consistent second interview; admission of recording of second interview did not violate defendant's constitutional right of confrontation; trial court abused its discretion in admission of audio recording of telephone call between defendant and his wife in which wife described what child victim told her about sexual abuse, under adoptive admissions exception to rule against hearsay; and error in admission of audio recording of telephone call was harmless.

In order to determine whether a double jeopardy violation has occurred, the same-elements test under Blockburger is employed, in which the court considers whether the act or transaction complained of constitutes a violation of two distinct statutes, and, if it does, whether each statute requires proof of a fact the other does not; put differently, the court considers whether one offense is included within the other.

*Allen v. Commonwealth*, 997 S.W.2d 483 (Ky. 1998)

Case involving the promoting prostitution and use of minor in sexual performance. It does not violate double jeopardy for defendant to be convicted of promoting prostitution in the first degree and use of a minor in a sexual performance.

*Miller v. Commonwealth*, 925 S.W.2d 449 (Ky. 1995) (reversed on other grounds)

Case involving kidnapping and sexual abuse. Defendant's conviction of kidnapping and sexual abuse does not violate the double jeopardy clause because the proof required to convict of kidnapping is different from the proof required to convict of sexual abuse as required under *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996).

*Wager v. Commonwealth*, 751 S.W.2d 28 (Ky. 1988)

Case involving second degree assault and first degree rape. Defendant was not subjected to double jeopardy by virtue of his conviction of both second-degree assault and first-degree rape based on same evidence as the physical injury element of second-degree assault was not an element of first-degree rape. Also, the sexual intercourse requirement of first-degree rape was not an element of second-degree assault.

*Hampton v. Commonwealth*, 666 S.W.2d 737 (Ky. 1984)

Case involving simultaneous sodomy. The defendant simultaneously performed oral sex on the victim while forcing the victim to perform oral sex on the defendant. Merely because each act occurred simultaneously does not render it double jeopardy as they were separate offenses.

*Norris v. Commonwealth*, 668 S.W. 2d 557 (Ky. App. 1984)

Case involving sodomy and aiding and abetting rape. It is not double jeopardy to convict of sodomy and aiding and abetting rape in the first degree when the acts by the defendant and the co-defendant occurred simultaneously.

*Van Dyke v. Commonwealth*, 581 S.W.2d 563, 564 (Ky. 1979)

"The evidence clearly discloses that Van Dyke committed three distinct offenses--rape, sodomy and a second rape. . . . The legislature intended to punish

each separate act of rape or sodomy. The fact that the acts occurred in a brief period of time with the same victim and in a continuum of force does not protect Van Dyke from separate prosecution and conviction of each separate offense."

Turner v. Commonwealth, 767 S.W.2d 557 (Ky. 1988)

Even though there are different elements for each, it is double jeopardy to convict defendant of sexual abuse and rape when the physical contact was incidental to the accomplishment of the rape.

Shouse v. Commonwealth, 481 S.W.3d 480 (Ky. 2015)

The statutory double jeopardy bar did not preclude convictions of both second-degree criminal abuse and second-degree aggravated-wantonness manslaughter based on defendant's course of conduct of leaving her two-year-old child inside her car overnight where he died, where the abuse conviction was not based on causing a serious physical injury.

## **6. Charging Complicity**

### KRS 502.020 Liability for conduct of another; complicity

(1) A person is guilty of an offense committed by another person when with the intention of promoting or facilitating the commission of the offense, he:

- (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
- (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

- (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
- (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
- (c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Peacher v. Commonwealth, 391 S.W.3d 821 (Ky. 2013)

Jury finding of serious bodily injury as a result of both first-degree assault and first-degree criminal abuse did not render infirm convictions for those offenses as having been premised on the same act; the jury found defendant guilty of wanton assault either as a principal or in complicity with another, while first-degree

criminal abuse, by definition and as provided in the instructions, required a finding that defendant herself intentionally abused victim, and there were serious injuries inflicted upon victim that could be deemed wantonly inflicted and others that were intentionally inflicted by defendant.

#### KRS 620.010 Legislative Purpose

In addition to the purposes set forth in KRS 600.010, this chapter shall be interpreted to effectuate the following express legislative purpose regarding the treatment of dependent, neglected, and abused children. Children have certain fundamental rights which must be protected and preserved, including but not limited to, the rights to adequate food, clothing and shelter; the right to be free from physical, sexual or emotional injury or exploitation; the right to develop physically, mentally, and emotionally to their potential; and the right to educational instruction and the right to a secure, stable family. It is further recognized that upon some occasions, in order to protect and preserve the rights and needs of children, it is necessary to remove a child from his or her parents.

#### **Parental Duty to Protect:**

##### *Tharp v. Commonwealth*, 40 S.W.3d 356 (Ky. 2000)

Defendant's ten-month old daughter died from a ruptured spleen. The child also suffered from fractures in her leg. The defendant and her husband were charged with wanton murder and criminal abuse first degree. Defendant, prior to trial, gave statements that she saw her husband beat the victim previously and on the day the victim died she saw her husband hit the victim and told him to stop, but then left the room. Defendant was convicted of wanton murder by complicity and criminal abuse in the second degree. The Supreme Court of Kentucky held that: (1) at time of offense, defendant had fair warning that failure to protect her child from her husband violated her legal duty to do so, and thus, application of judicial construction of accomplice liability statute did not violate ex post facto prohibition; (2) it was immaterial to defendant's liability whether husband was convicted of criminal homicide, and if so, the degree of homicide of which he was convicted; and (3) finding as to whether defendant was physically able to prevent her husband from killing her child was not required.

#### **Charging a parent with complicity for failing to protect a child:**

##### *Lane v. Commonwealth*, 956 S.W.2d 874, 876 (Ky. 1997)

The victim was the defendant's two year-old daughter. She was assaulted and suffered bruises, abrasions and contusions as well as a skull fracture. The defendant's boyfriend was charged with assault in the first degree. The defendant was charged with complicity to commit assault in the first degree. KRS 620.010 requires that a parent prevent any type of assault on their child. It is an

affirmative duty. “The legislature has clearly expressed their intent to punish those who through passive conduct allow physical injury to children.”

(Upon review of this case the Court overruled *Knox v. Commonwealth*, 735 S.W.2d 711 (Ky. 1987). *Knox* relied on the now repealed KRS 199.335 that is not the current law.)

### **No ex post facto law violation:**

#### *Tharp v. Commonwealth*, 40 S.W. 3d 356 (Ky. 2000)

Defendant’s ten-month old daughter died from a ruptured spleen. The child also suffered from fractures in her leg. The defendant and her husband were charged with wanton murder and criminal abuse first degree. Defendant, prior to trial, gave statements that she saw her husband beat the victim previously and on the day the victim died she saw her husband hit the victim and told him to stop, but then left the room. Defendant was convicted of wanton murder by complicity and criminal abuse in the second degree. This was a proper finding by the jury even though *Lane* was decided five months after the death of the defendant’s daughter. It did not violate the ex post facto clause because the defendant had fair warning that failure to protect her child from her husband violated her legal duty.

### **Case Law:**

#### *Gilbert v. Commonwealth*, 838 S.W.2d 376 (Ky. 1991)

Defendant was guilty of complicity to commit rape because she actively participated by forcing her daughter to get into bed with their stepfather. It was not in error to convict on complicity to use a minor in a sexual performance when mother participated in forcing her children to take off their clothes in front of stepfather.

#### *Waters v. Kassulke*, 916 F.2d 329 (6th Cir. 1990)

Defendant was charged and convicted of complicity in the rapes of her three daughters. She challenged her conviction stating there was insufficient evidence to convict her of complicity. The Court held that her intent to aid, counsel or attempt to aid her boyfriend could be inferred from the testimony and therefore it was proper to convict of complicity to commit rape.

#### *Dean v. Commonwealth*, 844 S.W.2d 417 (Ky. 1992)

The Defendant orally sodomized the victim while his codefendant raped her. Then the defendant anally sodomized her while the codefendant orally sodomized the victim. The defendant was convicted of rape, sodomy, complicity to rape, and complicity to sodomy. The defendant intended to rape and sodomize the victim himself, and independently, intended to aid his codefendant in doing the same.

Norris v. Commonwealth, 668 S.W. 2d 557 (Ky. App. 1984)

Not improper to convict defendant of sodomy and aiding and abetting rape when defendant sat on victim's chest and sodomized her while codefendant had sexual intercourse with her.

KRS 502.010 Liability for conduct of an innocent

Under KRS 502.010 (1)(b) a person is guilty of an offense committed by an innocent or irresponsible person when he causes that innocent or irresponsible person to engage in conduct constituting the offense.

The statute would apply under circumstances where an adult caused two children to engage in sexual activity with one another.

## **7. Method of Charging - Direct Indictments**

Where possible, child sexual abuse cases should be submitted directly to the grand jury. This practice avoids defense counsel's use of the preliminary hearing for non-legitimate purposes and aids in compliance with KRS 431.600(6)'s requirement that the prosecutor minimize the involvement of the child in court proceedings.

Specifically, KRS 431.600(6) states that the Commonwealth should avoid the victim testifying at a preliminary hearing and grand jury proceedings. However, when cases are not directly presented to the grand jury, the detective can testify at the preliminary hearing about the victim's statements so that the victim does not have to testify. Hearsay is permitted at hearings such as a preliminary hearing. KRE 1101(d)(2).

*See also Preliminary Hearing.*

### **C. PRELIMINARY HEARING**

#### **1. Purpose of Preliminary Hearing**

The procedure for a preliminary hearing is set forth in RCr 3.10 and 3.14. A preliminary hearing is held in the district courts of Kentucky for the purpose of determining probable cause after a person has been charged with a felony. The only other purpose of a preliminary hearing is to determine whether an appropriate bond is set for the defendant.

Commonwealth v. Wortman, 929 S.W.2d 199 (Ky. App. 1996)

Defendant was charged with stalking. At the preliminary hearing, probable cause was established by the Commonwealth through the testimony of a police officer. The defendant then called the victim as a witness. The court refused to allow the defendant to call the victim on the grounds that he could not "articulate

any reason, or indicate to the court the nature of the testimony, or its relevance to the determination of probable cause.” The evidence at the preliminary hearing must be limited to whether there is probable cause, and if there is probable cause, what are the conditions under which the defendant can be released pending indictment.

The Defendant may not use a preliminary hearing for the purpose of discovery. *See Commonwealth v. Watkins*, 398 S.W.2d 698 (Ky. 1966).

## **2. Format of Hearing**

The defendant has the right to cross-examine witnesses and introduce testimony pursuant to RCr 3.14(2). But, the defendant must explain the relevancy of the testimony it wants to introduce.

*Commonwealth v. Wortman*, 929 S.W.2d 199 (Ky. App. 1996); *see also Coleman v. Alabama*, 399 U.S. 1 (1970); *Barber v. Page*, 390 U.S. 719 (1968).

*Commonwealth v. Arnette*, 701 S.W.2d 407 (Ky. 1985)

A preliminary hearing may be held on joined felonies and misdemeanors.

## **D. GRAND JURY**

### **1. No Right to Preliminary Hearing After Indictment**

A defendant is not entitled to a preliminary hearing when an indictment results from direct submission. *Edwards v. Commonwealth*, 500 S.W.2d 396 (Ky. 1973). Directly submitting a case to the grand jury eliminates the need for a preliminary hearing.

### **2. Victim’s Testimony at the Grand Jury**

The Commonwealth pursuant to KRS 431.600(6) should also avoid having the victim testify at the grand jury. As hearsay is permitted in the proceedings of the grand jury, it is generally not necessary for the victim to testify. KRE 1101(d)(2).

If it is necessary for the minor victim to testify at the grand jury, RCr 5.18 permits a parent, guardian, or custodian of the victim to be present in the grand jury room. However, a parent is not required to be present during the grand jury proceedings.

### **3. Defendant’s Testimony at the Grand Jury**



The defendant may notify the Commonwealth in writing of his wish to testify before the grand jury. RCr 5.08. However, the defendant has no constitutional right to testify. See *Stopher v. Commonwealth*, 57 S.W. 3d 787 (Ky. 2001).

#### **4. Grand Jury Subpoena Duces Tecum**

The grand jury may also subpoena medical records, cabinet records, and school records. Psychiatric records may not be subpoenaed by the grand jury. The Court must order those records to be produced and reviewed in camera. See *Stidham v. Clark*, 74 S.W.3d 719 (Ky. 2002).

### **E. INDICTMENT**

#### **1. Test of Sufficiency**

##### **RCr 6.10(2):**

The indictment or information shall contain, and shall be sufficient if it contains, a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged. It need not contain any other matter not necessary to such statement, nor need it negative any exception, excuse or proviso contained in any statute creating or defining the offense charged.

##### **Howard v. Commonwealth, 554 S.W.2d 375 (Ky. 1977)**

As long as an indictment states the nature of the crime, the facts of the crime do not have to be included in detail.

##### **Wylie v. Commonwealth, 556 S.W.2d 1 (Ky. 1977)**

The indictment only needs to inform the defendant of the offense and cannot mislead him.

##### **Miller v. Commonwealth, 77 S.W.3d 566 (Ky. 2002)**

The lack of specificity of dates in this case was in error. The only testimony was that the crime happened “almost every other weekend,” “about ten weeks per year” or “every other time.” The grand jury indicted the defendant on 225 counts based on mathematical computation, not specific dates given by the victim. This is not enough evidence to support the separate convictions as set forth in the indictment.

#### **Dates of occurrence:**

##### **Garrett v. Commonwealth, 48 S.W.3d 6 (Ky. 2001)**

Child testified as to her age when each incident of abuse occurred. The Court held that was not improper as it provides enough evidence to identify the various

offenses that were charged in the indictment. The indictment set forth generally the years each act occurred.

*Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)

Defendant was charged with sodomizing and sexually abusing a ten year-old girl that attended a day care operated by defendant's daughter. However, the victim was unable to be specific about dates. The Court held the child was less than twelve years old and that was the only relevant date at issue. The lack of specificity on dates did not require reversal of the convictions.

*Farler v. Commonwealth*, 880 S.W.2d 882, 886 (Ky. App. 1994)

The defendant was charged with sexual abuse of his cousin. The victim testified that he began abusing her when she was five and continued until she was thirteen or fourteen. (The defendant was eighteen when he began abusing the victim.) The defendant asked for a directed verdict because the Commonwealth did not prove specific dates. The Court held that there was enough proof that two sexual abuse acts occurred between the ages of eight and twelve: "In our view, it was not necessary that P.F. give specific dates that the offenses occurred. It would be wholly unreasonable to expect a child of such tender years to remember specific dates, especially given the long time period over which the abuse occurred."

*Hampton v. Commonwealth*, 666 S.W.2d 737 (Ky. 1984)

Evidence of the dates on which the crimes were committed was ambiguous and confusing. If more specificity was required, the defendant should have pursued his bill of particulars and asked the Court to require the Commonwealth to respond.

**Pre-penal Code:**

*Browning v. Commonwealth*, 351 S.W.2d 499 (Ky. 1961)

As long as the offense date was found to be prior to indictment the ambiguity in date did not require dismissal because the date was not material to offense of incest. This was based on the offense of incest, as detailed in now-repealed KRS 436.060.

*Salyers v. Commonwealth*, 255 S.W.2d 605 (Ky. 1953)

It is not a material requirement of incest that the date be specific. All that is required is that it occurred before the defendant was indicted.

**2. Amendment**

RCr 6.16 permits the amendment of an indictment or an information if the amendment is not an additional charge or different offense. This amendment may be done any time before a verdict is rendered. However, the amendment cannot

prejudice the defendant's substantial rights. The amendment of the indictment may entitle the defendant to a continuance when the indictment is amended.

*Bennington v. Commonwealth*, 348 S.W.3d 613 (Ky. 2011)

Trial court did not abuse its discretion in granting defendant's request for a bill of particulars with respect to two of the five charged counts of sodomy, but denying request as to rest of the charged counts, in prosecution for rape, sodomy, and incest. The two counts of sodomy for which request was granted were based on isolated events occurring several years apart, while the remaining allegations represented a continuous course of conduct of rape, sodomy, and incest. The Commonwealth did not intend to focus on specific occurrences, victim did not describe occurrences in any further detail at trial, but simply explained that those crimes continuously occurred in each year. Having received statement setting forth all details that the victim could recall, defendant was on satisfactory notice. RCr 6.16

**Denial of Offense:**

*Anderson v. Commonwealth*, 63 S.W.3d 135 (Ky. 2001)

The Commonwealth moved to amend the dates in the two indictments. On one indictment, the Commonwealth changed the year from 1994 to 1992. The other indictment was amended from a specific date in April 1997 to the entire month of April 1997. The Court held this is permissible and did not prejudice the defendant because the defense was that it never happened.

**Notice Given in Bill of Particulars:**

*Yarnell v. Commonwealth*, 833 S.W.2d 834 (Ky. 1992)

The Commonwealth was permitted to amend the indictment from sodomy to rape. The Court held that because the defendant was given notice in the bill of particulars that the charge was rape and not sodomy, and because the defense was complete denial, there was no prejudice by amending count to rape from sodomy.

**Before Verdict:**

*Gilbert v. Commonwealth*, 838 S.W.2d 376 (Ky. 1991)

Amendment of an indictment is permissible any time prior to a verdict in a trial. The defendant knew that he did not have access to the children prior to 1986, therefore amendment of indictment from 1985 to 1986 did not mislead or surprise the defendant.

*Schambon v. Commonwealth*, 821 S.W.2d 804 (Ky. 1991)

The Commonwealth was permitted to amend the indictment at the close of their case-in-chief to change the applicable subsection of the statute. The defendant

was not prejudiced by the amendment because the offense was the same and no additional evidence was needed.

### **Change the Offense Date:**

#### *Herp v. Commonwealth*, 491 S.W.3d 507 (Ky. 2016)

Trial court did not abuse its discretion in prosecution for first-degree sodomy and first-degree sexual abuse arising out of the alleged sexual molestation of defendant's nephew over 20 years earlier by allowing Commonwealth to amend the indictment to add an additional year to the time period during which the offenses allegedly occurred; defendant was not prejudiced by the amendment, as he did not raise any date-specific defense to the charges, but rather denied any inappropriate behavior, and the amendment did not change the nature of the alleged offenses and imposed no additional criminality.

#### *McPherson v. Commonwealth*, 171 S.W.3d 1 (Ky. 2005)

Defendant was not prejudiced by amendment of indictment for sexual abuse that was made after trial but before verdict; amendment consisted solely of pinpointing exact dates of abusive incidents, which fell within range of dates initially stated in indictment and were obtained from victim's testimony at trial, and, although defendant argued that amendment had effect of bolstering victim's testimony, nothing indicated that jury was aware of amendment.

#### *Stephens v. Commonwealth*, 397 S.W.2d 157 (Ky. 1965)

Changing the date of the offense in the indictment did not substantially change the indictment and therefore was not prejudicial.

### **3. Variance between indictment and proof**

#### *Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993)

When examining whether the variance between the indictment and the proof was fatal, the standard is whether the defendant had fair notice and a fair trial. There is no longer a strict requirement that the proof must conform to the indictment. It was harmless error that the indictment was amended because the defendant was provided with discovery and written bill of particulars, which stated that the theory the Commonwealth was proceeding under was that the victim was physically helpless, not that the defendant use forcible compulsion.

#### *Blankenship v. Commonwealth*, 28 S.W.2d 774, 777 (Ky. 1930)

The name of the victim was Edna Mae Peck, while the indictment simply stated her name was Edna Peck. "The slight variance in her name was not material....The evidence left no doubt as to the party involved."

## F. VICTIM NOTIFICATION

### 1. KRS 421.500 Requirements

KRS 421.500 (current form good until 11/3/2020 if conditions met)

Under KRS 421.500(5), the attorney's for the Commonwealth have a duty to provide prompt notification to victims and witnesses of any scheduling changes that affect their appearances. If the victim is a minor, the Commonwealth must notify the parent, guardian, custodian, or court-appointed advocate.

The attorneys for the Commonwealth must also notify as to:

- Defendant's release on bond and special conditions of release
- The charges against the defendant
- Defendant pleading to charges
- Date of trial
- Changes in custody of defendant and changes in trial
- Verdict
- Victim's right to make impact statement for consideration by the court
- Date of sentencing
- Victim's right to receive notice of any parole board hearing
- Office of Attorney General will notify victim if appeal of conviction pursued by the defendant
- Scheduled hearing for shock probation
- Bail pending appeal

The victim shall be consulted by the attorney for the Commonwealth on the disposition of the case including dismissal, release of the defendant pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pre-trial diversion program.

#### KRS 421.500 (If contingency is met effective November 3, 2020)

(1) (a) As used in KRS 421.500 to 421.575, "victim" means an individual directly and proximately harmed as a result of:

1. The commission of a crime classified as a felony; a misdemeanor involving threatened or actual physical injury, harassment, or restraint; a misdemeanor involving a child or incompetent person; or a misdemeanor involving a sexual offense or a trespass; or

2. Conduct which, if committed by an adult, would be classified as a felony or a misdemeanor described in subparagraph 1. of this paragraph.

If the victim is a minor, incapacitated, or deceased, "victim" also means one (1) or more of the victim's spouse, parents, siblings, children, or other lawful

representatives which shall be designated by the court unless the person is the defendant or a person the court finds would not act in the best interests of the victim.

(b) In a case in which the number of victims makes it impracticable to accord all victims those rights provided by KRS 421.500 to 421.575, the court may fashion a reasonable procedure that does not unduly complicate or prolong the proceeding, to give effect to this section.

(c) If the victim is deceased and the relation is not the defendant, the following relations shall be designated as “victims” for the purpose of presenting victim impact testimony under KRS 532.055(2)(a)7.:

1. A spouse;
2. An adult child;
3. A parent;
4. A sibling; and
5. A grandparent.

(2) If any court believes that the health, safety, or welfare of a victim who is a minor or is legally incapacitated would not otherwise adequately be protected, the court may appoint a special advocate to represent the interest of the victim and to exercise those rights provided for by KRS 421.500 to 421.575. Communication between the victim and the special advocate shall be privileged.

(3) Law enforcement personnel shall ensure that victims receive information on available protective, emergency, social, and medical services upon initial contact with the victim and are given information on the following as soon as possible:

- (a) Availability of crime victim compensation where applicable;
- (b) Community-based treatment programs;
- (c) The criminal justice process as it involves the participation of the victim or witness;
- (d) The arrest of the accused; and
- (e) How to register to be notified when a person has been released from prison, jail, a juvenile detention facility, or a psychiatric facility or forensic psychiatric facility if the case involves a violent crime as defined in KRS 439.3401 and the person charged with or convicted of the offense has been involuntarily hospitalized pursuant to KRS Chapter 202A.

(4) Law enforcement officers and attorneys for the Commonwealth shall provide information to victims and witnesses on how they may be protected from intimidation, harassment, and retaliation as defined in KRS 524.040 or 524.055.

(5) Attorneys for the Commonwealth shall make a reasonable effort to insure that:

(a) All victims and witnesses who are required to attend criminal justice proceedings are notified promptly of any scheduling changes that affect their appearances;

(b) If victims so desire and if they provide the attorney for the Commonwealth with a current address and telephone number, they shall receive prompt notification, if possible, of judicial proceedings relating to their case, including but not limited to the defendant's release on bond and any special conditions of release; of the charges against the defendant, the defendant's pleading to the charges, and the date set for the trial; of notification of changes in the custody of the defendant and changes in trial dates; of the verdict, the victim's right to make an impact statement for consideration by the court at the time of sentencing of the defendant, the date of sentencing, the victim's right to receive notice of any parole board hearing held for the defendant, and that the office of Attorney General will notify the victim if an appeal of the conviction is pursued by the defendant; and of a scheduled hearing for shock probation or for bail pending appeal and any orders resulting from that hearing;

(c) The victim knows how to register to be notified when a person has been released from a prison, jail, a juvenile detention facility, or a psychiatric facility or forensic psychiatric facility if the case involves a violent crime as defined in KRS 439.3401 and the person charged with or convicted of the offense has been involuntarily hospitalized pursuant to KRS Chapter 202A;

(d) The victim receives information on available:

1. Protective, emergency, social, and medical services;
2. Crime victim compensation, where applicable;
3. Restitution, where applicable;
4. Assistance from a victim advocate; and
5. Community-based treatment programs; and

(e) The victim of crime may, pursuant to KRS 15.247, receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts.

(6) The victim shall be consulted by the attorney for the Commonwealth on the disposition of the case, including dismissal, release of the defendant pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program.

(7) In prosecution for offenses listed in this section for the purpose of defining "victim," law enforcement agencies and attorneys for the Commonwealth shall promptly return a victim's property held for evidentiary purposes unless there is a compelling reason for retaining it. Photographs of such property shall be received by the court as competent evidence in accordance with the provisions of KRS 422.350.

(8) A victim or witness who so requests shall be assisted by law enforcement agencies and attorneys for the Commonwealth in informing employers that the need

for victim or witness cooperation in the prosecution of the case may necessitate absence of that victim or witness from work.

(9) The Attorney General, where possible, shall provide technical assistance to law enforcement agencies and attorneys for the Commonwealth if such assistance is requested for establishing a victim assistance program.

(10) If a defendant seeks appellate review of a conviction and the Commonwealth is represented by the Attorney General, the Attorney General shall make a reasonable effort to notify victims promptly of the appeal, the status of the case, and the decision of the appellate court

(11) Full restitution to a named victim, if there is a named victim, shall be ordered by the court to be paid by the convicted or adjudicated party in a manner consistent, insofar as possible, with this section and KRS 439.563, 532.032, 532.033, 533.020, and 533.030 in addition to any other penalty.

(12) Nothing in KRS 421.500 to 421.575 shall be construed as altering the presumption of innocence in the criminal justice system, or to be a waiver of sovereign immunity or any other immunity or privilege maintained by the Commonwealth; its cabinets, departments, bureaus, political subdivisions, and agencies; and its officers, agents, and employees.

## **2. KRS 431.600 Requirements**

KRS 431.600 requires that the Commonwealth's and County Attorney take an active role in interviewing and preparing a child victim or witness for the proceedings in a case. This should be done as soon as possible. KRS 431.600 also states that if it is practicable, one prosecutor should handle a child abuse case from beginning to end. The prosecution should also limit the number of court appearances for the victim and make referrals for counseling, legal services, or other necessary services.

### **G. PRIVILEGE ISSUES**

#### **KRS 620.050(3)**

Neither the husband-wife nor any professional-client/patient privilege, except the attorney-client and clergy-penitent privilege, shall be a ground for refusing to report under this section or for excluding evidence regarding a dependent, neglected or abused child or the cause thereof, in any judicial proceedings resulting from a report pursuant this section. This subsection shall also apply in any criminal proceeding in District or Circuit Court regarding a dependent, neglected or abused child.



## 1. Husband-Wife Privilege

### KRE 504 (c) Husband-wife privilege

Exceptions. There is no privilege under this rule:

(1) In any criminal proceeding in which sufficient evidence is introduced to support a finding that the spouses conspired or acted jointly in the commission of the crime charged;

(2) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:

(A) The other;

(B) A minor child of either;

(C) An individual residing in the household of either; or

(D) A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals previously named in this sentence. The court may refuse to allow the privilege in any other proceeding if the interest of a minor child of either spouse may be adversely affected; or

(3) In any proceeding in which the spouses are adverse parties.

### **Third party:**

#### *Bills v. Commonwealth*, 851 S.W.2d 466 (Ky. 1993)

The Commonwealth introduced evidence that the defendant shouted to his wife, in the presence of the police, not to talk to the police. Defendant argues that what he said to his wife was privileged and should not be introduced into evidence. The wife was not a witness in the trial and therefore the spousal privilege is not applicable. However, it was permissible to allow the evidence to be introduced because the statement was made in front of a third party.

### **Child sexual abuse cases:**

#### *Mullins v. Commonwealth*, 956 S.W.2d 210, 212 (Ky. 1997)

Defendant's wife caught him in the act of sodomy with a fourteen year-old babysitter. The wife called the police immediately and told the police what happened. However, at the time of the trial, the defendant and his wife claimed marital privilege. KRS 620.050 disallows the claim of marital privilege when any child is abused. "The marital privilege is subordinate or inferior to the right of a child to be free from sexual abuses."

**Pre-KRE:**

*Commonwealth v. Boarman*, 610 S.W.2d 922 (Ky. App. 1980)

There is no husband/wife privilege not to testify against their spouse in a criminal action involving the abuse of a child.

**2. Psychotherapist-Patient Privilege**

KRE 507(c) Psychotherapist – Patient Privilege

Exceptions. There is no privilege under this rule for any relevant communications under this rule:

(1) In proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

(2) If a judge finds that a patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of an examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental condition; or

(3) If the patient is asserting that patient's mental condition as an element of a claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

*Stidham v. Clark*, 74 S.W.3d 719 (Ky. 2002)

Communications made by defendant to his psychiatrist for purpose of medical treatment were not protected at all by psychotherapist-patient privilege.

*Commonwealth v. Shaw*, 600 S.W.3d 233 (Ky. 2020)

Defendant, who was charged with incest, first-degree rape, and other sex crimes, filed motion for in camera review of alleged victim's therapy records.

The Supreme Court held that trial court did not compel alleged victim to waive therapist-patient records when it granted defendant's request for in camera review of alleged victim's records of therapy during specific time frame.

*Dunn v. Commonwealth*, 360 S.W.3d 751 (Ky 2012).

Portion of victim's psychotherapy records indicating that victim's father had been physically abusive to victim at some point was not exculpatory evidence and thus was not required to be disclosed to defendant, contrary to general privilege against disclosure of communications with psychotherapist, in prosecution for sodomy of child victim; defendant's theory that father's abuse of victim resulted in

victim's motive to falsely accuse defendant of sexual abuse was too speculative and attenuated for evidence to be considered exculpatory.

**Reporting requirements apply:**

Carrier v. Commonwealth, 142 S.W.3d 670 (Ky. 2004)

Defendant was convicted on conditional guilty plea of fifteen counts of sexual offenses against minors. Defendant appealed. The Supreme Court held that nothing in statute abrogating psychologist-client privilege in cases involving dependent, neglected, or abused children prohibited mandatory report of abuse when children subsequently reached adulthood.

**3. Counselor-Client Privilege**

KRE 506(d) Counselor – Client Privilege

Exceptions. There is no privilege under this rule for any relevant communication:

(1) If the client is asserting his physical, mental, or emotional condition as an element of a claim or defense; or, after the client's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

(2) If the judge finds:

(A) That the substance of the communication is relevant to an essential issue in the case;

(B) That there are no available alternate means to obtain the substantial equivalent of the communication; and

(C) That the need for the information outweighs the interest protected by the privilege. The court may receive evidence in camera to make findings under this rule.

**4. Other Privileges**

The lawyer-client privilege (KRE 503) and the religious privilege (KRE 505) cannot be breached. The reporting requirements of KRS 620.030 do not allow for these privileges to be set aside.

KRS 620.030 requires a doctor or other medical professional to report suspected child abuse, dependency or neglect. Such person may not claim a privilege from reporting.

## H. BOND ISSUES

### 1. KRS 431.525 and RCr 4.16

The amount of bail shall be sufficient to ensure compliance with the conditions of release set by the court. It shall not be oppressive and shall be commensurate with the gravity of the offense charged. In determining such amount the court shall consider the defendant's past criminal acts, if any, the Defendant's reasonably anticipated conduct if released, and the defendant's financial ability to give bail.

### 2. KRS 431.520

Provides that when a person is released on bond, the trial court can place conditions on where the defendant travels, who the defendant associates with, and where the defendant lives. The prosecution should request that the trial court place restrictions on a defendant released on bond, specifically that the defendant should have no contact with the victim.

## I. DISCOVERY

### 1. Bill of Particulars

#### RCr 6.22

The Court for cause shall direct the filing of a bill of particulars. A motion for such bill may be made at any time prior to arraignment, or thereafter in the discretion of the court. A bill of particulars may be amended at any time subject to such conditions as justice requires.

#### *Violett v. Commonwealth*, 907 S.W.2d 773 (Ky. 1995)

The Commonwealth provided a bill of particulars to the Defendant that the Defendant complained were insufficient. However, the Commonwealth provided the Defendant with all details of the crime and made available discovery, which complies with the standard for a bill of particulars. The defendant did not complain of any undue surprise; therefore the bill of particulars was not insufficient.

#### *Schambon v. Commonwealth*, 821 S.W.2d 804, 809 (Ky. 1991)

The fact that the bill of particulars had some errors did not violate due process because it set forth that the crimes resulted from deviate sexual intercourse and the defense was complete denial of the offenses. "Appellants could not have been misled or prejudiced in their defenses."

#### *Hampton v. Commonwealth*, 666 S.W.2d 737 (Ky. 1984)

The defendant filed a bill of particulars but the Commonwealth never responded. However, the defendant failed to object to the lack of response prior to trial. Therefore, the issue cannot be raised on appeal.

Howard v. Commonwealth, 554 S.W.2d 375 (Ky. 1977)

The defendant failed to object to the Commonwealth's response to bill of particulars and began the trial. The error was not preserved for review and therefore the issue cannot be raised on appeal.

Lane v. Commonwealth, 956 S.W.2d 874 (Ky. 1997)

The indictment gave the defendant enough notice of the crime she was charged with. If more specificity was required, the defendant should have filed a bill of particulars.

**2. RCr 7.24 and RCr 7.26 Governs Discovery in a Criminal Case.**

RCr 7.24 Discovery and Inspection

(1) Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

(2) On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. This provision authorizes pretrial discovery and inspection of official police reports, but not memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witness (other than the defendant).

RCr 7.26 Demands for Production of Statement and Reports

(1) Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any

witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

(2) If the Commonwealth claims that a statement to be produced under this Rule 7.26 does not relate to the subject matter of the witness's testimony, the court shall examine the statement privately and, before making it available for examination and use by the defendant, excise the portions that do not so relate. The entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

### **Medical Literature:**

#### *Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997)*

The defendant was not entitled to discovery of the medical literature that the Commonwealth's expert used to express an opinion that it was possible for a rape victim to retain hymen even though the victim had been sexually penetrated. The expert's testimony was evident from her report as a whole. The expert used by the defendant was obviously aware of the Commonwealth's doctor's report. Therefore, it is not prejudicial to the defendant to deny discovery of the medical literature.

### **3. Discovery of Videotaped Interview of Victims**

KRS 620.050 was amended in the 2002 General Assembly regarding the discovery of videotaped interview of victims. It was amended again in 2019 with no change to the portions below.

(10)(a) An interview of child recorded at a children's advocacy center shall not be duplicated, except that the Commonwealth's or county attorney prosecuting the case may:

1. Make and retain one (1) copy of the interview; and 2. Make one (1) copy for the defendant's counsel that the defendant's counsel shall not duplicate.

(b) The defendant's counsel shall file the copy with the court clerk at the close of the case.

(c) Unless objected to by the victim or victims, the court, on its own motion, or on motion of the attorney for the Commonwealth shall order all recorded interviews that are introduced into evidence or are in possession of the children's advocacy center, law enforcement, the prosecution, or the court to be sealed.

(d) The provisions of this subsection shall not be construed as to contravene the Rules of Criminal Procedure relating to discovery.

#### 4. Medical Records

*Louisville & N.R. Co. v. Crockett's Adm'x*, 24 S.W.2d 580, 583 (Ky. 1930)

"In most jurisdictions, communications between physician and patient arising from the professional relation are deemed of such confidential nature that the ends of justice do not demand exposure, and statutes have been enacted excluding them as evidence upon objection. At common law there was no such privilege . . . and that has not been changed by statute in this state."

#### **Medical Records Held by Health Department and CFC:**

KRS 214.420 Records declared confidential - application.

(1) The general assembly hereby declares that confidentiality is essential for the proper administration and operation of sexually transmitted disease control activities in this state and that the principle of confidentiality must remain inviolate.

(2) All information, records and reports in the possession of local health departments or the Cabinet for Health Services and which concern persons infected with or suspected of being infected with or tested for or identified in an epidemiologic investigation for sexually transmitted disease are hereby declared to be strictly confidential and only personnel of local health departments and the Cabinet for Health Services who are assigned to sexually transmitted disease control activities shall have access to such information, records and reports.

#### KRS 61.878 Exception

KRS 61.878 permits inspection of certain records "upon order of a court of competent jurisdiction." These records include, but aren't limited to:

(1)(a) Public record containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."

#### KRS 422.300: Use of Photo Static Copies

Medical charts or records of any hospital licensed under KRS 216B.105 that are susceptible to photo static reproduction may be proved as to foundation, identity and authenticity without any preliminary testimony, by use of legible and durable copies, certified in the manner provided herein by the employee of the hospital charged with the responsibility of being custodian of the originals thereof. Said copies may be used in any trial, hearing, deposition or any other judicial or administrative action or proceeding, whether civil or criminal, in lieu of the original charts or records which, however, the hospital shall hold available during the pendency of the action or proceeding for inspection and comparison by the court, tribunal or hearing officer, and by the parties and their attorneys of record.

Matthews v. Commonwealth, 163 S.W.3d 11 (Ky. 2005), as modified

Establishment of authenticity of a document does not necessarily mean that the document is admissible, as there may be other barriers, e.g., hearsay, to its admission.

### **Authentication:**

Bell v. Commonwealth, 875 S.W.2d 882 (Ky. 1994)

Medical records of a victim's examination by a physician, even though certified records, are not admissible into evidence at trial. The doctor must authenticate the records before they may be admissible. These records are not admissible as certified records because they are medical records from the doctor's office, not from a hospital. Issues of hearsay arise with these records. (See case under hearsay.)

## **5. Mental Health Records**

### **KRE 507 Psychotherapist-Patient Privilege**

(a) Definitions. As used in this rule:

(1) A "patient" is a person who, for the purpose of securing diagnosis or treatment of his or her mental condition, consults a psychotherapist.

(2) A "psychotherapist" is:

(A) A person licensed by the state of Kentucky, or by the laws of another state, to practice medicine, or reasonably believed by the patient to be licensed to practice medicine, while engaged in the diagnosis or treatment of mental conditions;

(C) A person licensed or certified by the state of Kentucky, or by the laws of another state, as a psychologist, or a person reasonably believed by the patient to be a licensed or certified psychologist; or

(D) A licensed clinical social worker, licensed by the Kentucky Board of Social Work ; or

(E) A person licensed as a registered nurse or advanced registered nurse practitioner by the board of nursing and who practices psychiatric or mental health nursing.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are present during the communication at the direction of the psychotherapist, including members of the patient's family.



(4) "Authorized representative" means a person empowered by the patient to assert the privilege granted by this rule and, until given permission by the patient to make disclosure, any person whose communications are made privileged by this rule.

(b) General rule of privilege. A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Exceptions. There is no privilege under this rule for any relevant communications under this rule:

(1) In proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

(2) If a judge finds that a patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of an examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental condition; or

(3) If the patient is asserting his mental condition as an element of a claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

### **Confidentiality in General:**

#### *Williams v. Williams*, 526 S.W.3d 108 (Ky. App. 2017)

Psychiatrist-patient privilege barred disclosure of children's counseling records to father during discovery in father's proceeding to modify no-visitation order; pendency of father's proceeding did not automatically waive privilege, no exception to privilege applied, and trial court, during in camera review that was conducted pursuant to parties' agreed order, expressly found no information relevant to issue of visitation.

### **Exceptions in General:**

#### *Commonwealth v. Barroso* , 122 S.W.3d 554 (Ky. 2003)

Other than the three specified exceptions in the rules of evidence, the psychotherapist-patient privilege is an absolute privilege, i.e., one that is not subject to avoidance because of a need for the evidence.

**Civil Suit Exception:***Jaffee v. Redmond*, 518 U.S. 1 (1996)

The Supreme Court recognized the psychotherapist and patient privilege. The Court held that communications made by a defendant in a civil suit were protected by this privilege and could not be compelled to be disclosed.

**In Camera Review:***Commonwealth v. Shaw*, 600 S.W.3d 233 (Ky. 2020)

The trial court did not compel the alleged victim to waive therapist-patient records when it granted the defendant's request for in camera review of alleged victim's records of therapy between the date of police interview, when the alleged victim stated she had started therapy, and the data of the controlled call with the defendant. During that call, the alleged victim stated she had told her family about the allegations of sexual abuse. Rather, in camera inspection of the victim's records would preserve the defendant's constitutional right to compulsory process without destroying the victim's interest in protecting confidentiality of those portions of records that were irrelevant to the defendant's interests.

*Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994)

This case has been abrogated by *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003). Upon a proper preliminary showing sufficient to establish a reasonable belief that the records contain exculpatory evidence, the witness's psychotherapy records are subject to production for an in camera inspection by the trial court to determine whether the records contain exculpatory evidence, including evidence relevant to the witness's credibility.

When the defendant raises the issue that mental health records are relevant, the trial court may subpoena those records and conduct an in camera review to determine whether the records must be turned over to the Commonwealth. But, articulable evidence must be given before the court will conduct an in camera review.

*Stidham v. Clark*, 74 S.W.3d 719, 727 (Ky. 2002)

The Supreme Court of Kentucky examined the psychotherapist-patient privilege in terms of whether these records should be released to the grand jury, reviewing whether the records contained unprivileged material that could be released. The Court set forth the procedure and held that a bare allegation of criminal behavior is not sufficient to warrant an in camera review of the records.

“[B]efore a....court may engage in an in camera review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the

exceptions applicability....[T]he threshold showing to obtain in camera review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.”

Once the threshold is met, the court may examine the records and determine whether an exception to the privilege has been met.

*Stopher v. Commonwealth*, 57 S.W.3d 787, 799 (Ky. 2001)

It was proper for the trial court to deny the defendant’s motion to conduct an in camera review into a witness’ medical records because the defendant “failed to produce articulable evidence that raise[d] a reasonable inquiry of [Porter’s] mental health history.”

## **6. Juvenile Court Records**

### KRS 610.340 Confidentiality of Juvenile Court Records

(1) (a) Unless a specific provision of KRS Chapters 600 to 645 specifies otherwise, all juvenile court records of any nature generated pursuant to KRS Chapters 600 to 645 by any agency or instrumentality, public or private, shall be deemed to be confidential and shall not be disclosed except to the child, parent, victims, or other persons authorized to attend a juvenile court hearing pursuant to KRS 610.070 unless ordered by the court for good cause.

(b) Juvenile court records which contain information pertaining to arrests, petitions, adjudications, and dispositions of a child may be disclosed to victims or other persons authorized to attend a juvenile court hearing pursuant to KRS 610.070.

(c) Release of the child's treatment, medical, mental, or psychological records is prohibited unless presented as evidence in Circuit Court. Any records resulting from the child's prior abuse and neglect under Title IV-E1 or Title IV-B2 of the Federal Social Security Act shall not be disclosed to victims or other persons authorized to attend a juvenile court hearing pursuant to KRS 610.070.

(d) Victim access under this subsection to juvenile court records shall include access to records of adjudications that occurred prior to July 15, 1998.

(2) The provisions of this section shall not apply to public officers or employees engaged in the investigation of and in the prosecution of cases under KRS Chapters 600 to 645 or other portions of the Kentucky Revised Statutes. Any record obtained pursuant to this subsection shall be used for official use only, shall not be disclosed publicly, and shall be exempt from disclosure under the Open Records Act, KRS 61.870 to 61.884.

(3) The provisions of this section shall not apply to any peace officer, as defined in KRS 446.010, who is engaged in the investigation or prosecution of cases under KRS Chapters 600 to 645 or other portions of the Kentucky Revised Statutes.

Any record obtained pursuant to this subsection shall be used for official use only, shall not be disclosed publicly, and shall be exempt from disclosure under the Open Records Act, KRS 61.870 to 61.884.

(4) The provisions of this section shall not apply to employees of the Department of Juvenile Justice or cabinet or its designees responsible for any services under KRS Chapters 600 to 645 or to attorneys for parties involved in actions relating to KRS Chapters 600 to 645 or other prosecutions authorized by the Kentucky Revised Statutes.

(5) The provisions of this section shall not apply to records disclosed pursuant to KRS 610.320 or to public or private elementary and secondary school administrative, transportation, and counseling personnel, to any teacher or school employee with whom the student may come in contact, or to persons entitled to have juvenile records under KRS 610.345, if the possession and use of the records is in compliance with the provisions of KRS 610.345 and this section.

(6) No person, including school personnel, shall disclose any confidential record or any information contained therein except as permitted by this section or other specific section of KRS Chapters 600 to 645, or except as permitted by specific order of the court.

(7) No person, including school personnel, authorized to obtain records pursuant to KRS Chapters 600 to 645 shall obtain or attempt to obtain confidential records to which he is not entitled or for purposes for which he is not permitted to obtain them pursuant to KRS Chapters 600 to 645.

(8) No person, including school personnel, not authorized to obtain records pursuant to KRS Chapters 600 to 645 shall obtain or attempt to obtain records which are made confidential pursuant to KRS Chapters 600 to 645 except upon proper motion to a court of competent jurisdiction.

(9) No person shall destroy or attempt to destroy any record required to be kept pursuant to KRS Chapters 600 to 645 unless the destruction is permitted pursuant to KRS Chapters 600 to 645 and is authorized by the court upon proper motion and good cause for the destruction being shown.

(10) As used in this section the term “KRS Chapters 600 to 645” includes any administrative regulations which are lawfully promulgated pursuant to KRS Chapters 600 to 645.

(11) Nothing in this section shall be construed to prohibit a crime victim from speaking publicly after the adjudication about his or her case on matters within his

or her knowledge or on matters disclosed to the victim during any aspect of a juvenile court proceeding.

### **Purposes of Impeachment:**

*Manns v. Commonwealth*, 80 S.W. 3d 439 (Ky. 2002)

The Court held that evidence of a defendant's prior adjudication in juvenile court, when used for impeachment purposes, violated separation of powers. Juvenile records may only be admissible during the sentencing phase of the trial.

### **Authorized persons:**

*Howard v. Commonwealth*, 595 S.W.3d 462 (Ky. 2020)

The defendant was being prosecuted and failed to establish a reasonable belief that the juvenile records of some of his victims contained exculpatory evidence. This was one step he was required to meet before he would be entitled to review the confidential juvenile records. In this case the defendant was being prosecuted for multiple counts of first-degree unlawful transaction with a minor. While the defendant specifically requested only the dispositions of the juvenile cases of certain victims, he provided no evidence that this dispositional information would be exculpatory and merely made vague references that what transpired in the juvenile cases would be part of his defense and would be exculpatory.

## **7. Police Records**

RCr 7.24

Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and permit the defendant to inspect, copy, or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

## **8. Records of Cabinet for Health and Family Services**

*Ballard v. Commonwealth*, 743 S.W.2d 21 (Ky. 1988)

The records of the Cabinet were requested and turned over to the defendant. Unbeknownst to the Commonwealth, the Cabinet withheld a report of a medical exam of the victim. The Cabinet and a testifying detective had a copy of this report.

This hiding of evidence by agents of the Commonwealth required reversal because the cabinet should have turned over their entire record when requested.

*Prater v. Cabinet for Human Recourses*, 954 S.W.2d 954 (Ky. 1997)

The records of social workers are admissible under the business records exception of KRE 803(6). These were permitted to be entered into the record in a parental rights termination hearing. However, not every entry in the record is admissible. If the social worker testifies, the records will be admissible. The recorded opinions of the social workers are not admissible and neither are statements made to the social workers by the victims.

## J. PRE-TRIAL MOTIONS

### 1. Defense Motions

#### **Medical Examination of the Victim:**

The Court must determine whether the prejudicial value to the defendant outweighs the probative value to refuse the defendant the opportunity to obtain an independent examination of the victim.

*Crawford v. Commonwealth*, 824 S.W.2d 847 (Ky. 1992)

The victim had a comprehensive medical exam done shortly after the rape occurred. At the time of the trial, the defendant requested a second medical examination. The trial court had a second independent doctor look at the medical records. The second doctor determined that a second medical exam would not be beneficial to the defendant. The trial court determined that a second medical exam of the victim would not benefit the defendant and correctly denied his request.

*Turner v. Commonwealth*, 767 S.W.2d 557 (Ky. 1988)

A doctor who examined the victim testified that the location of the injuries on the hymnal ring indicated they were caused by penile penetration. The Court held that the defendant was entitled to an independent examination because the evidence sought by the defendant outweighed the harm that might be caused to the victim. Another doctor might have contradicted whether these injuries existed and whether the injuries were caused by penile penetration and thereby be pertinent to the defense.

*Stoker v. Commonwealth*, 828 S.W.2d 619 (Ky. 1992)

The Commonwealth is not required to have medical examinations performed on victims. The Commonwealth only obtained a physical examination of one of the four victims. The Commonwealth is not required to obtain medical exams on the other victims. The defendant also made no effort to get other children examined. The defendant claimed that the Commonwealth should have obtained examinations

and turned over medical records. The court ruled that the Commonwealth does not have to generate evidence for the defendant.

### **Mental Health Examination of the Victim:**

#### *Bart v. Commonwealth*, 951 S.W.2d 576, 579 (Ky. 1997)

An independent psychological examination is not permitted to determine the victim's competency. The defendant entered a conditional plea to sodomy and use of a minor in a sexual performance. He appealed the trial judge's denial of his request for an exam by an independent psychologist. The Court held that the defendant is not entitled to the independent examination of the victim by a psychologist for the purpose of the independent psychologist testifying regarding the competency of the victim to testify. "We have long left witness competency decisions to the trial courts of this Commonwealth and we perceive no compelling reason to disturb the traditional approach that the trial judge is in the best position to make these decisions."

#### *Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993)

Defendant's theory of the case may require an independent examination of the victim. The defendant was entitled to have a psychological examination of the victim in this case. The victim had been sexually abused previously and she had previous psychological treatment. The defendant's theory was that the victim was transferring the previous sexual abuse and stating that the defendant was the perpetrator now when there really wasn't any sexual abuse. Therefore, just as in *Turner v. Commonwealth*, 767 S.W.2d 557 (Ky. 1989), the potential harm to the child was outweighed by the exculpatory value to the defendant.

### **Joinder and Severance:**

#### RCr 9.12 Consolidation of Offenses for Trial

The court may order two (2) or more indictments, informations, complaints or uniform citations to be tried together if the offenses, and the defendants, if more than one (1), could have been joined in a single indictment, information, complaint or uniform citation. The procedure shall be the same as if the prosecution were under a single indictment, information, complaint or uniform citation.

#### *Elam v. Commonwealth*, 500 S.W.3d 818 (Ky. 2016)

Defendant was convicted in the Christian County Circuit Court of 15 counts of first degree sodomy, 13 counts of first degree sexual abuse, and two counts of witness tampering. The defendant appealed. The Supreme Court held that consolidating the indictment for sexual offenses with the indictment for tampering with witnesses for trial was proper because when there was a direct nexus linking the underlying sexual offenses and the tampering charges. Consolidation of the offenses was not impermissibly prejudicial. The Circuit Court did not abuse its

discretion when it refused to sever the only count that alleged the defendant committed a sex crime against his biological daughter from the remaining counts of sexual abuse and sodomy in indictment. The rule governing other crimes, wrongs, or acts evidence would not operate to bar reciprocal admission of sexual acts against defendant's daughter and his stepdaughter in the same trial. Additionally, jury instructions that carefully differentiated between multiple charges of sodomy and sexual abuse did not violate defendant's right to a unanimous verdict. Even though the indictment was duplicitous, no manifest injustice occurred that would entitle the defendant to relief.

*Rearick v. Commonwealth*, 858 S.W.2d 185 (Ky. 1993)

The trial court consolidated three separate indictments involving three different victims; two girls and one boy. The defendant was charged with sexual abuse for the crime perpetrated against the girl, sodomy first degree for one of the boys, and sodomy third degree for the other boy. The Court held that the trial court erred in the consolidation of these three indictments because the evidence of each of these other crimes would not have been admissible under the standard set forth in *Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992).

RCr 6.18 Joinder of Offenses

Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate county for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

*Peacher v. Commonwealth*, 391 S.W.3d 821 (Ky. 2013)

Two defendants were convicted after a joint trial in the Jefferson Circuit Court, of murder, first-degree assault, and first-degree criminal abuse of a child victim. With respect to another child victim, the first defendant was convicted of first-degree criminal abuse and the second defendant was convicted of third-degree criminal abuse. Each defendant appealed, and the appeals were consolidated. The Supreme Court held that the admission of statements by the second defendant to police detectives about the first victim's condition when the victim awakened in the morning on the day he was taken to a hospital did not violate first defendant's right of confrontation. The charges of murder, assault, and abuse of the first victim and the charges of abuse of the second victim could be joined for trial as offenses of the same or similar character. Jury instruction on complicity, as an alternate theory of liability, was warranted as to the first defendant. The first defendant was not in custody for *Miranda* purposes during a police interview. Evidence was sufficient to show that second defendant caused the first victim's death either alone or in complicity with first defendant, and the evidence was sufficient to show that the second defendant recklessly inflicted pain and injury upon the second victim that



amounted to torture, cruel punishment, or both, so as to support a conviction for third-degree criminal abuse.

*Berry v. Commonwealth*, 84 S.W.3d 82, 87 (Ky. App. 2001)

A significant factor in determining whether joinder is proper, or whether prejudice exists, is the extent to which evidence of one offense would be admissible in the trial of the other offense. In this light, “evidence of independent sexual acts between the accused and person other than the victim, if similar to the act charged, and not too remote in time, are admissible to show intent, motive or a common plan.” There were five victims in the instant case. The earliest offense occurred in 1977 and the most recent offense occurred in 1980. A separate indictment included a charge involving a different victim from the first indictment, in which the offenses occurred in 1982 and 1986. Each count in both indictments involved a boy under 16 years old participating in Micro City. All charges were sodomy in the third degree. The Court distinguished *Rearick v. Commonwealth*, Ky., 858 S.W.2d 185 (1993) which did not permit joinder of indictments involving three counts sodomy first-degree, sodomy third-degree and two counts sexual abuse because they were not sufficiently similar to join together. The events in *Berry* were not so remote in time to prevent joinder and were similar in nature.

*Billings v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992)

The Supreme Court reaffirmed the standard to be used in determining whether uncharged criminal acts should be admitted into evidence under KRE 404(b). In every case in which evidence of other crimes is sought to be introduced to establish a pattern or scheme, the real question is whether the method of the commission of the other crime or crimes is so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person. If it does so, evidence that the defendant committed the other crime is admissible. If it only tends to show a disposition to commit a crime, the evidence is not admissible.

In the instant case, the Supreme Court ruled that it was improper to admit evidence of uncharged crimes allegedly perpetrated against the victim’s sister. The defendant allegedly touched the victim’s sister between her legs while she was fully clothed, and he exposed himself to her. In the case at bar, the defendant was charged with sodomy and the other acts were not similar to those charged.

*Violett v. Commonwealth*, 907 S.W.2d 773 (Ky. 1995)

It was proper for the trial court to join together two separate indictments charging the defendant in one indictment with sodomy of his step-daughter and the second charging defendant with rape of his biological daughter. The standard to overturn the trial court's decision is abuse of discretion. As the evidence of the other crime would have been admissible in each trial because the behavior and conduct was similar and each incident was close in time, it was proper to join the offenses for trial.

### RCr 8.31 (formerly RCr 9.16) Separate Trials

If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received. No reference to the motion shall be made during the trial. In ruling on a motion by a defendant for severance the court may order the attorney for the Commonwealth to deliver to the court for inspection in camera any statements or confessions made by the defendants that the Commonwealth intends to introduce in evidence at the trial.

### *Elam v. Commonwealth*, 500 S.W.3d 818 (Ky. 2016)

Under rule governing separate trials, a defendant must prove that joinder would be so prejudicial as to be unfair, unnecessarily, or unreasonably hurtful. Whether the prejudicial effect of an otherwise proper joinder of offenses meets the “unfair or unnecessarily or unreasonably hurtful” threshold is a matter that rests with the sound discretion of the trial judge. A trial judge has broad discretion in ruling on a motion for separate trials of counts, and that determination will not be overturned on appeal unless an abuse of discretion is shown.

### *Schambon v. Commonwealth*, 821 S.W.2d 804, 809 (Ky. 1991)

Mother and father were tried together for multiple counts of sodomy, criminal abuse and cruelty to animals. It was not error to try them together even though the evidence to convict for sodomy was different for each defendant. “[T]he trial court has broad discretion and an exercise of that discretion will not be overturned absent a clear showing of abuse.”

## **Victim’s Prior Sexual Contact:**

### Rule 412. Rape and similar cases – Admissibility of victim’s character and behavior.

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions:

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) Any other evidence directly pertaining to the offense charged.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

*Perry v. Commonwealth*, 390 S.W.3d 122 (Ky. 2012)

The purpose of the rape shield rule generally barring admission of a victim's prior sexual conduct to prove that the victim engaged in other sexual behavior or to prove a sexual predisposition. The rape shield rule prevents inferences of bad sexual character from being used to cast doubt on an alleged victim's claim of sexual assault, which is improper impeachment.

*Ward v. Commonwealth*, 568 S.W.3d 824 (Ky. 2019)

Evidence that the victim told police she had exchanged sex for money approximately one month prior to events in question did not directly pertain to charged offenses and, thus, was not admissible under residual exception to Rape Shield Law, in prosecution for sodomy, possession of a handgun by a convicted felon, and being a persistent felony offender (PFO); although defendant's defense rested on fact that oral sex was consensual, victim's statement regarding her prior prostitution was irrelevant to whether she consented to conduct with defendant, which conduct she indicated included him threatening her with a gun and claiming he would shoot her if she did not cooperate.

*Henderson v. Commonwealth*, 563 S.W.3d 651 (Ky. 2018)

Even if trial court erred by precluding defendant, pursuant to Rape Shield Law, from introducing evidence about victim's past collateral sexual incidents, such error was harmless, in prosecution for assault and sexual abuse; if defendant was

presenting a consent defense, he was entitled to ask about prior consensual experiences between him and victim, but defendant did ask those questions and victim unequivocally denied any such relationship, such that defendant's right to present defense was not inhibited.

Montgomery v. Commonwealth, 320 S.W.3d 28 (Ky. 2010)

Evidence of a sexual offense victim's prior sexual behavior pertains directly to the charged offense and thus is admissible under the residual exception to rape shield rule if, and only if, exclusion of the evidence would be arbitrary or disproportionate with respect to the rule's purposes of protecting the victim's privacy and eliminating unduly prejudicial character evidence from the trial

Violett v. Commonwealth, 907 S.W.2d 773 (Ky. 1995)

Letters written by victim describing her sexual activity with another are not admissible. The trial court's decision to not allow the introduction of letters describing victim's sexual activity with her boyfriend was proper. This evidence was prohibited by the rape shield law. This case is distinguished from *Barnett v. Commonwealth, Ky.*, 828 S.W.2d 361 (1992).

Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997)

It was proper for the trial court to prevent the defendant from introducing evidence of the victim's sexual behavior at another day care three years earlier. KRE 412 clearly precludes this evidence and the evidence does not fall within an exception set forth in KRE 412.

Gilbert v. Commonwealth, 838 S.W.2d 376 (Ky. 1991)

The Defendant attempted to introduce evidence that seventeen year-old step-daughter had requested birth control. That evidence is reputation evidence about her prior sexual history which is clearly inadmissible.

Billings v. Commonwealth, 843 S.W.2d 890 (Ky. 1992)

The defendant wanted to introduce evidence that the victim had sexual intercourse with his son and the defendant subsequently made the victim leave the house. The Court held that it was not in error to refuse to admit this evidence based on Rape Shield Statute. The defendant could still introduce the evidence of the victim's expulsion from the home as a motive for the victim to lie without introducing evidence of victim's sexual activity with his son.

Renner v. Commonwealth, 784 S.W.2d 182 (Ky. 1990)

This case is distinguishable from *Bixler v. Commonwealth, 712 S.W.2d 366 (Ky. App. 1986)*, in that the evidence of prior sexual activities between the victim and the defendant were not admissible because consent was not at issue in this case. Two other witnesses testified that the victim did not consent. Therefore, the probative value did not outweigh prejudicial nature of this evidence.

**Exceptions:***Barnett v. Commonwealth*, 828 S.W.2d 361 (Ky. 1992)

The rape shield statute does not always prohibit the introduction of prior sexual contact of the victim. It is admissible if it is relevant and probative and directly pertains to the crime charged. In this case a doctor testified that the victim had findings of chronic sexual contact. Therefore, the evidence that the victim and her brother had sexual relations was relevant and should have been admitted to show that the finding by the doctor of chronic sexual contact could be because she had sexual contact with someone other than defendant.

*Anderson v. Commonwealth*, 63 S.W.3d 135, 140 (Ky. 2001)

Commonwealth introduced evidence that the victim showed on a medical examination she had a loose vaginal opening thereby implying the defendant caused this condition. The Court held that after the admission of this testimony the defendant should have been permitted to question the victim about a statement to a nurse that she had a previous sexual experience. This evidence is allowed to show an alternative explanation. However, the Court reaffirmed the principle that “[t]he purpose of the Rape Shield Statute is to ensure that [the victim] does not become the party on trial through the admission of evidence that is neither material nor relevant to the charge made.”

*Bixler v. Commonwealth*, 712 S.W.2d 366 (Ky. App. 1986)

The victim claimed that the defendant had sexual intercourse with her without her consent. The court allowed evidence of a prior consensual sexual experience between the victim and the defendant. The Court held that the probative value outweighs the prejudicial nature because it goes to the issue of consent. *Renner v. Commonwealth*, 784 S.W.2d 182 (Ky. 1990) is distinguished by Bixler where a prior sexual contact was not allowed into evidence.

*Hillard v. Commonwealth*, 158 S.W.3d 758 (Ky. 2005)

Evidence of minor's sexual history was not relevant in trial for unlawful transaction with a minor arising from allegedly inducing minor to engage in illegal sexual activity; evidence could not be used to prove consent, as 15-year-old minor was statutorily incapable of consent because of his age, and use of the evidence to prove minor's sexual orientation and that he had a sexual relationship with another prosecution witness would have been cumulative. KRS 510.130(1); Rules of Evid., Rule 402, 403.

**Competency of the Victim: (see trial issues, child's testimony)****Taint Hearing**

A hearing to determine whether interviewing techniques were so flawed as to distort a child witness's recollection of events and thereby undermine the reliability of testimony.

**Pendleton v. Commonwealth, 83 S.W.3d 522 (Ky. 2002)**

Trial court framed the issue as one of credibility. On appeal defendant claimed the motion for the taint hearing was really a motion for a competency hearing. The Kentucky Supreme Court found that the trial court had an opportunity to hear the victim's testimony in another county and was familiar with her competency to testify. Defendant had an opportunity to cross-examine her credibility with the jury if he felt her testimony had seemed coerced by the social worker. No error occurred. Trial court also noted that Kentucky does not follow the holding in *State v. Michaels*, 136 N. J. 299, 642 A.2d 1372 (1994).

**Double Jeopardy on Possession of MPSP by a minor and UMSP:**

The Blockburger rule is the "sole basis for determining whether multiple convictions arising out of a single course of conduct constitutes double jeopardy." *Barth v. Commonwealth*, 80 S.W.3d 390, 399 (Ky.2001)(quoting *Taylor v. Commonwealth*, 995 S.W.2d 355, 358 (Ky.1999)). "The test ... to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 305 (1932)). As stated above KRS 531.310 requires: (1) to employ, consent, authorize or induce; (2) a minor; (3) to engage in a sexual performance. The elements of KRS 531.335 are to: (1) knowingly; (2) have in possession or control; (3) any matter visually depicting an actual sexual performance by a minor; and (4) with knowledge of the matter's content, character, and that the sexual performance is by a minor. Westerfield concedes that KRS 531.310 requires additional proof of consent, authorization, or inducement for the minor to engage in a sexual performance. KRS 531.335 requires possession of the material depicting the sexual performance which KRS 531.310 does not. As a result, KRS 531.335 is not a lesser included offense of KRS 531.310. The offense of use of a minor in a sexual performance was completed when Westerfield induced A.M.R. to remove her shirt and photographed her. His decision to retain the photograph in his possession was a distinct step that constituted a separate criminal offense under 531.335. Therefore, the double jeopardy protection was not implicated.

*Westerfield v. Commonwealth*, Case No. 20060-CA-000592-MR, 2007 WL 1196462 at \*3 (Ky. App.,2007). See KY ST RCP Rule 76.28(4) before citing.

## 2. Pre-Trial Motions by the Commonwealth

### **Other Crimes:**

#### KRE 404 Character Evidence and Evidence of Other Crimes

(b) Evidence of other crimes may be admissible

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

(c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

#### *Calhoun v. Commonwealth*, 492 S.W.3d 132 (Ky. 2016)

Evidence that sexual abuse victim's mother was hostile toward authority or had a deep mistrust of social-service workers was relevant to impeach mother and to indicate a potential bias for her testimony, and thus, such testimony was admissible; mother testified that she thought victim had concocted the story of the sexual encounter with defendant and she believed the questioning by the police was improper, and in an attempt to impeach mother's credibility, the Commonwealth presented evidence that indicated she was, in fact, hostile toward authority, and Commonwealth was not introducing evidence of a prior bad act or poor character to prove that mother acted in conformity therewith.

#### *Buford v. Commonwealth*, 197 S.W.3d 66 (Ky. 2006)

In case where 2 girls molested by youth group leader at church, admission of evidence regarding allegation of abuse by defendant against his 8 year old niece reversible because not similar enough.

#### *Crabtree v. Commonwealth*, 455 S.W.3d 390 (Ky. 2014)

Detective's testimony that criminally accused persons often tried to minimize their criminal conduct placed defendant's character for truthfulness at issue, and thus, defendant's proffered evidence of character for truthfulness via testimony of family friend was relevant to support claim that he became disgusted when he realized that videos he was downloading onto his computer contained child pornography and immediately deleted them, in trial for possession of matter portraying sexual performance by minor, where Commonwealth argued that

defendant's culpability was much greater than statement that he gave to police indicated and that defendant was only "sickened" at having gotten caught, and not by images he saw.

*Daniel v. Commonwealth*, 905 S.W.2d 76 (Ky. 1995)

The Commonwealth did not provide reasonable notice to the defendant to offer evidence of prior bad acts when it merely provided police reports. The Commonwealth must provide actual notice. The court in turn must make a determination as set forth in *Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990) on whether KRE 404(b) evidence is admissible.

*Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990)

(Overruled on other grounds) Evidence of other crimes will be admitted into evidence if it meets an exception set forth in 404(b). The evidence must prove something else than a propensity to commit a crime. The evidence must also be probative to warrant introduction and does not outweigh the prejudice to the defendant.

*Sharp v. Commonwealth*, 849 S.W.2d 542 (Ky. 1993)

When a trial court determines whether to admit evidence of other crimes it must adhere strictly to KRE 404(b) and its exceptions.

The trial court must hold a hearing on whether the proposed evidence by the Commonwealth would be admissible under KRE 404(b). The hearing does not have to include testimony. The court must make findings as to the admissibility of the evidence. The findings should be made on the record and written findings would be preferred.

*Messmear v. Commonwealth*, 472 S.W.2d 682 (Ky. 1971)

(pre-KRE case) Admonition must be given. It has been held that when evidence is introduced of other crimes in sex cases, an admonition is to be given that the evidence is to be only considered to corroborate the testimony regarding principal offenses. If the admonition is not requested, it is considered waived. *Messmear* was overruled by *Ware v. Commonwealth*, 537 S.W.2d 174 (Ky. 1976), on other grounds. Subsequently *Ware* was overruled by *Watts v. Commonwealth*, Case No. 2018-CR-000409-MR, 2019 WL 5678462 (Ky. Oct. 31, 2019).

*Anastasi v. Commonwealth*, 754 S.W.2d 860 (Ky. 1988)

The judge properly admonished the jury that the testimony regarding prior bad acts was only for the purpose of corroboration.

*Holloman v. Commonwealth*, 37 S.W.3d 764 (Ky. 2001)

The Commonwealth introduced evidence of a second victim because the offenses were similar in nature. The offenses were committed in the living room



and the defendant's bedroom and both victims were less than twelve years old. This evidence was properly admitted.

*Noel v. Commonwealth*, 76 S.W.3d 923 (Ky. 2002)

It was proper to admit the testimony of the victim that the sexual abuse happened more than once even though only one offense was charged. The prior act proved intent, plan or absence of mistake or accident.

*Pendleton v. Commonwealth*, 83 S.W.3d 522 (Ky. 2002)

The victim was an eleven-year old child who was unable to separate the dates of the different crimes perpetrated against her. The different crimes perpetuated against the victim were admissible to prove motive, intent, opportunity, plan, identity, knowledge or absence of mistake or accident.

*St. Clair v. Commonwealth*, 455 S.W.3d 869 (Ky. 2015)

Evidence of other bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the *res gestae*.

*Waters v. Kassulke*, 916 F.2d 329 (6th Cir. 1990)

In the trial of the victim's mother for complicity and the boyfriend for rape it was permissible evidence of boyfriend's sexual abuse of victim's that occurred outside of Kentucky to prove knowledge and intent.

*Gullett v. Commonwealth*, 514 S.W.3d 518 (Ky. 2017)

Evidence of an uncharged act of sodomy when victim was forced to stimulate defendant's penis was relevant to prove the motive and intent of the act charged, and thus admissible in prosecution for incest, first-degree rape, first-degree sodomy, first-degree sexual abuse, and second-degree sexual abuse, as an exception to the rule governing character evidence and evidence of other crimes.

*Jenkins v. Commonwealth*, 496 S.W.3d 435 (Ky. 2016)

Victim's testimony about acts defendant had committed similar to those with which he was charged was admissible as extrinsic act evidence in prosecution for first degree rape and first degree sodomy; one of principal issues in case was whether crime occurred at all, and, thus, relevant to issue was whether defendant had motive to do as victim alleged, victim's testimony to effect that defendant had done similar things to her during her childhood tended to show that defendant found victim attractive as vulnerable object of his sexual impulses, testimony was relevant to issue of whether consent and forcible compulsion, and probative value of testimony was substantial, because it gave jury insight it would not otherwise have

had into possible motive for defendant's seemingly out-of-the-blue sexual assault on his granddaughter.

*Gilbert v. Commonwealth*, 838 S.W.2d 376 (Ky. 1991)

It was not improper for the court to admit evidence regarding the victims being forced to watch sexually explicit movies while their mother and step-father had sexual intercourse. The evidence was admitted to show a pattern of conduct and motive for behavior. It was necessary for the jury to see the entire picture of what was going on in the home and was part of the overall scheme of abuse against the children.

*Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993)

The Court held that prior acts that occurred six years before is not necessarily excluded simply because of the time gap. The admissibility is to be determined based on the standards set for in KRE 404 (b) and *Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992).

*Anastasi v. Commonwealth*, 754 S.W.2d 860 (Ky.1988)

The evidence of sexual abuse to other victims not charged in the indictment were similar in nature and not too remote in the past - even eight years - to be admissible.

*Bussy v. Commonwealth*, 697 S.W.2d 139 (Ky. 1985)

The trial court properly admitted testimony by victim's brothers that they observed the defendant fondling their sister on five different occasions. The Court held that the testimony went to the defendant's intent and therefore was admissible under KRE 404(b). However, the case was reversed and remanded for other issues and the Court noted that at retrial the trial court should not admonition the jury that the evidence is only admissible to prove lustful inclination.

*Pendleton v. Commonwealth*, 685 S.W.2d 549 (Ky. 1985)

The Commonwealth introduced evidence that defendant sexually abused his fourteen year-old daughter. He was not charged with this sexual abuse. However, the trial court was correct in allowing this testimony because it showed a modus operandi even though the charge was rape and sodomy. The Court also said that this evidence could not be admitted under the theory of "lustful inclination."

*Rearick v. Commonwealth*, 858 S.W.2d 185 (Ky. 1993)

It was proper to admit the testimony of the victim when he testified that he saw his father (the defendant) sodomize his younger sibling in the basement where he always abused the witness. The evidence was similar enough to demonstrate modus operandi.

*Thacker v. Commonwealth*, 816 S.W.2d 660 (Ky. App. 1991)

Defendant was convicted of abusing his daughter. The Commonwealth was permitted to introduce evidence that the defendant sexually abused his two older daughters. Although the acts stretched as far back as eight years they were sufficiently similar in nature to the charged act and not too remote.

*Schambon v. Commonwealth*, 821 S.W.2d 804 (Ky. 1991)

Testimony by defendant's eighteen year-old daughter concerning the unsanitary conditions in the house, the discipline methods, and the defendant's habit of walking around the house nude and touching daughter's vaginal area was so interwoven with the proof as to be admissible.

**Evidence Inadmissible:**

*Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky. 2009)

In prosecution for sodomy and sexual abuse involving a child, admission of child sexual abuse accommodation syndrome (CSAAS) testimony by clinical psychologist, that it was normal for child victims of sexual abuse, like the victim, a girl, to appear happy and add details about the abuse after having been in counseling, coupled with Commonwealth's speculation about whether such symptoms caused sexually abused girls to become prostitutes, constituted reversible error.

*Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994)

It was improper to admit the testimony of victim's brother that he was sodomized by defendant two years after the victim alleges the abuse occurred. The number of times and the approach the defendant took with the victim was different than he used with his brother. The Commonwealth must establish a striking similarity to admit testimony under KRE 404(b).

*Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992)

The Court held that it was error for the trial court to allow the victim's sister to testify that several years before the defendant touched her between her legs, exposed himself and had her watch pornographic movies. The defendant was charged with sodomy. There was no similarity to the crime the defendant was charged with and the evidence of other crimes. The prejudice outweighs the probative value.

*Gray v. Commonwealth*, 843 S.W.2d 895 (Ky. 1992)

It was in error to permit the Commonwealth to introduce evidence of prior acts by the defendant to three of his nieces. The evidence was too remote and not similar to the charged act.

*Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986)

The Commonwealth produced testimony that the defendant made improper sexual advances toward two women who were not the victims in this case. The evidence is not admissible because evidence of prior crimes may not be introduced to prove lustful inclination.

(See also order of proof - common, scheme and plan)

*Majors v. Commonwealth*, 215 S.W.2d 118, 119 (Ky. 1948)

Pre-KRE Case. We have held that in prosecutions for sex crimes, such as that of intercourse with girls under age of consent, it is competent to admit evidence of prior and subsequent acts of a similar nature with the same person in order to corroborate the act in question or to show a design, disposition or intent on the part of the accused.

**Testimony of Child Victim by Closed Circuit Television:**KRS 421.350 Testimony of child allegedly victim of illegal sexual activity.

(1) This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.155, 529.030 to 529.050, 529.070, 529.100, 529.110, 530.020, 530.060, 530.064(1)(a), 531.310, 531.320, 531.370, or any specified in KRS 439.3401 and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection.

(2) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(3) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and

the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by subsection (3) of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

(a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

(b) The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(c) Each voice on the recording is identified; and

(d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(4) If the court orders the testimony of a child to be taken under subsection (2) or (3) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken, but shall be subject to being recalled during the course of the trial to give additional testimony under the same circumstances as with any other recalled witness, provided that the additional testimony is given utilizing the provisions of subsection (2) or (3) of this section.

(5) For the purpose of subsections (2) and (3) of this section, "compelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

*J.E. v. Commonwealth*, 521 S.W.3d 210 (Ky. App 2017)

The use of screens to obstruct juvenile's view of child victim as victim testified at adjudication hearing on allegation of sodomy in the first degree violated juvenile's Confrontation Clause rights; the court's finding that the victim was "extremely hesitant" to testify did not constitute a compelling need, as required by statute, to ensure the victim did not see juvenile while testifying.

*Danner v. Commonwealth*, 963 S.W.2d 632, 634 (Ky. 1998)

The defendant's daughter was between the ages of five and ten years old when she was sexually abused by him. By the time he was brought to trial the child was fifteen years old. The Commonwealth sought to have the child testify outside of the presence of the defendant. The defendant objected, claiming the child was too old under the statute to be allowed to testify outside of the courtroom. The court held that the "legislative intent is to protect child victims twelve and under when the crimes were committed against them and who remain children at the time of trial. To hold otherwise would permit the untoward result of disallowing the protections of the statute to a child who was twelve when the sex crimes were

committed, but who had turned thirteen before the trial of the accused. Such a result would be contrary to the broad protective purpose underlying the statute.”

*Commonwealth v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986)

The Kentucky Supreme Court has enumerated certain factors a trial court should consider in making a compelling need determination: “the trial court must have wide discretion to consider the age and demeanor of the child witness, the nature of the offense and the likely impact of testimony in court or facing the defendant.”

*Danner v. Commonwealth*, 963 S.W.2d 632, 634-35 (Ky. 1998)

“Additional factors a trial court should consider when making a compelling need determination, especially in a case where the child is older than twelve, are the age of the victim, and the time which has elapsed from the crime to the date of trial.” Expert testimony if not required to show compelling need: In *Danner*, the trial judge interviewed child in camera and then determined that compelling need justified the use of KRS 431.350 procedures. Despite objection from *Danner* that “[o]ne judge, one man alone, unqualified in behavioral sciences, made the determination, without additional facts or opinions, that the alleged victim could not testify in open court,” The Kentucky Supreme Court disagreed; “decisions such as this fall precisely within the judicial role.”

*George v. Commonwealth*, 885 S.W.2d 938, 942 (Ky. 1994)

(Reversed and remanded) Reversed for allowing the non-victim child witness to testify outside of the defendant’s presence (before KRS 421.350 was amended to include the non-victim child witness), court found the Commonwealth had not shown compelling need for the procedure. A psychiatric nurse, with a masters degree in social work, testified against requiring the child to testify in court because the child would be “traumatized more than the average child by the courtroom setting,” “because she would feel it was a ‘betrayal’ of her father”; and that the child had expressed “anxiety” and “dread” about testimony, but was “not fearful”. KRS 421.350(3) and (4), (now (2) and (3)), is constitutional as to sworn testimony by video, closed circuit television or screen. *Willis v. Commonwealth*, 716 S.W.2d 224 (Ky. 1986).

RCr 8.28 Presence of defendant.

The defendant shall be present at arraignment, at every critical stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of the sentence. Defendant must be present and may not be excluded from the courtroom during the testimony of the child victim.

*Commonwealth v. M.G.*, 75 S.W.3d 714 (Ky. App. 2002)

(Reversed by the Warren Circuit Court, reversal affirmed on appeal) During a juvenile court proceeding, in which the defendant was accused of first degree

sexual abuse of a 10 year-old girl, the trial judge excluded everyone from the courtroom, including the seventeen year-old defendant, while he questioned the victim. Only the bailiff, the prosecutor, and defense counsel were permitted to remain. The expulsion of the defendant was held reversible error.

*Price v. Commonwealth*, 31 S.W.3d 885, 894 (Ky. 2000)

(Reversed in part.) During his trial for the of murder of his wife and attempted rape of his step-daughter, Price was excluded from the courtroom during his step-daughter's testimony, and required to view the proceedings on a monitor in an anteroom, where he could not be in constant audio contact with his attorney. "We would not have reversed this case on this issue alone, since the defendant, though technically absent during a critical stage of the trial, was able to view the courtroom proceedings by video monitor." However the defendant could not be in continuous audio contact with this counsel, nor was there a finding of compelling need.

*Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)

Based upon the recommendation of the child victim's treating psychologist, the trial judge permitted the child witness to testify from the courthouse library, but in the presence of the defendant, his attorney, and the prosecutor. The trial court found that the child needed to testify in a non-threatening environment, but could testify in the presence of the defendant. The testimony was transmitted by closed circuit television to a monitor in the courtroom where it was viewed by the jury and courtroom spectators. The Court found this procedure much more favorable to the defendant than that authorized by KRS 421.350(3). Because the defendant was permitted to remain in the same room with the witness during her testimony there was no violation of the defendant's constitutional rights.

Technical details:

*Commonwealth v. M.G.*, 75 S.W.3d 714 (Ky. App. 2002)

The technical details must be worked out so that the child is screened from the sight and hearing of defendant, while at the same time the defendant can view and hear the child and maintain continuous audio contact with defense counsel. Lack of technical facilities to accommodate the mandatory procedures set forth in KRS 421.350 does not justify excluding the defendant from the courtroom. Defense counsel cannot waive defendant's presence.

**Exclusion of General Public from Courtroom:**

*Beauchamp v. Cahill*, 180 S.W.2d 423, 424 (Ky. 1944)

"It cannot be doubted that a trial judge has authority to exclude the young from his court room during a trial where unsavory and vulgar evidence will be produced. Also, he may protect a child witness, who from the nature of the case must testify to revolting facts, by excluding morbid, prurient, curious and sensation-

seeking persons from the court room, so long as he does not abuse his discretion and deprive the accused of the right to have his family and friends present as well as a reasonable portion of the public. Such limited exclusion of people from the court room when resorted to in the exercise of a reasonable and sound discretion does not violate Section 11 of the Constitution granting the accused a public trial.”

*See also Lexington Herald Leader Co. v. Tackett*, 601 S.W.2d 905 (Ky. 1980).  
United States Supreme Court cases:

*Maryland v. Craig*, 497 U.S. 836 (1990)

“We have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial.”

*Coy v. Iowa*, 487 U.S. 1012 (1988)

The Court held that the Confrontation Clause was violated when child sexual abuse victims were permitted to testify behind a screen not allowing the defendant to see the victim. In this case there were no findings that there was harm to the victims by testifying in the presence of the defendant

### **Testing of Physical Evidence:**

*Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999)

The Court held that PCR and RFLP methods of DNA analysis is sufficiently established in the scientific community. Therefore the Court held that a pre-trial Daubert hearing is no longer required. This holding only applies to the RFLP and PCR methods of testing for DNA.

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

In part overruling *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995)

*Ivey v. Commonwealth*, 486 S.W.3d 846 (Ky. 2016)

Defendant was convicted in the Circuit Court, Hardin County, Kelly M. Easton, J., of two counts of rape of a minor. Defendant appealed. The Supreme Court held that: the trial court adequately addressed defendant's motion for an evidentiary hearing on the reliability of the 50% prior probability of paternity statistical method for evaluating a DNA test, and the Commonwealth expert's testimony as to the use of prior probabilities other than 50% did not impermissibly instruct the jury on how to consider evidence.

The Commonwealth may request defendant to submit to taking of blood and body samples.



Holbrook v. Knopf, 847 S.W.2d 52 (Ky. 1992)

The trial court may order, post-indictment, that a defendant submit to the taking of blood and body samples for the purpose of testing and comparing to the evidence collected in the case.

KRS 17.170 requires certain persons convicted under KRS 510 or KRS 530.020 to submit a blood sample to be included in the DNA database.

J.D.K. v. Commonwealth, 54 S.W.3d 174 (Ky. App. 2001)

It was improper for the district court to order a juvenile to submit a blood sample for inclusion in the DNA database. The defendant was adjudicated as a public offender and therefore not subject to the requirements of KRS 17.170.

## VIII. PRE-TRIAL ISSUES

### **A. DEFENSE ATTEMPTS TO OBTAIN EVIDENCE THEY ARE NOT ENTITLED TO**

These may include counseling records, juvenile court records, school records, DCBS records, child advocacy records.

Counseling Records: Object unless the defense has provided a proper basis under Commonwealth v. Barroso, 122 S.W.3d 554 (2003), which holds that *in camera* review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence. They are not entitled to "fishing expeditions."

School Records: KRS 160.705 and KRS 160.720

Juvenile Court Records: KRS 610.340, with exception for law enforcement and prosecutors.

DCBS Records: KRS 620.050, with exceptions for custodial parents/ legal guardians; persons suspected of abuse, but the exception is limited to only those records pertaining to that specific report against him/her. Remember that in cases where the parent or caretaker is not supportive of the child, you can assume that they will assist the defense, even if it is against their own child's interest. You may want to address the ability to access the child's private records in family court if temporary custody has been removed from a parent/caretaker. There is a further exception for noncustodial parent with the dependency, neglect or abuse is substantiated.

Child Advocacy Center records: KRS 620.050 with exception for law enforcement and prosecutors. In all other cases a court order is required.

### **B. MOTION IN LIMINE**

These can take a lot of forms and are specific to the facts in your case. But, generally watch out for the defense trying to put the non-offending parent on trial and taking focus off of the defendant by focusing on the child's behaviors or issues that the non-offending parent may be having.

Some examples may include: to prevent defense witness hearsay statements, exclude defense expert-witness testimony, obtain a ruling requiring attorneys to ask age appropriate questions of the victim, limit character witness testimony to

permissible questions and answers, and prohibit reference to negative opinion or character evidence about victims, including evidence that may be covered by rape shield laws.

### **C. MOTION FOR COURTROOM ACCOMMODATION**

There are many motions that should be filed to accommodate child witnesses in the courtroom and ensure that the child is given the best possible chance to give credible testimony free from stress and other challenges.

**Motion for Guardian Ad Litem.** While a GAL is routinely appointed in all family court proceedings, you may want to ask for appointment in a criminal case. This attorney can assist in handling motions on their client's behalf.

**Motion for Close Circuit Testimony or Change of Courtroom Setting.** This motion can be used to allow testimony from a closed circuit television or other devices. The motion can also include the use of a personal item to ease the child or change the general set up of the courtroom during a trial.

Motions to clear the courtroom during child's testimony or limit the people present during said testimony.

Motions to limit the Defendant's ability to intimidate the child (if the Defendant is pro-se). See Faretta v. California, 422 U.S. 806 (1975).

Motions for Linguistically and developmentally appropriate questions and a developmentally appropriate oath.

Motions for all objections to be made at the bench during the child's testimony or Silent Objections (ability not to shout objections and be aware of child's susceptibility to raised voices and that the child may take some argument personally).

Motions for recesses or breaks during the child's testimony, or Motion to take the child's testimony at beginning of day (or during normal school hours when the child is likely most productive and aware.).

### **D. CONTINUED CONSULT WITH YOUR MEDICAL EXPERT OR PHYSICIAN**

Remember that it is crucial to update your medical witness on new theories of how an injury could have occurred and new motions or information that have arisen

during the pretrial process. Remember to meet and talk about all issues and what your medical expert can and cannot say! Oftentimes, the physician can help you with these issues but only if they know they exist! Same rule goes for therapist and those mental health experts that are caring for your child witness.

#### **E. PRE-TRIAL MEETINGS WITH YOUR CHILD VICTIM**

These are crucial and should be done with your victim advocate, GAL, and even with the DCBS worker. Make sure to prepare your child victim for their testimony and introduce them to what the courtroom will look like.

#### **F. KRE 404 MOTIONS**

Make sure to give notice of any KRE 404(b) evidence, which may include prior or subsequent acts involving your victim. Or, prior or subsequent acts involving other children. These are sometimes hard Motions to win, but keep in mind, other acts need not be identical, Martin v. Commonwealth, 170 S.W.3d 374 (Ky. 2005).

But also keep in mind there are some not so great rulings for the prosecution out there as well! See Clark v. Commonwealth, 223 S.W.3d 90 (Ky. 2007).

#### **G. PLEA NEGOTIATIONS**

- What is your goal in a given case?
  - To keep defendant locked up forever?
  - To make sure he/she no longer has access to these children? Any children?
  - To make a record of his/her crime and get him/her on the registry?
  - Speedy resolution for victim and family?
  - To Keep the child victim off of the stand?
  - Potential damage of an acquittal.
- What can you give up?
- What might the Defendant be willing to give up?
- What does justice require?
- What are victims wishes/input/ thoughts?

## H. Jury Trial

### 1. VOIR DIRE

At this point you should have a theme and overall idea of what you need to accomplish in voir dire. So your questions will have some general jury trial component questions as in all trials, but should focus on those questions which directly pertain to issues for child abuse. Keep in mind at all time what you want to educate your jury on and what kind of juror you want for your case. Also, all voir dire should assume that you have already examined the jury questionnaires in your jurisdiction. Make sure to keep that information in your office and also keep information on current jury panels, including who has served on other juries and what finding that jury made. Here are some general considerations in child abuse cases:

- What do you think of corporal or other forms of punishment?
- What is comfortability or knowledge of children?
- Do you believe that children lie about abuse?
- Has any juror experienced an issue during a child custody or divorce case that compares to your case?
- Has juror been accused of some act or behavior like what is alleged in your case?
- Any beliefs about children from “troubled” backgrounds or families.
- Explore feelings when children suffer from mental, emotional or behavioral problems.
- Explore feelings when your child may have extreme nervousness or lack of emotion or some other outward behavior when testifying (nervous laughter during inappropriate times).
- Exploration about who is responsible for child sexual assault? An example would be if your child “consented” to sexual contact but legally was not able to. What if your child did not resist sexual advances? Do jury members agree with age of consent laws?
- You need to explore attitudes or expose attitudes about caregivers or witnesses that you plan to call. This could include law enforcement, single parents who date, those who receive public assistance, those who are on public assistance but live with men, those who parent in a non-traditional way.
- Have you, or anyone close to you, ever been accused of sexual abuse of any type?
- Have you, or anyone close to you ever been falsely accused of sexual abuse of any type?
- How many of you know someone who did not disclose sexual abuse until they were an adult?

- How many of you think children always tell about sexual abuse right away? Do children always disclose physical assault?
- What are some reasons why children may not immediately disclose physical abuse or sexual abuse?
- How many of you would require the Commonwealth to produce DNA evidence before you could ever convict someone of a sex crime?
- How many of you could give an account of an event to someone and tell it exactly the same way both times?
- Who thinks they know what a child abuser looks like?

## **2. OPENING STATEMENT**

Consider the use of a theme to tie your case together. Any theme should be simple and straightforward and reflect the seriousness of the case.

Sample themes for child physical abuse cases could include:

- No care was taken for Sally Jo
- The TEN-4 rule
- Those who don't cruise rarely bruise

You can also pull statements from the medical exam that are especially impactful to use as your theme. In a sexual assault case you may want to choose to use the victim's own words as a theme in your case.

### **I. PRE-TRIAL CHECKLIST OR CASE CHECKLIST**

This is only a suggestion. But, the use of checklists can force you to start thinking about your case from the very beginning which will aid you in formulating a theme and developing a strong case. Checklists should be developed by office or by the individual prosecutor for what best works in each instance or by what is required by their elected official. The use of a checklist can also keep you on track in performing your due diligence on each case and help you to direct investigators as to what evidence you will require. Quite simply the practice of working a checklist, if done diligently and properly, will make your cases stronger.

Some elements to consider with your checklist may include:

#### **A. Charges and elements required to be proven.**

This exercise requires you to list out each charge you are seeking to pursue or gather evidence on. You can also separate these out by specific instance, which will help you with counts to be charged. Some prosecutors will list the charge and then

look to jury instructions or the statute and list out the specific elements. This will help you customize your voir dire, opening and closing argument and go a long way to developing your theme.

**B. Review of Statements.**

This exercise will force you to review each statement that you have and ensure that you collect each and every statement that exists. You should be checking your statements and looking for inconsistencies, cross-corroboration and impeachment material.

**C. Period of Abuse**

This will help you to chart out when and where abuse occurred during the period of your case. Chart the abuse by the victim's age, school grade, or location. This exercise helps you to clearly understand and thus present the charged instances or course of conduct in a clear manner.

**D. Applicable case law/ Pre-Trial Motions**

So you may have already attached your applicable case law as above when looking at charges to be proven. This exercise will help you to get familiar with issues regularly brought up in child abuse cases and get you in the practice of filing routine motions in abuse cases. For example, you may mark that you need a Motion for Accommodation of Courtroom. Accommodations may become dependent on children's ages. You can develop your arguments and needs quickly on future cases where your victim falls into the same age range. So, do this exercise once and you can quickly adapt it to future cases. You may also mark if you will need to obtain Calio material on studies and so forth to support your motions.

**E. Discovery and Notice to Defense**

This exercise will guarantee that you have given all proper notice of exculpatory evidence and notice of any statements that the defendant has made to law enforcement or social workers. Your defense attorney has likely asked you for these in discovery. You can ensure you have turned over everything and documented it in your discovery responses. This also can track reciprocal discovery and aid you in remembering to obtain items from the defense.

**F. Prior Bad Acts and Convictions of Defendant**

Again, this ensures that you fully look into any evidence that you may be able to use against the Defendant and forces you to collect all of this information up front so that you are not scrambling for it right before a trial! Make sure to have obtained all of the Defendant's prior arrests and convictions and have these certified and ready to go for trial.

#### G. Subpoenas and Record Checks

Make sure to document and list that you have subpoenaed all necessary witnesses and documentary material. Make sure to run criminal record checks on your witnesses as you may need to disclose prior convictions of your own witnesses to the defense (and you want to be prepared for any challenges to their credibility).

#### H. Work Records/ Military Records or Other Records of the Defendant

Work records may be subpoenaed to show when the Defendant had access to the victim. Also, work records of the parent (offending or not) may lead to information that can be used for impeachment or shows where parent was during crucial times in the case.

Military records can provide information on Defendant's education, training, prior bad acts or circumstances around discharge from the military.

#### I. The Elements of the Offense and Jury Instructions

It is good to have the statutory definitions in your file to incorporate language into your voir dire, opening or closing statements. This info can lead to a concise list of the elements to be proven and what evidence you have to satisfy those requirements. Jury Instructions must be submitted as per your local rules and are an excellent starting point for voir dire questions, opening and closing statement creation.

#### J. Witness List

A list of all witnesses and (in a perfect world) how you would like them to be called (order to be called) knowing that this may not occur due to scheduling of court time and schedules. On the list jot down their contact phone numbers. Outline important evidence and issues which each witness will supply or be responsible for testifying to. Also note what exhibits and evidence you will seek to admit by which witness you will do so through.

#### K. Cross Examination Checklist

A matrix by which you can outline areas of cross-examination and corroboration you have planned for the defendant and each defense witness.

#### L. Physical Evidence and Exhibits

Keep a list and accounting of all your evidence and exhibits. Also check to make sure you have made evidence available for the defense to view. This also helps you plan chain of custody witnesses and provides a chance to list potential objections and planned arguments for admissibility for your evidence. Also will



allow you to check off exhibits and evidence from this list during trial. Some prosecutors will choose to pre-mark these.

M. Demonstrative Evidence

Keep a list of all charts, graphs or other evidence that will help the jury to digest complicated facts or concepts. This could include time lines or models and diagrams to be used by expert witnesses to discuss mechanisms of injury.

N. Scientific Testing

A list to ensure that you are tracking all evidence gathered and that it was sent to appropriate laboratory for testing. Will help you keep track of results and what experts you may need to authenticate and admit said evidence. Some prosecutors will choose to include pocket dividers to put gloves and other items to use for trial so that they are not forgotten!

O. Photograph of Victim/ Victim support information

Keep a photograph of the victim showing the victim's appearance at the time of abuse. Sometimes there are delays, or issues and your victim may look very different at the time of trial. Also document the victim's therapist or counseling information with phone numbers.

P. Family Court Records and Transcripts

This may include divorce records, custody records, DNA records, or records showing a violation of restraining orders during your case. You should also be aware of the findings regarding abuse and neglect and who the DCBS workers are that have been involved in the case.

\*Gathered and duplicated from Investigation and Prosecution of Child Abuse, Third Edition APRI, Sage Publications, 2004.

**Materials Developed from:**

- Prosecution of Child Sexual Abuse presented at KPC by Carol Cobb and Jonathan Heck, 2010 and Investigation and Prosecution of Child Abuse, Third Edition, APRI, Sage Publications 2004
- Child Abuse and Neglect, Diagnosis, Treatment, and Evidence, By: Carole Jenny, MD, MBA, Editor, Professor of Pediatrics, Warren Alpert Medical School of Brown University; Director, ChildSafe Child Protection Program, Hasbro Children's Hospital, Providence, Rhode Island Saunders, Elsevier Health Sciences, 3251 Riverport Lane St. Louis, Missouri 63043

**Articles of Importance:**

- National Children’s Alliance. (2017). Standards for Accredited Members. <http://www.nationalchildrensalliance.org/sites/default/files/downloads/NCA-Standards-for-Accredited-Members-2017.pdf>
- Finkel, M. A., & Alexander, R. A. (2011). Conducting the medical history. *Journal of child sexual abuse*, 20(5), 486-504
- Adams, J. A., Farst, K. J., & Kellogg, N. D. (2017). Interpretation of medical findings in suspected child sexual abuse: an update for 2018. *Journal of pediatric and adolescent gynecology*

**IX. TRIAL ISSUES**

**A. RELEVANCY**

**1. KRE 401 Definition of relevant evidence**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**2. KRE 402 General rule of relevancy**

All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence, which is not relevant, is not admissible.

**3. KRE 403 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

**4. KRE 412 Rape Shield**

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

**(b) Exceptions:**

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) Any other evidence directly pertaining to the offense charged.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

**(c) Procedure to determine admissibility.**

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

**5. Balancing test**

Holloman v. Commonwealth, 37 S.W.3d 764 (Ky. 2001)

The trial court on remand must determine whether the probative value outweighs the prejudicial effect pursuant to KRE 403 of the admission of a racial slur in defendant's confession to the police.

## 6. Relevancy Cases

### **Pregnancy:**

*Martin v. Commonwealth*, 476 S.W.2d 834, 836 (Ky. 1972)

"Evidence of a pregnancy as a result of a forcible rape alleged to have been committed upon a teenage unmarried girl, who notifies the authorities immediately after the act, is competent. Certainly it is relevant to show the act of intercourse, the fact has some relevancy."

### **Pornography:**

*Dyer v. Commonwealth*, 816 S.W.2d 647 (Ky. 1991)

(overruled on other grounds) The Court held that in the prosecution of the defendant for sodomy of a boy under twelve years old, the Commonwealth may not introduce pornographic material seized from defendant's home in an attempt to bolster the victim's testimony.

*Sharp v. Commonwealth*, 849 S.W.2d 542 (Ky. 1993)

The Commonwealth introduced evidence that the defendant showed the victim's pornographic magazines, that he used a paddle to beat the children, and he smothered one of the children with a pillow. The Court reiterated the rule that evidence of other crimes is not to be introduced to show a criminal disposition but there are exceptions to the rule. The Court did not rule whether this evidence was admissible.

### **Venereal Disease:**

*Fox v. Commonwealth*, 185 S.W.2d 394 (Ky. 1945)

The victim was raped by two men, one being the appellant. The Court held it was permissible to introduce evidence that victim, as well as the other defendant, was infected with gonorrhea. The evidence the victim contracted gonorrhea and that the other defendant had gonorrhea was competent at appellant's trial because it was corroborative of the victim's story.

*Goodfriend v. Commonwealth*, 288 S.W. 330, 332 (Ky. 1926)

"It is also argued that it was improper to permit the county attorney and county judge to testify as to defendant's statements that he was infected with a venereal disease. We think this evidence was competent. The development of gonorrhea in the child indicated a contact with some person thus infected, and his admission that he was so diseased tended to connect him with the crime."

## **Mental Retardation of Defendant:**

### *Holloman v. Commonwealth*, 37 S.W.3d 764 (Ky. 2001)

The defendant was charged with rape, sodomy and sexual abuse. The trial court prohibited the defendant from introducing the testimony of a clinical psychologist regarding defendant's mental retardation and how it affects his communication. The defendant stated it was relevant to the credibility of his confession. The Supreme Court stated it was in error for trial court to refuse the admission of this evidence because such testimony would be relevant.

## **B. CHILD WITNESS ISSUES**

### **1. Competency**

#### KRE 601 Competency

(a) General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.

(b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:

- (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
- (2) Lacks the capacity to recollect facts;
- (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
- (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

#### Commentary to KRE 601

This provision serves to establish a minimum standard of testimonial competency for witnesses. It is designed to empower the trial judge to exclude the testimony of a witness who is so mentally incapacitated or so mentally immature that no testimony of probative worth could be expected from the witness. It should be applied grudgingly, only against the "incapable" witness and never against the "incredible" witness, since the triers of fact are particularly adept at judging credibility.

## **Presumption of Competency:**

### *Perry v. Commonwealth*, 390 S.W.3d 122 (Ky. 2012)

Trial court's error in refusing to order an independent psychological examination of alleged child victim as a matter of due process and fundamental fairness required reversal of defendant's convictions for first-degree sodomy; at the very least, there could have been relevant and beneficial evidence that would aid a

jury in gauging the reliability of victim's memory, taking into consideration his psychological condition and medication, and there were serious questions about victim's thought processes, clarity, and motivations that were fairly raised by defendant.

Huddleston v. Commonwealth, 542 S.W.3d 237 (Ky. 2018)

Age is not determinative of competency and there is no minimum age for testimonial capacity.

Causey v. Commonwealth, 550 S.W.2d 494 (Ky. 1977)

“A person who is offered as a witness is presumed to be competent to testify until the contrary is shown. The burden of showing incompetency is on the party objecting on that ground.”

Wombles v. Commonwealth, 831 S.W.2d 172 (Ky. 1992)

Decision based on KRS 421.200 – repealed by KRE 601. An eleven year-old rape victim was found competent to testify.

Hardy v. Commonwealth, 19 S.W.2d 727 (Ky. 1986)

6 year-old victim is competent.

Humphrey v. Commonwealth, 962 S.W.2d 870, 874 (Ky. 1998)

Two children under the age of 12 years old, specific ages not stated. It was not ineffective assistance of counsel when trial counsel failed to object to the trial court conducting a competency hearing of child in open court and in the presence of the jury. “It is well accepted that age is no determination of competency. The Kentucky Rules of Evidence do not contain a minimum age for testimonial capacity.”

Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky. 1998)

A child who was three and a half years-old at time of the event and five years-old at time of testimony was found to be competent to testify.

### **Standard of Competency for Child Witness:**

Bart v. Commonwealth, 951 S.W.2d 576 (Ky. 1997)

Trial court did not abuse its discretion in determining that a fifteen year-old victim was competent to testify. While some of the victim’s testimony bordered on the bizarre, she testified that she knew the difference between the truth and a lie, and demonstrated ability to observe, recollect, and relate the facts.

Capps v. Commonwealth, 560 S.W.2d 559, 560 (Ky. 1977)

“When the competency of an infant to testify is properly raised it is then the duty of the trial court to carefully examine the witness to ascertain whether she (or

he) is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth.” The victim was five and a half years-old.

*Jarvis v. Commonwealth*, 960 S.W.2d 466 (Ky. 1998)

Child who witnessed her father stab her mother in the throat testified at competency hearing that she knew where she went to school, that she was in kindergarten, who she lived with, and her age. She did not remember her last birthday, where she lived, or who brought her to court that day. She demonstrated that she knew the difference between telling truth and telling lies. She stated that when she did not know the answer, she would respond by saying “I don’t know”. Court found trial court did not abuse its discretion in finding child competent to testify. The witness was three and a half at the time of the crime and five at the time of her testimony.

**The Hearing:**

*Humphrey v. Commonwealth*, 962 S.W.2d 870, 874 (Ky. 1998)

“While it would have been better practice to have conducted the competency hearing in chambers, outside the presence and hearing of the jury, inasmuch as our law was not then settled on this point counsel’s failure to object did not amount to ineffective assistance.”

*Kentucky v. Stincer*, 482 U. S. 730 (1987)

“In Kentucky, as in other certain States, it is the responsibility of the judge, not the jury, to decide whether a witness is competent to testify based on the witness’ answers to such questions.”

*Kentucky v. Stincer*, 482 U. S. 730 (1987)

The Kentucky Supreme Court reversed Stincer’s conviction for first degree sodomy on the grounds that he had an absolute right to be present and to be represented by counsel at the competency hearings of the alleged victims. The United States Supreme Court reversed stating (1) Stincer’s rights under the confrontation clause of the Sixth Amendment were not violated by his exclusion from a competency hearing; and (2) Stincer’s rights under the due process clause were not violated by his exclusion from a competency hearing of the child witnesses.

*Causey v. Commonwealth*, 550 S.W.2d 494 (Ky. 1977)

Child testified that she was nine year-old, was in the fourth grade, and made good grades. She knew Causey was her uncle, the brother of her mother. On appeal Causey tried to claim his niece was not competent to testify. The Court found no merit in his claim and stated the Causey’s failure to object to the testimony constituted waiver.

*Bart v. Commonwealth*, 951 S.W.2d 576 (Ky. 1997)

It is within the sound discretion of the trial court to determine whether a witness is competent to testify. Defendant's fifteen year-old stepdaughter who gave lucid and unemotional testimony was competent to testifying, even though she could not recall all of the specific details surrounding her abuse by Bart; her lack of complete recollection affected only the credibility of her testimony, not her competency to testify.

*Wombles v. Commonwealth*, 831 S.W.2d 172 (Ky. 1992)

A trial court's finding that the eleven year-old victim was competent to testify was not an abuse of discretion. Although she incorrectly stated the date of the year and could not formulate any lengthy statement she knew her birthday by number and month, the day of the week by number of the month and name of the month, how many siblings she had, and the difference between the truth and a lie.

*Bussey v. Commonwealth*, 797 S.W.2d 483 (Ky. 1990)

The trial judge's determination of competency of a severely mentally retarded witness must be accorded great deference.

*Pendleton v. Commonwealth*, 685 S.W.2d 549, 551 (Ky. 1985)

"Whether a witness is competent is a question for the sound discretion of the trial court. Unless that discretion is abused, it will not be disturbed on appeal." The victim was six years-old.

*Hendricks v. Commonwealth*, 550 S.W.2d 551, 554 (Ky. 1977)

The witnesses were thirteen, eight and seven and were properly allowed to testify.

## **2. Oath or affirmation**

KRE 603 Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

No formal oath required for young children.

*Gaines v. Commonwealth*, 728 S.W.2d 525, 526 (Ky. 1987)

It is apparent that there has not been an issue raised in the cases as to whether a formal oath should be administered to the child after the trial court has determined the child is competent to testify. It is apparent that this has been left to the good judgment of the trial court to decide whether a solemn obligation to tell the



truth is to be reinforced with a formal oath in the case of very young children. In any event, after a child has been found competent to testify, the child becomes a witness the same as any other witness who has taken an oath or affirmed.

*Hardy v. Commonwealth*, 719 S.W.2d 727 (Ky. 1986)

Child victim's testimony was taken during a video deposition pursuant to KRS 421.350(3) No oath was given to the child at the deposition and no objection was made until the deposition was concluded. Court found (1) no error because failure to object promptly constituted waiver; and (2) child had clearly demonstrated that she recognized her moral obligation to tell the truth during the competency hearing two weeks earlier. See *Hardy v. Wigginton*, 922 F.2d 294 (6th Cir. 1990)

### **3. Leading questions**

KRE 611 Mode and order of interrogation and presentation

KRE 611(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination, but only upon the subject matter of the direct examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

CR 43.05 – Scope of Examination and Cross-Examination; Leading questions

A leading question is a question that suggests to the witness the answer which the examining party desired, and such questions may only be used:

- (a) To interrogate any unwilling or hostile witness.
- (b) On cross-examination by the adverse party only upon the subject matter of the examination chief.
- (c) In all cases where special circumstances make it appear that the interests of justice require such interrogation.

*Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998)

Commonwealth began leading the child witness before asking formal leave to proceed in such a manner. Trial court has broad discretion in permitting leading questions in the examination of the very young and the very old, when such method of questioning is necessary to elicit the facts.

*Hardy v. Commonwealth*, 719 S.W.2d 727, 729 (Ky. 1986)

“The trial judge has broad discretion in permitting leading questions to a child of tender years and herein we find no abuse of this discretion.” Witness was a six year-old sodomy victim.

*Peters v. Commonwealth*, 477 S.W.2d 154, 158 (Ky.1972)

“No authority is demanded in this situation as it is universally recognized that the trial judge is vested with broad discretion under these circumstances.” The Commonwealth used leading questions in examining a thirteen year-old witness.

*Askew v. Commonwealth*, 437 S.W.2d 205, 209 (Ky. 1969)

“Leading questions are not to be commended, but the permission of them is within the discretion of the trial court, and the judgments will not be reversed for this unless the court has abused his discretion and a shocking miscarriage of justice has resulted.”

*Rollyson v. Commonwealth*, 320 S.W.2d 800, 802 (Ky. 1959)

“Leading questions on direct examination of the prosecutrix were not ‘improperly leading’ in view of her youth [sixteen year-old rape victim] and apparent difficulty in relating a detailed story.”

*Blankenship v. Commonwealth*, 28 S.W.2d 774, 775 (Ky. 1930)

“It is well settled that the trial court in its discretion may permit leading questions when the witness is a child of tender years and such method of examination is necessary in order to elicit the facts.”

#### **4. Testimonial aids**

*Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998)

Child permitted to write their answer on paper. When the child victim was unable to respond verbally to the question “Who did this to you?” instead stating she did not want to state the name out loud, the trial court allowed the child to take a pad of paper and write down the name (the defendant). Trial court cited the sensitive nature of the proceedings, the age of the child witness and the family relationship between the witness and the defendant as grounds for permitting the procedure. The failure of trial counsel to object to this procedure was not ineffective assistance of counsel.

*Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)

It was not error to permit child victim to use anatomically detailed dolls during her testimony. Used in this way, the child’s use of the dolls was no different than any other appropriate visual aid employed by a witness.

*Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986)

(Overruled by *B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007)) on other grounds, but court indicated that testimonial incompetence is a consideration to undertake. Original declarant must be competent.) “There is no recognized exception to the hearsay rule for social workers or the results of their investigations. This includes the pointing and demonstrating performed by the child in the presence of the social worker, using a so-called ‘anatomically correct’ doll, because

hearsay includes ‘nonverbal conduct of a person, if it is intended by him as an assertion.’ Fed.R.Evid.801 (a) (2).”

*Sharp v. Commonwealth*, 849 S.W.2d 542, 545-46 (Ky. 1993)

Social worker gave children (victims) outlines of male and female figures and had the children “illustrate what had happened to them.” The drawings were then made a part of the departmental records. The trial court admitted several of the drawings and social worker Hardorf extensively repeated the children’s out-of-court statements and described their out-of-court actions which identified appellant as their abuser, and included her “conclusions as to the meaning of the children’s acts and statements.” The Court stated that Lantrip, Hester, Mitchell, and Brown “well illustrate, this Court has demonstrated its discomfort with convictions based upon hearsay testimony and ultimate fact opinion given by social workers.” “On this issue, we likewise reverse the trial court.”

*Hellstrom v. Commonwealth*, 825 S.W.2d 612, 617 (Ky. 1992)

“While it is true that the writings were out-of-court statements offered for their truth, and thus hearsay, they were identified and explained by the child victim during her in-court testimony and thus were merely cumulative evidence. Further, she was subject to full cross-examination thereon. The error, if any, was harmless. . . .”

## **5. Closed Circuit Testimony**

See Pretrial motions, Prosecution.

### **C. ORDER OF PROOF**

#### **1. Common plan, pattern or scheme evidence**

See cases under Commonwealth’s motions, 404(b) evidence.

*Mack v. Commonwealth*, 860 S.W.2d 275, 278 (Ky. 1993)

Other crimes evidence. "In the instant case, the testimony of the previous victims and the evidence of Mack's confession precede presentation of any evidence with respect to the present charges. That order of proof invites prejudicial error by precluding the trial court from judging the admissibility of the prior acts evidence according to its degree of similarity to evidence introduced on the present charge."

*Reed v. Commonwealth*, 738 S.W.2d 818 (Ky. 1987)

The court held that it was not prejudicial to the defendant for a social worker to testify about a victim's statements when the victim was subsequently accused of fabrication. However, the Court notes that this is not the proper way to introduce

rebuttal evidence. The Commonwealth should have waited for rebuttal to introduce this evidence, but it was held to be harmless error.

*Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001)

It was permissible to introduce a page of victim's diary to rebut defendant challenge that the victim's testimony was fabricated. He used the victim's diary as a basis for the victim's bias and motive for fabrication. The Court held that one page, which rebuts a claim of fabrication, may be admitted in evidence.

D. HEARSAY

**1. KRE 801 - Definitions**

(a) Statement. A "statement" is

(1) An oral or written assertion; or  
 (2) Nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

**2. Non-Hearsay Use of Extrajudicial Statements**

*Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)

It was not hearsay for the victim's mother to testify about a statement made by the victim to her: "Please don't make me ride with him (the defendant)." The Court concluded that it wasn't offered to prove the truth of the matter asserted and therefore was non-hearsay about the state of mind of the victim.

*Stoker v. Commonwealth*, 828 S.W.2d 619 (Ky. 1992)

It was permissible for two of the victims to testify that the defendant threatened "not to tell anybody or he'd kill us like he did my dad." Their mother had been convicted of killing their father. The Court ruled that this testimony was non hearsay use of extrajudicial statement. This statement was only used to prove intent and therefore admissible.

KRE 802 Hearsay Rule

Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky.

*Bussey v. Commonwealth*, 797 S.W.2d 483 (Ky. 1990)

The Commonwealth introduced evidence testimony by the social worker that victim told her that her father touched her genitals. This testimony does not fall under residual hearsay exception and the Court refused to adopt such an exception.

### **3. Hearsay Exceptions: Declarant Unavailable KRE 804**

#### **KRE 804 Hearsay Exceptions: Declarant Unavailable**

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a criminal prosecution or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statements of personal or family history.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

#### **Idaho v. Wright, 497 U.S. 805 (1990)**

Incriminating statements even if admissible under an exception to the hearsay rule (such as the residual hearsay exception) are not inadmissible under

the Confrontation Clause unless the prosecution demonstrates the unavailability of the declarant and adequate "indicia of reliability." Reliability can be established by showing (1) the statement falls within a firmly rooted hearsay exception or (2) "particularized guarantees of trustworthiness."

*Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010)

Child's nonverbal conduct in pointing at defendant following uncle's asking child who touched her was the equivalent of a verbal assertion by child that defendant touched her, and thus the nonverbal assertion fell under the normal hearsay rules for the admission of evidence.

*Dickerson v. Commonwealth*, 485 S.W.3d 310 (Ky. 2016)

Detective's testimony regarding summarizing witnesses' statements during investigation into defendant's story attributing two-year-old child's fatal injury to physical attack by a "white-headed boy" on playground at trailer park, namely that nothing the detective was told by 14 witnesses he interviewed provided any evidence that there was any truth to the defendant's story, was hearsay, in prosecution for murder arising out of child's death, though testimony did not repeat any express statements from interview subjects. Ky. R. Evid. 801(c).

**4. Exceptions to Rule against Hearsay - Availability of Declarant Immaterial**

KRE 801A Prior statements of witnesses and admissions

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613 and the statement is:

- (1) Inconsistent with the declarant's testimony;
- (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or
- (3) One of identification of a person made after perceiving the person.

*Owens v. Commonwealth*, 950 S.W.2d 837 (Ky. 1997)

It is permissible for a police officer to testify regarding an identification of the defendant made by another person testifying at the trial if the police officer was present during the identification. This is distinguished by *Bussey v. Commonwealth*, 797 S.W.2d 483 (Ky. 1990) and *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

*Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969)

This case abolishes the rule that when a witness fails to testify regarding a prior statement the opposing party may ask if they made the statement and then put the person who heard the out-of-court statement on the witness stand. These out-of-court statements may be used as substantial evidence.

*Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990)

(Overruled on other grounds) A foundation must be laid to introduce a prior, inconsistent statement.

See also Impeachment and Prior Statements

KRE 803 (2) Excited Utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

*McClure v. Commonwealth*, 686 S.W.2d 469 (Ky. App. 1985)

The test for determining whether statements made by a victim may be testified to by other witnesses is whether the statement was made "under stress of nervous excitement and shock." The trial court was affirmed on its decision to allow hearsay testimony because the victim made statements right after the abuse when mother arrived home.

*Hopper v. Commonwealth*, 225 S.W.2d 100 (Ky. 1949)

It was in error to permit witness to testify as to statements made by the victim because the statement is not part of *res gestae*.

*Noel v. Commonwealth*, 76 S.W.3d 923 (Ky. 2002)

It was in error for the trial court to permit the hearsay testimony of the victim's step-sister reciting allegations victim made of sexual abuse against Defendant. It was not an excited utterance when victim's statement was made two days after the incident. However, it is admissible to rebut the defense theory that the victim was improperly influenced to make the statement. Therefore, trial judge's decision to admit the evidence was proper even though for the wrong reasons.

*Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986)

The Court set forth factors in considering whether a statement is an excited utterance:

- (1) Lapse of time between the main act and the declaration;
- (2) The actual excitement of the declarant;
- (3) The place of the declaration;

- (4) The presence there of visible results of the act or occurrence to which the utterance relates;
- (5) Whether the utterance was made in response to a question;
- (6) Whether the declaration was against interest or self-serving.

*Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986)

Each trial court judge must determine on a case by case basis whether a hearsay statement qualifies as spontaneous and therefore permissible under the excited utterance exception. In this case the two and a half year-old victim was declared incompetent to testify. Testimony by the victim's grandmother regarding statements said to her over twenty-four hours after the abuse was inadmissible, as were the statements made a couple of days later to her mother.

*R.C. v. Commonwealth*, 101 S.W.3d 897 (Ky. App. 2002)

It was improper for the juvenile court to allow the victim's mother to testify regarding statements made to her under the excited utterance exception.

The child made these statements several days after the incident and when the mother came in the child's room and startled her. The criteria set forth in *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986) for the admissibility of statement under the excited utterance exception is to be followed. "Whether a particular statement qualifies as an excited utterance depends on the circumstances of each use and is often an arguable point."

*Mounce v. Commonwealth*, 795 S.W.2d 375 (Ky. 1990)

It is not an excited utterance when the hearsay statements are made nine to twenty-three days after the abuse allegedly occurred.

*White v. Illinois*, 502 U.S. 346 (1992)

It was permissible to allow victim's babysitter, mother, and police officer to testify regarding victim's statement to them soon after the crime occurred. These statements fell under the "excited utterance" exception, and it does not require the victim to be declared unavailable.

KRE 803 (3) Then existing mental, emotional, or physical condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

*Schambon v. Commonwealth*, 821 S.W.2d 804 (Ky. 1991)

It was not improper hearsay to admit testimony of victim's foster parent describing his behavior and statements of "games in the shower." The victim's



credibility was attacked by the defendant. Therefore, the statements were proper rebuttal evidence.

*Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993)

Victim was unconscious during the abuse and she admitted she had no memory of what happened. The trial court permitted her to testify about what her friends told her about the incident. The Supreme Court held that the victim could testify about her own observations, even explain that she had been told she was abused by friends and that is why she sought medical treatment. But she could not testify about what her friends told her about the abuse.

*Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002)

It was improper for the Commonwealth to introduce letters exchanged between victim and her friend that had been found by victim's mother. However, once the defendant testified and the issue as to why the mother reported the allegations to the police arose, then the evidence that mother found these letters would have been relevant and admissible on rebuttal.

KRE 803 (4) Statements for Purpose of Medical Treatment or Diagnosis.

Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

*Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010)

Defendant was convicted in the Circuit Court, Jefferson County, of first-degree sodomy, first-degree rape, first-degree burglary, and of being a second-degree persistent felony offender (PFO II). Defendant appealed. The Supreme Court held that: The identity of the perpetrator of sexual abuse is not admissible under exception to hearsay rule for statements made for purposes of medical treatment or diagnosis, even where a family or household member is the perpetrator of sexual abuse against a minor of that household, overruling *Edwards v. Commonwealth*, 833 S.W.2d 842, *J.M.R. v. Commonwealth of Kentucky*, Cabinet for Health and Family Services, 239 S.W.3d 116, and *Plotnick v. Commonwealth*, 2008 WL 162881; Medical professionals' testimony that children identified defendant as the perpetrator of sexual abuse against them was inadmissible hearsay; Admission of other hearsay testimony was improper; Admission of hearsay testimony was not harmless; Defendant's prior attempted rape conviction was admissible to show modus operandi; and burglary instruction failed to properly correspond to statutory elements.

*Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)

It was permissible to allow the mother of the victim to testify that she took her child to therapy because the victim told her that she had been sexually abused. The Court held that such testimony was necessary in the instant case because there was an issue about the victim's referral to the psychologist and why she was referred.

*Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001)

The Court overruled the balancing test set forth in *Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990) regarding the prejudicial effect of permitting the "examining" physician to testify regarding statements made to the doctor. The adoption of KRE 803(4) has eliminated the distinction between treating and examining physician. If *Miller v. Commonwealth*, 925 S.W.2d 449 (Ky. 1995) is interpreted to hold the hybrid rule still exists, it is overruled.

*Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990) (overruled)

The Court stated that on retrial that the trial court should determine whether the statements made by the children to the psychiatrist had enough probative value that outweighed the prejudicial effect. The trial court is also to consider that if the doctor is not the treating doctor then the evidence is less reliable. The distinction between treating and testifying physician has been blurred.

*Sharp v. Commonwealth*, 849 S.W.2d 542 (Ky. 1993)

Following the rule set forth in *Drumm v. Commonwealth*, Ky., 783 S.W.2d 380 (1990), the Court held that the physician which testified in this case was not a treating physician and the prejudicial effect of his testimony outweighed the probative value. The reliability is significantly less because there is little relationship between the physician and the patient.

*Miller v. Commonwealth*, 925 S.W.2d 449 (Ky. 1995)

(Overruled by *Garrett* above) The trial court determined that the doctor was not the victim's treating physician and therefore the test of probative value outweighs the prejudicial effect of the testimony. The Court held that the case for the Commonwealth was in such a weakened state and by admitting the testimony of the doctor, there was severe prejudicial effect to the Defendant.

*Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993)

Victim must have personal knowledge of history provided to doctor to permit doctor to testify about victim's statements. It was highly prejudicial to admit evidence of the victim's statement to the psychologist she saw for treatment. This case is distinguishable from cases that permit the testimony of psychiatrist regarding the history of the patient because the victim had no knowledge of the

crimes other than what she had heard from people who heard stories from other people.

*Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994)

Doctor's office records are not to be admitted without doctor testifying. It was hearsay to admit the doctor's medical records without the doctor to testify because the court was unable to determine whether the hearsay statements contained in the medical records were admissible under the Drumm balancing test. The defendant was also denied his right to confrontation of a witness because only records were introduced, the doctor did not testify.

*Holland v. Commonwealth*, 272 S.W.2d 458 (Ky. 1954)

It is permissible for a physician to testify as to the victim's appearance shortly after alleged offenses took place to prove corpus delicti when victim's clothing soiled and mussed up and scratches and bruises were on her body.

*Rollyson v. Commonwealth*, 320 S.W.2d 800 (Ky. 1959)

It was permissible for a physician to testify that a victim told him she was raped as a reason for presenting for treatment.

*Souder v. Commonwealth*, 719 S.W.2d 730 (Ky.1986)

It is not permissible for a doctor to testify regarding the medical history of a victim when all of the information came primarily from information provided by others. This information provided to the doctor must be admissible for the doctor's testimony to be admissible.

*Jones v. Commonwealth*, 833 S.W.2d 839 (Ky. 1992)

It is not necessary for the trial court to hold a preliminary hearing to determine whether hearsay testimony by physician is admissible. All that is required is a proper foundation for a physician to testify regarding the medical history of a victim.

*White v. Illinois*, 502 U.S. 346 (1992)

No basis to exclude hearsay testimony by physician under the Confrontation Clause.

KRE 803 (6) Records of regularly conducted activity.

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances

of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(A) Foundation exemptions. A custodian or other qualified witness, as required above, is unnecessary when the evidence offered under this provision consists of medical charts or records of a hospital that has elected to proceed under the provisions of KRS 422.300 to 422.330, business records which satisfy the requirements of KRE 902(11), or some other record which is subject to a statutory exemption from normal foundation requirements.

(B) Opinion. No evidence in the form of an opinion is admissible under this paragraph unless such opinion would be admissible under Article VII of these rules if the person whose opinion is recorded were to testify to the opinion directly.

*James v. Commonwealth*, 360 S.W.3d 189 (Ky. 2012)

The trial court erred when it admitted, through the victim's medical records, statements defendant made to the victim, which the victim then relayed to the sexual assault nurse who examined her at hospital; the statements were hearsay.

*Alexander v. Commonwealth*, 862 S.W.2d 856 (Ky. 1993)

(Overruled on other grounds) It was not permissible under the business records exception to admit the hearsay testimony of the social worker. For the business records to be admissible both the maker of the record and the person supplying the information must be under a duty to report. The victim supplying the information has no duty to report.

*Prater v. Cabinet for Human Resources*, 954 S.W.2d 954 (Ky. 1997)

The records of social workers are admissible under the business records exception KRE 803(6). However, not every entry in the record is admissible. If the social worker testifies, the records will be admissible. However, the recorded opinions of the social workers are not admissible and neither are statements made to the social workers by the victim.

*Cabinet for Human Resources v. E.S. and H.S.*, 730 S.W.2d 929 (Ky. 1987)

Only factual observations in the Cabinet's records are admissible under business records hearsay. Opinions and conclusions of social workers are not admissible.

*Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990)

(Overruled on other grounds) Factual observations by social workers in the records kept by the social workers are admissible records. But, the opinions and conclusions are not admissible.

Jordan v. Commonwealth, 74 S.W.3d 263, 269 (Ky. 2002)

In Prater, we specifically held that “[t]he recorded opinions and conclusions of social workers are not admissible.” And a social worker’s “professional determination” that an allegation of abuse is “substantiated” is nothing more than improper opinion testimony. The testimony concerning information contained in the DSS-150 form did nothing more than put before the jury an unidentified social worker’s written belief that appellant’s father was guilty of abusing D.W. Under Article VII of the Kentucky Rule of Evidence, the social worker who prepared the DS-150 form could not have testified to this conclusion. The trial court erred when it allowed the Commonwealth to introduce this opinion testimony through testimony concerning the contents of the DSS-150 form.”

Bussey v. Commonwealth, 797 S.W.2d 483 (Ky. 1990)

No investigative hearsay. A police officer may only testify about the action he took if the action he took is in question. There is no investigative hearsay exception. The purpose is not to prove the facts told to the police officer. It was not improper for a police officer to testify that he would have filed a complaint unless he believed some kind of misconduct had occurred. This "investigative hearsay" is not an exception to the hearsay rule. “Prosecutor’s should, once and for all, abandon the term ‘investigative hearsay’ as a misnomer, an oxymoron.”

Commonwealth v. M.G., 75 S.W.3d 714 (Ky. App. 2002)

No investigative hearsay. The trial court permitted the police investigator to testify about the content of out-of-court statements made to him during the course of his investigation. It is impermissible to allow the testimony of the police detective regarding out-of-court statements because the actions of the police officer were not challenged.

Daniel v. Commonwealth, 905 S.W.2d 76 (Ky. 1995)

The police officer testified that the victim told him she was raped and he took victim into protective custody. It was in error to permit the police to testify regarding the victim’s statements to him because it was unnecessary to explain the actions of the detective as they were not at issue.

Sanborn v. Commonwealth, 754 S.W.2d 534, 542 (Ky. 1988)

(This case was receded from in Hudson v. Commonwealth, 202 S.W.3d 17 (Ky. 2006 on a separate issue.) "In each of these three examples we are dealing with 'investigative hearsay.' In each instance the police officer was testifying as to information furnished to him by persons whom he interviewed. The problem is the information was inadmissible because it was hearsay. It was relevant for the truth of what was stated, not for any non-hearsay use to explain the actions of the police officers. The actions taken by the police officers were not at issue."

*Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)

Other witnesses. It was permissible to allow the mother of the victim to testify that she took her child to therapy because the victim told her that she had been sexually abused. The Court held that such testimony was necessary in the instant case because there was an issue about the victim's referral to the psychologist and why she was referred.

*Sharp v. Commonwealth*, 849 S.W.2d 542 (Ky. 1993)

No social worker exception. The defendant was charged with two counts of rape of his step-daughters. The trial court allowed the social worker who interviewed the two victims to testify extensively about their out of court statements and express her opinion about their truthfulness. There is no exception to the hearsay rule which permits the social worker to testify about their investigations and facts told to them by other people.

*Commonwealth v. M.G.*, 75 S.W.3d 714 (Ky. App. 2002)

It was improper to admit the testimony of social workers in which they repeated statements made by the victim and his sister.

*See also R.C. v. Commonwealth*, 101 S.W.3d 897 (Ky. App. 2002).

*Waters v. Kassulke*, 916 F.2d 329 (6th Cir. 1990)

It is not bolstering for the victims to testify about prior sexual abuse that occurred to them.

*Smith v. Commonwealth*, 920 S.W.2d 514 (Ky. 1995)

It was reversible error for the trial court to allow the police detective to testify about statements made by the victim. On cross-examination by the defense counsel, they tried to show inconsistencies in the victim's statement at trial versus the statement to the police. The Court held that the testimony by the detective in this case was intended to bolster victim's testimony because she had already effectively testified.

*Reed v. Commonwealth*, 738 S.W.2d 818 (Ky. 1987)

A social worker is not permitted to testify about statements made by victim in the instant case because the defense did not attack the victim on charges of recent fabrication or any type of fabrication in cross-examination of victim. However, once the defendant testified and accused the victim of fabrication, it was admissible as hearsay.

**Medical Records:**

Certified medical records of a hospital are admissible as self-authenticating documents. KRS 422.300. However, the requirements of the hearsay rule must still

be met and the information in the hospital records must be admissible under hearsay.

## E. OPINION TESTIMONY

### 1. KRE 701 Opinion Testimony by Lay Witness

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are:

- (a) Rationally based on the perception of the witness; and
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact issue

#### **Collective Facts Rule:**

*Clifford v. Commonwealth*, 7 S.W.3d 371 (Ky. 1999)

The "collective facts rule" permits a lay witness to resort to a conclusion or an opinion to describe an observed phenomenon where there exists no other feasible alternative by which to communicate that observation to the trier of fact. Police officer who had listened to undercover drug transaction via an audio transmitter, could testify that a fourth voice he heard sounded like that of a black male.

#### **Opinion of Defendant's Guilt Not Admissible:**

*Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)

The opinion of the father of another child suspected of being sexually abused by defendant, that social workers who interviewed the child were already convinced of the defendant's guilt, was irrelevant in sexual abuse prosecution, absent proof that the social workers falsified evidence.

### 2. KRE 702 Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The 2007 amendment to Kentucky Rule of Evidence, Rule 702 is designed to follow the development and adopts exact language set by the Federal Rules. The amendment will codify the approach taken in the Daubert case, followed in the Toyota Motor Corp. case and allow the trial court to act as gatekeeper to the introduction of "scientific, technical, or other specialized knowledge." The amendment does not specifically require the use of all or any one of the factors

suggested by the court. It allows the trial court to use those factors that are appropriate to the case at trial.

*Hammond v. Commonwealth*, 577 S.W.3d 93 (Ky. App. 2019)

Sociology professor's expert testimony about sexual role playing would have aided jury in determining a necessary element of crime charged, and, therefore, trial court abused its discretion in not conducting a full Daubert hearing to consider the relevance and reliability of professor's testimony before excluding it, in prosecution for unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities; sexual role playing was not a topic of which the jury would necessarily understand the specifics, testimony would have helped jury determine whether defendant was engaging in role playing behavior, and testimony would have aided jury in determining whether defendant knew person he was talking to was 15 years old.

*Commonwealth v Martin*, 290 S.W.3d 59 (Ky. App. 2008)

Trial court's decision to exclude Commonwealth's proffered expert witness's testimony that injuries sustained by infant victims were the result of shaken baby syndrome was abuse of discretion, in prosecution of defendants for assault in the second degree and criminal abuse in the first degree; trial court's decision was founded on the unsupported legal conclusion that because there was dispute amongst the experts as to the possible cause of the victims' injuries, it was the court's role to choose the side it found more convincing and exclude the side it found less convincing, based in part on giving greater weight to "scientific" as opposed to "clinical" studies.

*Bell v. Commonwealth*, 245 S.W.3d 738 (Ky. 2008)

Evidence of a child's behavioral symptoms or traits as being indicative of sexual abuse, which evidence is sometimes referred to as Child Sexual Abuse Accommodation Syndrome, is not a generally accepted medical concept, as would be required for admission as scientific evidence or expert evidence.

### **3. KRE 704**

The Kentucky Supreme Court did not adopt Rule 704 of the Federal Rules of Evidence, a rule which allows expert opinion testimony upon ultimate issues of fact. As a result there were a number of child sexual abuse cases that were reversed because the physician who examined a child victim, testified regarding his or her findings and opinions.

*Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)

The Kentucky Supreme Court departed from the so called "ultimate issue" rule and ruled that expert opinion evidence is admissible so long as:

1. The witness is qualified to render an opinion on the subject matter;



2. The subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993);
  - a. Has the scientific methodology been tested;
  - b. Has it been subjected to peer review and publication;
  - c. Has the court considered the known or potential rate of error;
  - d. Has there been a determination of a particular degree of acceptance within that scientific community.
3. The subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403; and;
4. The opinion will assist the trier of fact per KRE 702.

Insofar as they hold otherwise, *Brown v. Commonwealth*, 812 S.W.2d 502 (Ky. 1991) and *Alexander v. Commonwealth*, 862 S.W.2d 856 (Ky. 1993) are overruled *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997)

### **Trial Court Discretion:**

*Ford v. Commonwealth*, 665 S.W.2d 304, 309 (Ky. 1983)

“On the question of experts, it has long been the law of this jurisdiction that the decision as to the qualifications of an expert rests in the discretion of the trial court.”

*Kentucky Power Co. v. Kilbourn*, 307 S.W.2d 9, 12 (Ky. 1957)

“While it is clear that a witness in order to be competent as an expert must show himself to be skilled in the business or profession to which the subject about which he is called to testify relates, there is no precise rule as to the mode in which such skill or experience must be acquired. A witness may become qualified by practice or an acquaintance with the subject. He may possess the requisite skill by reason of actual experience or long observation. The decision as to qualification of the witness as an expert rests in the discretion of the trial court.”

### **Educational Degrees:**

*Hellstrom v. Commonwealth*, 825 S.W.2d 612, 614 (Ky. 1992)

(Licensed clinical social worker – reversed)

Mr. Veltkamp is well-trained and experienced as a social worker . . . but he is neither a physician, a psychiatrist, nor a psychologist trained in diagnosing the cause of a child’s mental disturbance . . . .”

### **Medical Expert Opinion Testimony:**

*Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)

The testimony of a licensed obstetrician/gynecologist that the child victim's vaginal injuries were consistent with her history of sexual abuse was relevant in sexual abuse prosecution and was not inadmissible opinion evidence concerning ultimate issue. Stringer overrules *Brown v. Commonwealth*, Ky., 812 S.W.2d 502 (Ky. 1991) and *Alexander v. Commonwealth*, 862 S.W.2d 856 (Ky. 1993)

*Hellstrom v. Commonwealth*, 825 S.W.2d 612, 617 (Ky. 1992)

(Family physician – reversed on other grounds) “A physician can certainly express a medical opinion as he did here that the physical changes, including thickening and scarring observed in the external genitalia of a patient, were consistent with the complaints of sexual abuse including prodding of the genitals.”

*Pelvor v. Commonwealth*, 638 S.W.2d 272, 275-76 (Ky. 1982)

(Specialist in obstetrics and gynecology) The doctor, by reason of his special skills and special training, was qualified to conclude that the bruises were induced by force and the doctor most assuredly was capable of testifying of the presence of sperm in her body. It was thus only logical, and it follows as a matter of course that someone by the use of force had intercourse with Linda. Dr. Gunn did not associate Pevlor with the execution of the force on Linda or with having intercourse with her. He merely stated that her condition was consistent with intercourse induced by force. “It was competent for Dr. Gunn, by reason of his expertise, to express his personal opinion that Linda had undergone forcible intercourse.”

*Collins v. Commonwealth*, 951 S.W.2d 569, 575 (Ky. 1997)

(Daubert hearing not required.) “[W]e conclude that such analysis is not, in fact, triggered in this case. Daubert and Mitchell use the catch phrases ‘expert scientific testimony’, ‘theory’, ‘technology’, and ‘methodology’. Dr. Bate’s testimony, on the other hand, concerned basic female anatomical findings. Her examinations did not involve any novel scientific techniques or theories. Likewise, the research that Dr. Bates referred to involved the study of a female physical characteristic... We discern nothing of a scientific nature to trigger the necessity of applying the Daubert analysis.”

*Turner v. Commonwealth*, 914 S.W.2d 343 (Ky. 1996)

Physician’s testimony that no physical findings of abuse in victim’s examination was not inconsistent with victim’s allegations of sexual abuse was admissible. It was relevant not merely to verify truthfulness of victim, but to establish that absence of physical findings did not necessarily indicate that such abuse had not occurred.

*Luttrell v. Commonwealth*, 952 S.W.2d 216 (Ky. 1997)

Great care should be exercised by the trial court when a determination has been made that a witness is an expert, all rulings regarding the witness' expertise should be made outside the hearing of the jury and there should be no declaration that witness is an expert.

**Psychological/Psychiatric Expert Testimony:**

Child Sexual Abuse Accommodation Syndrome (CSAAS) is not admissible.

*Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky. 2009)

Here, the testimony in the Commonwealth's case-in-chief that sexually abused children, like B. T., commonly add details over time through counseling is analogous to the situation in *Miller*, where this Court held testimony that sexually abused victims commonly delay reporting of their abuse to be reversible error. *Miller*, 77 S.W.3d at 577. In essence, victims are delaying their reporting of some of their abuse when they later add details. In addition, when Brown was recalled in the Commonwealth's rebuttal, she went even further in identifying generic characteristics of child sex abuse victims by describing them as outwardly appearing happy. This is the type of testimony this Court feared in *Newkirk*; this was testimony where there '“remain[s] the question of whether other children who had not been similarly abused might also develop the same symptoms or traits.’ “ *Newkirk*, 937 S.W.2d at 691-92 (quoting *Lantrip*, 713 S.W.2d at 817). Finally, the Commonwealth even went so far as to ask whether these “symptoms” are what cause sexually abused children to become prostitutes. Brown's “expert” testimony in this case, coupled with the Commonwealth's speculation about the creation of prostitutes, are the exact type of generic and unreliable evidence this Court has repeatedly held to be reversible error. Therefore, this case must be reversed for a new trial because of the admission of CSAAS testimony against Appellant.

*Kurtz v. Commonwealth*, 172 S.W.3d 409 (Ky. 2005)

This Court quoted the basic rule against CSAAS testimony: [W]here a victim had delayed reporting of abuse, we held improper the testimony of a seasoned child sex abuse investigator stating that it was common, in her experience, for sexually abused victims to delay reporting of the abuse.... We held that “a party cannot introduce evidence of the habit of a class of individuals either to prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class because he/she acted the same way under similar circumstances.”

*Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996)

An expert's opinion that it is common for child victims of sexual abuse to recant held to be an opinion “synonymous” with the ultimate fact of guilt.

Evidence about aspects of CSAAS is generally not admissible in criminal prosecution as CSAAS has not attained general acceptance in the scientific community. Such evidence can lack relevancy, and expert testimony could invade the province of the jury by undue influence of credibility. Even when the testimony is introduced to rebut evidence presented by the defendant that child had recanted, CSAAS is inadmissible.

*R.C. v. Commonwealth*, 101 S.W.3d 897 (Ky. App. 2002)

“Therefore we find no basis for concluding that the 1996 amendment to KRS 600.020(47) which permits a licensed clinical social worker to express an opinion regarding a diagnosis of sexual abuse, or that Andrew’s testimony was admissible under *Stringer v. Commonwealth*. Consequently we conclude the district court erred by allowing Andrews to express an opinion that I.C. exhibited signs of being a sexually abused child.”

*Bussey v. Commonwealth*, 697 S.W.2d 139 (Ky. 1985)

Psychiatrist testimony of child abuse accommodation syndrome is inadmissible.

*Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986)

Clinical social worker with a master’s degree testimony regarding the child abuse accommodation syndrome is inadmissible.

*Hester v. Commonwealth*, 734 S.W.2d 457, 458-59 (Ky. 1987)

Sociologist testimony inadmissible. Family sociologist with a master’s degree in sociology testified as follows:

“Children do not usually have a lot of details in – when they are – tell something like this unless it has actually happened . . . . When they have given specific details to adults, generally - - well almost universally this has happened to them. One of the reasons children often will say later it didn’t happen is because the family has put pressure on them either verbally, or by their actions to be loyal to the family.”

“The admission of the expert opinion was improper as it, in effect, told the jury to believe the story the children had initially told and disbelieve the testimony given in open court [in which they denied any abuse].”

“Expert opinion which purports to resolve the ultimate issue before the jury is inadmissible.”

*Brown v. Commonwealth*, 812 S.W.2d 502, 504 (Ky. 1991)

(Overruled on other grounds. *Stringer v. Commonwealth*, 956 S.W. 2d 883 (Ky. 1997) Social worker testified as to whether the victim’s behavior was consistent with abuse. “In the case at bar . . . the social worker testified as to the components of the Syndrome but did not label the theory. In accordance with our previous opinions, we hold that the trial court erred in admitting Ms.

McCreary's expert testimony regarding Child Sexual Abuse Accommodation Syndrome."

*Hellstrom v. Commonwealth*, 825 S.W.2d 612 (Ky. 1992)

Testimony from clinical social worker that delayed disclosure is common among child victims of sexual abuse is inadmissible.

Offender Profiling Opinion Is Not Admissible.

*Hampton v. Commonwealth*, 666 S.W.2d 737, 742 (Ky. 1984)

Opinion evidence from a clinical social worker that defendant's psychological development by history indicated that the 12 year-old victim was too young to be attractive to him was inadmissible because it invaded the province of the jury.

*Pendleton v. Commonwealth*, 685 S.W.2d 549, 553 (Ky. 1985)

Appellant attempted to introduce psychologist testimony "to the effect that Pendleton's psychological profile was not consistent with that of a sex offender. In addition there was a desire to present Kroger's testimony as to the probability that Pendleton had committed the act." at 553. Trial court correctly refused the testimony because it "should not have been admitted because it went to the ultimate issue of innocence or guilt."

*Dyer v. Commonwealth*, 816 S.W.2d 647, 654 (Ky. 1991)

(Overruled on other grounds. *Baker v. Commonwealth*, 973 S.W.2d 54 (Ky. 1998)) A police officer was asked to describe, for the jury, the behavior of a pedophile. "Concepts such as a 'battered woman syndrome' in Craig and Rose cases, or a 'pedophile' in the present case, have no conceivable bearing on a criminal case except as they bear on the accuser's mental condition at the time of the alleged offense. The proposition that they should be used as evidence to convict or acquit without further testimony from an expert qualified in the field positively establishing that the condition is a recognized scientific entity, and then tying the accused to this mental state, is indefensible. Commonwealth v. Craig was in error, and is overruled to the extent it has overruled Commonwealth v. Rose on this point." "In the present case, in the event of a retrial no evidence should be admitted, and no argument permitted, characterizing the appellant as a "pedophile" or suggesting that he suffers from 'pedophilia', unless there is proof from an expert on the subject qualified to express an opinion about the appellant's mental condition."

**Other Expert Testimony:**

*Fugate v. Commonwealth*, 933 S.W.2d 931 (Ky. 1999)

DNA. The reliability of DNA by PCR and RFLP methods of analysis have been sufficiently established so that the resulting DNA evidence is per se admissible.

*Staggs v. Commonwealth*, 877 S.W.2d 604 (Ky. 1993)

Art Therapy. Art therapist gave testimony that the victim's drawings indicated sexual abuse. It is not established that art therapy is generally accepted as reliable for identifying sexual abuse or that the technique used in this case complied with acknowledged method for applying the science.

*Stringer v. Commonwealth*, 956 S.W.2d 883, 888-92 (Ky. 1997)

Testimony of the truthfulness of a child is not admissible.

Testimony by expert that children are generally suggestible and may be improperly influenced by adult interrogation if proper procedures not followed excluded as irrelevant. Interviews were neither audio taped, nor videotaped so "Dr. could not ascertain whether proper procedures were followed. Thus, he presumed that proper techniques were not followed and child's testimony was unreliable. This proposed hypothesis premised upon speculation was properly excluded as irrelevant".

## F. IMPEACHMENT - INCONSISTENT STATEMENT – PRIOR CONSISTENT STATEMENTS

### 1. KRE 801A Prior Statements of witnesses and admissions

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRS 613 and the statement is:

- (1) Inconsistent with the declarant's testimony;
- (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or
- (3) One of the identification of a person made after perceiving the person.

### 2. KRE 613 Prior Statements of Witnesses

(a) Examining witness concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be

in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the trial or hearing of the witness sought to be contradicted, and when the court finds that the impeaching party has acted in good faith.

(b) This provision does not apply to admissions of a party-opponent as defined in KRE 801A.

### **3. Prior inconsistent statements may be used for substantive evidence.**

*Jett v. Commonwealth*, 436 S.W.2d 788, 792 (Ky. 1969)

When both the person who is said to have made the out-of-court statement and the person who says he made it appear as witnesses under oath and subject to cross examination there is simply no justification for not permitting the jury to hear, as substantive evidence, all they both have to say on the subject and to determine wherein lies the truth.

*Wise v. Commonwealth*, 600 S.W.2d 470, 472 (Ky. App. 1978)

“[T]he credibility of any witness, including one’s own witness, may be impeached by showing that the witness has made prior inconsistent statements.”

### **4. Hearsay testimony must be properly introduced for impeachment purposes.**

*Bussey v. Commonwealth*, 797 S.W.2d 483 (Ky. 1990)

It was in error for the Commonwealth to introduce testimony by police officers testifying about prior consistent statements made by fifty year old mentally challenged sexual abuse victim. The Commonwealth introduced this hearsay testimony not for impeachment purposes but because the defendant challenged the victim’s credibility. That was in error.

### **5. A proper foundation must be laid to impeach a witness.**

*Noel v. Commonwealth*, 76 S.W.3d 923 (Ky. 2002)

The defendant called victim's step-father as a witness for the purpose of asking him if the victim told him that the sexual abuse did not occur. The defense never asked the victim if she made the statement. The trial court properly sustained the Commonwealth's objection to the testimony of the step-father.

*Bussey v. Commonwealth*, 697 S.W.2d 139 (Ky. 1985)

The Commonwealth failed to lay a foundation to allow the detective to testify regarding the victim's mother's inconsistent statement because it did not properly question her regarding the inconsistent statements.

*Schambon v. Commonwealth*, 821 S.W.2d 804 (Ky. 1991)

The taped statement of the victim was properly introduced. When victim was confronted about what he had previously stated, he was evasive in his testimony and ambiguous allowing for the introduction of the taped statement.

*Reed v. Commonwealth*, 738 S.W.2d 818 (Ky. 1987)

The Court held that it was not prejudicial to the defendant for a social worker to testify regarding a victim's statements when the victim was subsequently accused of fabrication. However, the Court notes that this is not the proper way to introduce rebuttal evidence. The Commonwealth should have waited for rebuttal to introduce this evidence, but it was held to be harmless error.

*Samples v. Commonwealth*, 983 S.W.2d 151 (Ky. 1998)

Defendant was accused of raping, sodomizing and sexually abusing his three step-children. As part of his defense he called a social worker to state that several of victim's allegations were not part of the social worker's records. Upon cross-examination it was permissible for the Commonwealth to question whether the defendant threatened "that if anyone removed his kids that he would kill 'em." The children alleged that defendant threatened to kill them. This testimony is permissible because the defendant is alleging fabrication.

*Tome v. United States*, 513 U.S. 150, 167 (1995)

It was improper for the government to introduce consistent statements of a victim which were made after the allegations that the victim fabricated her story. Rule 801(d)(1)(B) "permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive. These conditions of admissibility were not established here."

*Smith v. Commonwealth*, 920 S.W.2d 514 (Ky. 1995)

It was in error to permit the detective to testify about victim's prior consistent statement. There was no dispute about the victim's testimony and therefore no reason to admit a prior consistent statement.

*Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001)

It was permissible to introduce a page of victim's diary when defendant challenged the victim's testimony against defendant as being fabricated. He used the victim's diary as a basis for the victim's bias and motive for fabrication. Therefore, permissible to introduce one page which rebuts a claim of fabrication.



*Muse v. Commonwealth*, 779 S.W.2d 229, 230 (Ky. App. 1989)

At trial, the victim recanted her charges against the defendant. "If the out-of-court statement is material and relevant, then it may be received into evidence through the testimony of another witness both as an impeachment tool and as substantial evidence of the facts stated." The Court held that the videotape of J.S.'s prior statement was properly admitted, and that it did not think it is material the prior statement was introduced through a videotape of it. "In fact, it can be argued that a videotape of the actual statement is preferable to having a second witness testify as to what the first witness said previously because the jury would be able to discern more of the first witness's demeanor and the exact statement made on the videotape."

## **6. KRE 608 Evidence of Character and Conduct of Witness**

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

*Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010)

Defendant was convicted of reckless homicide for her role in a fatal vehicular collision. She appealed, and the Court of Appeals vacated the judgment of conviction and remanded for a new trial. The Commonwealth appealed. The Supreme Court held that a trial court has discretion to permit or deny impeachment by extrinsic evidence on a collateral issue raised by a party on direct examination, overruling *Woodard v. Commonwealth*, 219 S.W.3d 723, and *Purcell v. Commonwealth*, 149

S.W.3d 382, and Trial court acted within its discretion in allowing the prosecution to impeach with extrinsic evidence defendant's direct testimony about her reason for taking prescription painkillers before the collision.

## **7. Impeachment on victim's earlier statement that she was a virgin**

### Explanation of Woodard

The state of L.A.'s virginity is not relevant to the claims made against the Appellants. It is in fact the kind of information the Rape Shield Law is designed to exclude, so that the witness is not actually made to be a defendant at the trial. *Smith v. Commonwealth*, 566 S.W.2d 181 (Ky. App. 1978). Here, however, L.A. put that status into evidence during her direct testimony. Given her avowal testimony, her statement was obviously false despite her attempt to explain it away. Consequently, the evidence must be reviewed as to whether its probative value outweighs its prejudicial effect. *Berry v. Commonwealth*, 84 S.W.3d 82 (Ky. App. 2001).

The defense wanted to introduce her statement to challenge her credibility, not to prove whether she was or was not a virgin when she claimed the Appellants abused her. Her prior inconsistent statement would be relevant to show this. Given that her virginity status is not relevant to prove her claims of abuse by the Appellants, this would be impeachment on a collateral matter, which is allowed while the witness is still on the stand, although not by extrinsic evidence. Richard Underwood and Glen Weissenberger, *Kentucky Evidence 2005-2006 Courtroom Manual* 321 (2005). However, the trial court must decide what is most important: allowing the impeachment or giving the protection of the Rape Shield Law. Impeachment on an irrelevant matter that would tend to put the victim on trial for matters outside the charged offenses obviates the requirements of KRE 412. Ordinarily, a motion and hearing must be held to determine the relevance of such evidence prior to offering it. While impeachment possibilities often do not arise until testimony at trial, impeachment on the irrelevant matter at issue, even though arising at trial, would violate the purpose of the Rape Shield Law. The trial court did not abuse its discretion in denying the impeachment evidence. *Woodard v. Commonwealth*, 219 S.W.3d 723, 730 (Ky.2007)

### *Bell v. Commonwealth*, 245 S.W.3d 738 (Ky. 2008)

Testimony of social worker who interviewed alleged victim of sexual abuse, that alleged victim was "spontaneous" and "unrehearsed" in telling her story, as opposed to alleged victims who sound "rehearsed" or "canned," improperly vouched for credibility of alleged victim.

Vaughn v. Commonwealth, 230 S.W.3d 559 (Ky. 2007)

The trial court's exclusion of evidence of child's reputation for truthfulness in her elementary school constituted reversible error, in prosecution for attempted sodomy in the first degree; child's school was an adequate community from which to obtain credibility evidence, and the evidence would have been material since child's allegations formed the foundation for the charge against defendant.

## G. DEFENSES

### 1. Defense of consent

KRS 510.030

In any prosecution under this chapter in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was, at the time of the offense:

- (1) Less than sixteen (16) years old;
- (2) Sixteen (16) or seventeen (17) years old and the defendant was at least ten (10) years older than the victim;
- (3) An individual with an intellectual disability;
- (4) Mentally incapacitated; or
- (5) Physically helpless;

The defendant may prove in exculpation that at the time of the conduct constituting the offense he or she did not know of the facts or conditions responsible for such incapacity to consent.

Chames v. Commonwealth, 405 S.W.3d 519 (Ky. App. 2012)

Evidence that defendant attempted to engage in deviate sexual intercourse with minor victim was sufficient to support conviction of attempted first-degree sodomy; victim testified that defendant unzipped his pants and put his penis right in front of her mouth, and that she would not let him put his penis into her mouth because she kept her mouth shut, and jury could reasonably have inferred from such testimony that defendant used force to place his penis directly in front of victim's mouth in attempt to penetrate her mouth. .

Holbrook v. Commonwealth, 662 S.W.2d 484 (Ky. App. 1984)

Consent is not a defense to use of minor in a sexual performance.

## **2. Defense of Intoxication**

Malone v. Commonwealth, 636 S.W.2d 647 (Ky. 1982)

Voluntary intoxication is only available in those crimes which require knowledge and intent. The offense of rape first degree and sodomy first degree do not require a mental state and therefore voluntary intoxication is not available as a defense. See also *Isaacs v. Commonwealth, 553 S.W. 2d 843 (Ky. 1977)*; *Hatfield v. Commonwealth, 473 S.W.2d 104 (Ky. 1971)*

## **3. Attempt**

KRS 506.010 Criminal attempt

(1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.

(3) A person is guilty of criminal attempt to commit a crime when he engages in conduct intended to aid another person to commit that crime, although the crime is not committed or attempted by the other person, provided that his conduct would establish complicity under KRS 502.020 if the crime were committed by the other person.

### **Substantial Step:**

Young v. Commonwealth, 968 S.W.2d 670 (Ky. 1998)

The defendant approached several boys either asking the boys to have sex with him or with each other. The Court found the "substantial step" requirement for the offense of criminal attempt to commit unlawful transaction with a minor. The Court held that by asking the boys to have sex with him or each other was a substantial step and therefore the defendant could be convicted of criminal attempt.

Harris v. Commonwealth, 846 S.W.2d 678 (Ky. 1992)

(over ruled on other grounds. *Mitchell v. Commonwealth, 908 S.W. 2d 100 (Ky. 1995)*) Defendant charged with attempted sodomy. "Substantial step" was met

because victim testified she was awakened to a man attempting to perform oral sex on her.

### **Renunciation:**

#### KRS 506.020 Criminal attempt; defense of renunciation

(1) In any prosecution for criminal attempt to commit a crime, it is a defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant abandoned his effort to commit the crime and, if mere abandonment was insufficient to avoid the commission of the crime, took the necessary affirmative steps to prevent its commission

(2) A renunciation is not “voluntary and complete” within the meaning of this section if it is motivated in whole or in part by:

(a) A belief that circumstances exist which pose a particular threat of apprehension or detection of the accused or another participant in the criminal enterprise or which render more difficult the accomplishment of the criminal purpose; or

(b) A decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar object.

#### RCr 9.86 Limitations on conviction

The defendant may be found guilty of an offense included in the offense charged or of an attempt to commit either the offense charged or an offense included therein if the attempt is an offense.

#### Cooper v. Commonwealth, 569 S.W.2d 668 (Ky. 1978)

It was proper to refuse to instruct on attempted rape when the defendant attempted at trial to repudiate his confession that he did rape the victim. He stated at the trial that the victim (a seventy-four year-old woman) made sexual advances toward him and then when he responded she resisted. The overwhelming testimony was that the defendant intended to and did rape her. Therefore, not entitled to an instruction on attempted rape.

## **H. DIRECTED VERDICT**

Pursuant to CR 50.01 “[a] motion for directed verdict shall state the specific grounds therefor.”

### **1. The Court must look at the evidence as a whole to determine whether directed verdict should be granted**

*Bussey v. Commonwealth*, 797 S.W.2d 483 (Ky. 1990)

Not every fact of victim's testimony must be probable or believable. A conviction can still be supported if the victim's testimony on the whole would lead the jury to a reasonable belief that a crime occurred.

*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)

“On appellate review, the test of directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a direct verdict of acquittal.”

*Holland v. Commonwealth*, 272 S.W.2d 458 (Ky. 1954)

The defendant on retrial would be entitled to a directed verdict if the evidence was so incredible or improbable as to be untrue and therefore not prove the required element of force.

## **2. Jury must judge the credibility of victim**

*Owsley v. Commonwealth*, 743 S.W.2d 408 (Ky. 1987)

Defendant alleges that his motion for directed verdict should have been granted because the ten year-old child’s testimony was "so incredible and improbable to be as variance with the laws of common sense." However, there was sufficient evidence to support a conviction of the defendant of first degree sexual abuse. It is up to the jury to judge credibility of a witness, not the court.

## **3. Motion viewed in light most favorable to the Commonwealth**

*Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993)

It was not in error for the trial court to overrule the defendant’s motion for directed verdict. When viewing the totality of the evidence in favor of the Commonwealth, a jury could believe beyond a reasonable doubt that the defendant committed rape, sodomy, sexual abuse and wanton endangerment.

*Wombles v. Commonwealth*, 831 S.W.2d 172 (Ky. 1992)

When the defendant makes a motion for directed verdict the court must look at the evidence that is introduced as true. It is for the jury to judge credibility. When an appellate court reviews the trial court’s ruling it should determine whether it is unreasonable for a jury to find guilt.

### **I. SUFFICIENCY OF THE EVIDENCE**

#### **1. Rape (KRS 510.040 - 510.060)**

**Penetration may be proved by circumstantial evidence:**

*Causey v. Commonwealth*, 550 S.W.2d 494 (Ky. 1977)

Penetration may be proven by circumstantial evidence. Nine year-old victim testified that she woke up and defendant was “touching and pushing” at the private parts of her body with the private parts of his body. Her physical appearance was also described. Therefore, there was enough evidence to submit to the jury.

*Paenitz v. Commonwealth*, 820 S.W.2d 480 (Ky. 1991)

The defendant argued that there was insufficient evidence to prove penetration for the rape of 3 ½ month old. Defendant claimed he merely stuck his finger in the baby’s vagina. However, there was sufficient circumstantial evidence to show that there was penetration, namely the testimony of the doctor that pubic hairs were found inside baby’s vagina and injuries could have been caused by penis or other blunt object. The case was reversed on other grounds.

*Jones v. Commonwealth*, 833 S.W.2d 839 (Ky. 1992)

The trial court properly overruled the defendant’s motion for directed verdict as evidence of penetration may be proved by circumstantial evidence.

*Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998)

The victim never said she had sexual intercourse or penetration with the defendant. Victim does not have to say specifically that penis went into vagina.

*Anderson v. Commonwealth*, 500 S.W.2d 76, 77 (Ky. 1973)

Victim testified that she knew what constituted sex and that she had been forced to have sexual relations with appellant. "A fact may be proved by circumstances no less than by words, and this rule is applied to the questions of penetration just as it is in other questions of fact arising in criminal cases. Here the parties went to the woods for this purpose; the witness testified they stayed on the ground all night, and defendant got on top of her and had sexual intercourse with her two or three times that night. Certainly a jury giving this evidence reasonable effect did not need to be told that there was penetration of the female parts. This was the purpose of the whole adventure, and it must be presumed that the witness used the words 'sexual intercourse' in their ordinary sense."

Slight Penetration:

*Sharp v. Commonwealth*, 849 S.W.2d 542 (Ky. 1993)

The evidence was sufficient to sustain a conviction of rape against the defendant. The victim testified that the defendant touched her middle part with his middle part and it hurt. A doctor who examined the victim several years later testified that there was a penetrating injury that indicates it occurred in the distant past.

*Stoker v. Commonwealth*, 828 S.W.2d 619 (Ky. 1992)

There were four victims of rape and sodomy. Two of the victims were examined by a doctor – with only one of the victims having any signs of sexual abuse. However, the testimony of the victims was that there was contact and slight penetration.

KRS 510.010(8) states that “sexual intercourse occurs upon any penetration, however slight; emission is not required.”

*Trimble v. Commonwealth*, 447 S.W.2d 348 (Ky. 1969)

The eight year-old victim testified that defendant took her to a wooded area and forced her to partially take off her clothes. She described slight penetration and medical evidence showed that bruises were found near opening of vagina although hymen intact. This evidence was sufficient to submit an instruction of rape to the jury.

**Actual physical force not required to prove forcible compulsion:**

*Yates v. Commonwealth*, 430 S.W.3d 883 (Ky. 2014)

“Voluntary” consent, in context of a rape prosecution and specifically as applied in analyzing willingness to engage in an activity, does not imply that the act was consensual, but merely addresses whether a victim permitted the sexual act, or whether the defendant used physical force, or threat of physical force, to procure sexual intercourse; the latter does not require resistance, earnest or otherwise, but the physical act must compel the victim and overcome the victim's volition.

*Newcomb v. Commonwealth*, 410 S.W.3d 63 (Ky. 2013)

Sufficient evidence of forcible compulsion is presented to the jury if, taking into consideration all of the circumstances, the jury could believe beyond a reasonable doubt that rape victim was terror-stricken at the time she submitted to the defendant.

*Yarnell v. Commonwealth*, 833 S.W.2d 834 (Ky. 1992)

The Court held that actual physical force is not required to prove forcible compulsion. The victims’ testified that they were in constant fear and they did not fight the defendant, who forced them to perform deviate sexual intercourse because they were afraid.

*Salsman v. Commonwealth*, 565 S.W.2d 638 (Ky. App. 1978)

Victim fearful that defendant would hurt her was sufficient to support an instruction of forcible compulsion.

**A threat may not be enough to prove forcible compulsion:**

*Yates v. Commonwealth*, 430 S.W.3d 883 (Ky. 2014)



In determining whether the alleged rape victim submitted because of an implied threat which placed her in fear, a subjective rather than an objective standard must be applied; that standard, however, does not obviate the requirement that the fear the victim experiences must fit within that recognized by the statute. Evidence in this case was insufficient to establish that defendant engaged in sexual intercourse with complainant, his 14-year-old stepdaughter, “by forcible compulsion” through use of a threat of physical force, thus precluding conviction for first-degree rape; although defendant threatened to inform complainant's mother of complainant's relationship with her adult boyfriend unless complainant had sexual intercourse with defendant, defendant's threat to inform the mother of the relationship did not include a threat of immediate death or physical injury either to complainant or another person.

*Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002)

The only threat the victim testified about was that the defendant told victim not tell anyone about what was happening to her or she would get in trouble. That testimony alone is not enough to receive an instruction on forcible compulsion.

**2. Sodomy (KRS 510.070-510.100)**

*Galloway v. Commonwealth*, 424 S.W.3d 921 (Ky. 2014)

Evidence was sufficient to show that there was an act of sexual gratification involving the sex organs of defendant and the mouth of victim, such that defendant was not entitled to a directed verdict on a charge of first-degree sodomy; victim testified that defendant forced victim's head and mouth down on defendant's penis, and although victim also testified that defendant's penis did not go past her lips and teeth because she could not open her mouth due to a swollen jaw, lips and teeth were part of victim's mouth.

*Hulan v. Commonwealth*, 634 S.W.2d 410 (Ky. 1982)

Penetration is not a necessary element of sodomy as it is in rape cases.

*Bills v. Commonwealth*, 851 S.W.2d 466, 469 (Ky. 1993)

Victim stated she kept her mouth closed during the attempted oral sodomy. The court stated, citing Hulan, “penetration is not a necessary element to the crime of sodomy as defined in the penal code.”

*Gullett v. Commonwealth*, 514 S.W.3d 518 (Ky. 2017)

Defendant was not entitled to a directed verdict on first-degree forcible compulsion sodomy charge; victim, who was five feet tall and weighed less than a third of 300 pound defendant, explained that defendant succeeding in performing oral sex on victim only after she got “just so tired of trying to fight it” that she just “let it happen,” which was sufficient to satisfy the Commonwealth's burden for overcoming a directed verdict on that charge.

### **Physically Helpless:**

*Bond v. Commonwealth*, 453 S.W.3d 729 (Ky. 2015)

Confession by defendant that he engaged in anal sex with victim while she was unconscious was sufficiently corroborated by evidence to support a conviction for first-degree sodomy; witness testified that victim, who was defendant's girlfriend, was unconscious and clothed when he and defendant dragged victim into a bedroom and that victim was nude when witness later entered the bedroom, and medical examiner testified, inter alia, that she found evidence of anal tearing and contusions when she examined victim, that victim was significantly intoxicated, and that victim's level of intoxication would have been consistent with her having passed out.

### **3. Use of a Minor in a Sexual Performance (KRS 531.310)**

*Baker v. Commonwealth*, 103 S.W.3d 90 (Ky. 2003)

Consent of the minor is not a defense to the offense of using a minor in a sexual performance.

*Jenkins v. Commonwealth*, 275 S.W.3d 226 (Ky.App.,2008)

Evidence was sufficient to support conviction for use of a minor in a sexual performance; there was evidence presented that defendant forcibly placed a dog toy in minor victims' underwear and allowed a dog to retrieve the item, and victim testimony indicated that either the dog's mouth or the dog toy came in contact with each victim's genitals. KRS 531.300(6).

*Alcorn v. Commonwealth*, 910 S.W.2d 716 (Ky. App. 1995)

The defendant required that the victim expose his genitals to the defendant while the defendant was masturbating. This clearly falls within sexual conduct under the crime of use of a minor in a sexual performance. It is not necessary for the defendant to have any physical contact with the victim

*Gilbert v. Commonwealth*, 838 S.W.2d 376 (Ky. 1991)

The defendant was charged with multiple counts of rape and use of a minor in a sexual performance. The defendant was not entitled to a directed verdict on the charge of use of a minor where the defendant ordered the victims to disrobe and ripped off their clothes. The testimony establishes the statutory elements of “employs, consents to, authorizes or induces a minor.”

*Holbrook v. Commonwealth*, 662 S.W.2d 484, 489 (Ky. App. 1984)

The defendant was charged with use of a minor in a sexual performance on the basis of a videotape in which the defendant engaged in sexual activity with a seventeen year old. It is not a defense that the minor consented. This law is

designed to protect minors from exploitation. "To employ or to induce a minor to engage in the performance of sexual acts would necessitate such an affirmative act; however, the definition of the offense is not limited to such affirmative acts."

#### **4. Sexual Abuse (KRS 510.110)**

##### *Stinson v. Commonwealth*, 396 S.W.3d 900 (Ky. 2013)

Defendant entered conditional Alford guilty plea in the Circuit Court, Madison County, to first-degree sexual abuse. The Court of Appeals affirmed. Defendant's petition for discretionary review was granted. Provision of first-degree sexual abuse statute under which defendant was convicted recognized a defendant's position of authority or trust as a means of showing a victim's lack of consent; statute was not void for vagueness in violation of defendant's due process rights; and statute was not overbroad.

##### *Anastasi v. Commonwealth*, 754 S.W.2d 860 (Ky. 1988)

The defendant stated that the Commonwealth did not prove sexual gratification. However, intent and sexual gratification can be inferred from the evidence.

##### *Tungate v. Commonwealth*, 901 S.W.2d 41 (Ky. 1995)

The element of sexual gratification may be inferred from the evidence to convict of sexual abuse. The jury can consider the actions of the accused and the other circumstances. The defendant is not entitled to an instruction of sexual abuse second when the evidence is clear that all the victims were less than twelve years old.

##### *Bills v. Commonwealth*, 851 S.W.2d 466, 472 (Ky. 1993)

"Certainly a proper test to determine if the part of the body is 'intimate' should revolve around an examination of three factors: (1) what area of the body is touched; (2) what is the manner of the touching; and, (3) under what circumstances did the touching occur."

##### *Hillard v. Commonwealth*, 158 S.W.3d 758 (Ky.2005)

Defendant's having minor place minor's fist in defendant's anus constituted "sexual contact," for purposes of conviction for unlawful transaction with a minor, arising from sexual abuse of minor; sexual contact included the touching of any sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party, and defendant's statement that it "felt great" sufficed to prove that he solicited the conduct for the purpose of his own sexual gratification. KRS 510.010(7), 510.130(1).

## **5. Criminal Abuse (KRS 508.100 (1) (c))**

*Stoker v. Commonwealth*, 828 S.W.2d 619, 625 (Ky. 1992)

"We have no difficulty in holding the bizarre misconduct involved in those charges of Criminal Abuse I generated by tying up the children, putting tape over their mouths, and forcing them to watch pornographic movies, can reasonably and appropriately be deemed by a jury to constitute 'torture, cruel confinement or cruel punishment . . . to a person twelve (12) years of age or less.' KRS 508.100 (1) (c)" "The question whether 'hitting [a child] with a wire coat hanger' is sufficient to prove Criminal Abuse I is more difficult, particularly where, as here, the blows inflicted did not result in medical treatment or leave scars or marks to verify that severe beating had occurred. It may well be there are situations where using a wire coat hanger to correct a child's behavior, if not appropriate, is at least within the legal limits of parental discretion in raising their children."

*Carpenter v. Commonwealth*, 771 S.W.2d 822 (Ky. 1989)

There was sufficient evidence to convict the defendant of criminal abuse of five month old daughter. Prior to the date in question, a witness saw the defendant shake the baby and throw the baby in fit of rage. It is undisputed that the defendant and his wife had exclusive control over child on the day the brain injury occurred.

*United States v. Phillips*, 948 F.2d 241, 252 (6th Cir 1991)

It was proper for the trial court to deny the defendant's request for an instruction on criminal abuse second when there was no evidence that "a parent has placed a child in harm's way with no particular desire that harm ensued."

## **6. Corroboration of victim's testimony is not required.**

*Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001)

Corroboration in a child sexual abuse case is required only if the unsupported testimony of the victim is contradictory, or incredible or inherently improbable; otherwise, discrepancies in the victim's testimony are matters of credibility going to the weight to be given by the jury of the child's testimony.

*Commonwealth v. Cox*, 837 S.W.2d 898 (Ky. 1992)

As long as the testimony of the victim is not improbable, corroboration is not required. The Court based its decision on *Bussey v. Commonwealth*, 797 S.W.2d 483 (Ky. 1990).

*Stoker v. Commonwealth*, 828 S.W.2d 619, 624 (Ky. 1992)

Doctor testified that lack of physical findings is not conclusive. "In these circumstances we are in no position to declare the law of physical findings

‘contradictory or incredible, or inherently probable’ as to compel a finding that the evidence regarding rape and anal sodomy was legally insufficient.”

*Dyer v. Commonwealth*, 816 S.W.2d 647 (Ky. 1991)

(Overruled on other grounds, *Baker v. Commonwealth*, 973 S.W.2d 54 (Ky. 1998)) The victim’s testimony standing alone is sufficient to support a conviction of sodomy.

*Bussey v. Commonwealth*, 797 S.W.2d 483, 484 (Ky. 1990)

“While appellant insists that no reasonable juror could have believed the story told by the victim, we believe otherwise. We acknowledge the improbability of some of the details of the victim’s version of the story, but the jury could have reasonably concluded that despite the improbability of every detail related by the victim, an act of sexual abuse occurred. In other words, to survive a motion for directed verdict, it is not necessary that every fact related by the victim be reasonable and probable. It is sufficient if the victim’s testimony taken as a whole could induce a reasonable belief by the jury that the crime occurred.”

*Turner v. Commonwealth*, 767 S.W.2d 557, 558 (Ky. 1988)

"Although we uphold the decision of the trial court as to the competency of the four-year-old child witness, and the sufficiency of her testimony to sustain the verdict, we note that her testimony occupied 60 pages of the transcript of record, much of which was rambling, and only a small portion of her testimony, in response to leading questions by the Commonwealth, was sufficient to sustain the conviction."

*Browning v. Commonwealth*, 351 S.W.2d 499 (Ky. 1961)

The victim's testimony did not require corroboration to convict defendant of incest.

*Patrick v. Commonwealth*, 436 S.W.2d 69 (Ky. 1968)

The victim was the only witness to testify as to her rape. No one else corroborated her story but that was sufficient to support a conviction of rape first degree.

*Meland v. Commonwealth*, 280 S.W.2d 145 (Ky. 1955)

Defendant was charged with rape of the victim. Her statement was uncorroborated and unusual but not improbable as to reverse defendant’s conviction.

*See also Fletcher v. Commonwealth*, 63 S. W. 2d 780 (Ky. 1933)

## **J. JURY INSTRUCTIONS**

*Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009)

The Kentucky Supreme Court unanimously reversed convictions for four counts of rape III, one count of sodomy III, and PFO I. Miller was acquitted of three counts of rape and one count of sodomy. The Court found palpable error per se in the jury instructions because the instructions failed to distinguish each count of rape from the other six counts and the one count of sodomy from the second count of sodomy. The Court found that this set of errors was not preserved. The Court held that the trial evidence or arguments of counsel cannot cure this type of error. And thus, it is now settled that a trial court errs in a case involving multiple charges if its instructions to the jury fail to factually differentiate between the separate offenses according to the evidence. *Combs [v. Commonwealth]*, 198 S.W.3d [574] at 580 [Ky. 2006]. Here, because the trial court used identical jury instructions on multiple counts of third degree rape and sodomy, none of which could be distinguished from the others as to what factually distinct crime each applied to, Appellant was presumptively prejudiced. Nor has the Commonwealth met its burden to show affirmatively that no prejudice resulted from the error. *Harp [v. Commonwealth]*, 266 S.W.3d [813] at 818 [Ky. 2008]. Therefore, the identical jury instructions, here, cannot be considered harmless. [The Court's opinion co-mingles harmless error and palpable error and appears to shift the burden to the Commonwealth to prove that unpreserved errors are harmless even though the burden should be upon appellant to prove the error caused manifest injustice (i.e., probably caused the conviction of a probably innocent defendant). Under the Court's ruling there is no way that the Commonwealth can rebut the presumption of prejudice. Therefore, I have concluded that this type of error is reversible per se.] Justices Cunningham and Schroeder concurred in the result and expressed the opinion that this type of unpreserved instructional error is not reversible when the jury convicted upon all counts of the same crime since the jury would have found that all charged crimes occurred.

## **K. LESSER INCLUDED OFFENSES**

### **1. If the evidence does not warrant a lesser included offense, the defendant is not entitled to an instruction on the offense**

*Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992)

When the Commonwealth's evidence proves sodomy and the defense was that the sodomy did not happen at all, the defendant is not entitled to an instruction of sexual abuse in the first degree.

### **2. Not entitled to instruction on sexual abuse if evidence does not warrant**

*Isaacs v. Commonwealth*, 553 S.W.2d 843 (Ky. 1977)

The evidence must be sufficient to support conviction on lesser included offenses and also justify reasonable doubt as to the original charge. In the instant

case there was no evidence to support defendant's theory that something besides penile penetration caused injury to the victim including the testimony of the victim.

*George v. Commonwealth*, 468 S.W.2d 296 (Ky. 1971)

Defendant was convicted of raping a twelve year-old girl. The evidence was that the defendant forced her into car and had sexual intercourse with her. An examining doctor found evidence that an object penetrated her vagina. The defendant claimed alibi and therefore not entitled to instruction regarding intent or detaining a woman against her will.

**3. Even if defendant claimed alibi, if evidence warrants a lesser included instruction it should be given**

*Reed v. Commonwealth*, 738 S.W.2d 818 (Ky. 1987)

The court should instruct on the offense of sexual abuse second degree even if the defendant claimed an alibi when the evidence warrants such in a the case of rape of a young girl.

**4. Evidence must prove a lesser offense of sexual abuse to be instructed**

*Clark v. Commonwealth*, 223 S.W.3d 90 (Ky. 2007)

Defendant was convicted of two counts of first-degree sexual abuse. The Supreme Court held that the defendant was entitled to a jury instruction on second-degree sexual abuse as a lesser-included offense of one count of first-degree sexual abuse; error in trial court's failure to instruct jury on second-degree sexual abuse was not harmless; and evidence of defendant's prior sexual misconduct with a witness was inadmissible under other-acts rule.

*Dawson v. Commonwealth*, 498 S.W.2d 128 (Ky. 1973)

The defendant was convicted of attempted rape of a child under twelve. The defendant argued that the jury should have been instructed on detaining a woman against her will. However, nothing in the evidence proved a lesser offense. Defendant denied any wrongdoing. Therefore, the defendant is not entitled to a lesser offense instruction.

**5. When warranted, lesser included instruction of sexual abuse must be given**

*King v. Commonwealth*, 554 S.W.3d 343 (Ky. 2018)

The additional element in a sodomy offense, as compared to a charge on the included offense of sexual abuse, for the purposes of double jeopardy analysis, is the specific sexual or intimate parts involved, namely, the mouth or anus. First-degree sexual abuse is properly classified as a lesser included offense of first-degree

sodomy, for the purposes of double jeopardy analysis, the distinction between the two offenses being the body part touched for purposes of sexual gratification.

*Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993)

When the evidence could support a lesser conviction of sexual abuse first or sexual misconduct on rape first and sodomy first charges, a court must give these instructions. In the same vein, sexual abuse third instruction should be given as a lesser included to sexual abuse first degree charges when warranted by the evidence.

**6. Not entitled to sexual misconduct instruction when both the victim and the defendant are over 21**

*Spencer v. Commonwealth*, 554 S.W.2d 355 (Ky. 1977)

The defendant was convicted of rape and sodomy of two women over the age of 21. The women said that he used forcible compulsion. The defendant said it was consensual sex. The defendant is not entitled to an instruction on sexual misconduct because both the victims and defendant were over 21 and neither was physically or mentally incompetent.

*Patterson v. Commonwealth*, 555 S.W.2d 607 (Ky. App. 1977)

Only evidence was that force was used in the rape of an 18 year old girl. The defendant is not entitled to instruction on sexual misconduct.

**7. Evidence must support instruction on lesser-included instruction of sexual misconduct**

*Jenkins v. Commonwealth*, 496 S.W.3d 435 (Ky. 2016)

Sexual misconduct instruction was not warranted in prosecution for first degree rape; sexual misconduct was not lesser included offense of rape, because victim's non-consent was not based on her age or defendant's age, sexual misconduct statute did not apply, and, since rape statute and sexual misconduct statute criminalized exact same conduct, instructions on both offenses could not be justified because factual issues to be resolved by jury were same as to both.

*Yarnell v. Commonwealth*, 833 S.W.2d 834, 837 (Ky. 1992)

"The evidence did not require an instruction on sexual misconduct. A trial judge must instruct the jury on all lesser-included offenses which are supported by the evidence . . . The evidence clearly established that Yarnell used forcible compulsion by means of threats and intimidation to engage in sexual intercourse with Tanya."



*Johnson v. Commonwealth*, 864 S.W.2d 266, 277 (Ky. 1993)

Because A. was fifteen at the time of the alleged offenses, and Johnson was seventeen, the giving of an instruction on sexual misconduct in this case would not have thwarted the long-standing rule that KRS 510.140 was intended to apply only in cases where the victim is fourteen or fifteen and the defendant less than twenty-one, or where the victim is twelve-to-fifteen and the defendant is less than eighteen years of age (citation omitted). What remains of the question is whether the jury might reasonably have believed beyond a reasonable doubt that Johnson had engaged in sexual acts with A., but entertained reasonable doubt as to whether A. had in fact been physically helpless at the time. The Court held that the trial court erred in failing to instruct the jury on sexual misconduct in relation to the charges of rape and sodomy, respectfully.

**8. Lesser included instruction on incest***Wombles v. Commonwealth*, 831 S.W.2d 172 (Ky. 1992)

The defendant was convicted of Rape first degree for the rape of his eleven year old-daughter. If the evidence justifies a lesser-included instruction and it is requested, then the court should give the instruction. The court instructed the jury as to rape first-degree and sexual abuse first-degree. Incest is not a lesser-included offense of rape in the first degree and the defendant was not entitled to that instruction.

*Rodriguez v. Commonwealth*, 396 S.W.3d 916 (Ky. 2013)

Defendant was convicted in Christian County of Class A felony incest. Defendant appealed. The Supreme Court held that the evidence was sufficient to support conviction for Class A felony incest; jury instructions that failed to require a unanimous determination beyond a reasonable doubt that victim was under 12 years of age at the time of the offense constituted palpable error; evidence supported jury instruction on Class B and Class C felony incest; and retrial on charge of Class A felony incest after reversal of conviction based on instructional error did not violate defendant's right of protection against double jeopardy.

**9. Lesser included instruction is warranted on attempted sodomy***Bills v. Commonwealth*, 851 S.W.2d 466, 469 (Ky. 1993)

"Bills contends that the trial court committed reversible error by denying his request to instruct the jury on attempted first-degree sodomy. Bills submits that because the victim told the police, in a written statement, that she had kept her mouth closed during the attempted oral sex act, the jury could have found that Bills' penis only touched the victim's mouth . . . Bills' inability to recall the event provided no evidence at all regarding the claim of entitlement for the lesser included offense of attempted first-degree sodomy. Penetration is not a requirement under the

sodomy statute. Therefore, the only possible inference from the victim's testimony is that Bill's penis came into contact with her mouth. The trial court correctly determined that there was no evidence submitted to support an instruction on attempted first-degree sodomy."

**10. It is improper to instruct on course of conduct**

*Holloman v. Commonwealth*, 37 S.W.3d 764 (Ky. 2001)

The trial court improperly gave an instruction of course of conduct in instructions on rape, sodomy and sexual abuse. Course of conduct under KRS 508.130 applies only to stalking, not rape, sodomy or sexual abuse.

## X. SENTENCING ISSUES

### **A. SEXUAL OFFENDER EVALUATION REQUIRED**

Sexual Offender Evaluation is required prior to sentencing if a defendant has been convicted of a sex crime.

#### **1. Sexual offender defined**

KRS 17.500: “Sexual offender” means any person convicted of, pleading guilty to, or entering an Alford plea to a sex crime as defined in this section, as of the date the verdict is entered by the court.

KRS 532.050(4) states in part: If the defendant has been convicted of a sex crime, as defined in KRS 17.500, prior to determining the sentence or prior to final sentencing for youthful offenders, the court shall order a comprehensive sex offender pre-sentence evaluation of the defendant to be conducted by an approved provider, as defined in KRS 17.500, the Department of Corrections, or the Department of Juvenile Justice if the defendant is a youthful offender. The comprehensive sex offender pre-sentence evaluation shall provide to the court a recommendation related to the risk of a repeat offense by the defendant and the defendant's amenability to treatment and shall be considered by the court in determining the appropriate sentence. A copy of the comprehensive sex offender pre-sentence evaluation shall be furnished to the court, the Commonwealth's attorney, and to counsel for the defendant. If the defendant is eligible and the court suspends the sentence and places the defendant on probation or conditional discharge, the provisions of KRS 532.045(3) to (8) shall apply. All communications relative to the comprehensive sex offender pre-sentence evaluation and treatment of the sex offender shall fall under the provisions of KRS 197.440 and shall not be made a part of the court record subject to review in appellate proceedings. The defendant shall pay for any comprehensive sex offender pre-sentence evaluation or treatment required pursuant to this section up to the defendant's ability to pay but no more than the actual cost of the comprehensive sex offender pre-sentence evaluation or treatment.

#### **2. The sexual offender pre-sentence report**

KRS 532.045(8): Before imposing sentence, the court shall advise the defendant or his counsel of the contents and conclusions of any comprehensive sex offender pre-sentence evaluation performed pursuant to this section and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. The court shall provide the defendant's counsel and the Commonwealth's attorney a copy of the comprehensive sex offender pre-sentence

evaluation. It shall not be necessary to disclose the sources of confidential information.

*But see Berg v. Commonwealth, 20 S.W.3d 475 (Ky. App. 2000)*

There is no requirement that defendant be given an opportunity to controvert facts and conclusions of the sexual offender evaluation. Berg discussed KRS 532.050 treatment of the presentence investigative report (PSI), psychiatric examination and sexual offender evaluation, but did not mention KRS 532.045.

### **3. Communications are privileged, with exceptions**

KRS 532.050(4) provides that all communications relative to the comprehensive sex offender pre-sentence evaluation and treatment of the sex offender shall fall under the provisions of KRS 197.440 and shall not be made a part of the court record subject to review in appellate proceedings.

KRS 197.440 and KRS 17.576 provide that communications made in the application for or in the course of a sexual offender's diagnosis and treatment in the program between a sexual offender or member of the offender's family and any employee of the department who is assigned to work in the program, shall be privileged from disclosure in any civil or criminal proceeding, other than the proceeding to determine the sentence, unless the offender consents in writing to the disclosure or the communication is related to an ongoing criminal investigation. The privilege created by this section shall not extend to disclosures made for the purpose of determining whether the offender should continue to participate in the program.

### **4. Sexual Offender Evaluation required prior to placing defendant on probation**

KRS 532.045(3) requires that a defendant who is not otherwise prohibited from probation, may not be placed on probation until the court is in receipt of a sexual offender evaluation and requires the court to use the evaluation in determining the appropriateness of probation or conditional discharge.

If the court grants probation or conditional discharge, the offender shall be ordered as a condition of either, to successfully complete a sexual offender treatment program. Failure to successfully complete such a program constitutes grounds for revocation of probation or conditional discharge. KRS 532.045 (4)(6)

*Razor v. Commonwealth, 960 S.W.2d 472 (Ky. App. 1998)*

The requirement of sexual treatment program that an offender admit guilt as part of treatment did not violate his right against self-incrimination; nor did the

trial judge's revocation of offender's probation for failure to successfully complete sex offender treatment program because of his failure to admit guilt.

## **B. PROBATION**

### **1. Statutory Prohibitions**

KRS 532.045 prohibits probation and conditional discharge for certain sexual offenses and sets forth the procedure when probation or conditional discharge is not prohibited. To be prohibited from probation the offender must have been convicted of or criminal attempt of one of the following: rape in the second degree, sodomy in the second degree, promoting prostitution, permitting prostitution, human trafficking (where it includes commercial sexual activity), incest, use of a minor in a sexual performance, promoting a sexual performance by a minor, using minors to distribute material portraying a sexual performance by a minor and meet one or more of the following criteria:

- The person who committed the offense against the minor used force, violence, duress, menace or threat of bodily harm;
- The person who committed the offense caused bodily injury to the minor;
- The person convicted of the offense was a stranger to the minor or made friends with the minor for the purpose of committing of offense, unless the person honestly and reasonable believed the minor was eighteen (18) years old or older;
- The person used a dangerous instrument or deadly weapon against the minor during the offense;
- The person convicted had a prior conviction of assaulting a minor with intent to commit any of the acts constituting the crimes named above;
- The person was convicted of kidnapping the minor and, in fact, kidnapped the minor for the purpose of committing the act;
- The person committed the offense against more than one minor at the same time or in the same course of conduct;
- The person had substantial sexual conduct with a minor under the age of fourteen (14) years of age; or
- The person occupied a position of special trust and committed an act of substantial sexual conduct.

### **2. Statute is constitutional**

*Owsley v. Commonwealth*, 743 S.W.2d 408 (Ky. App. 1987)

There is a reasonable basis in the legislature's differentiating sexual offenders who are strangers or mere acquaintances of an abused child from those who abuse not only the child, but their advantageous position as a person in a special position of trust. Therefore KRS 532.045 does not violate Section 59 of the Kentucky as being class legislation.

### **3. Statute was not overruled by the Alternative Sentence Statute, KRS 500.095**

*Porter v. Commonwealth*, 841 S.W.2d 166 (Ky. 1992)

KRS 532.045 is a specific statute which explicitly prohibits probation for certain offenses and the enactment of KRS 500.095 does not overrule the sentencing prohibitions in that section, since a specific statute takes precedence over the general one. Defendant pleading guilty to first degree sodomy and sexual abuse committed upon his three-year-old daughter is not entitled to any form of alternative sentence.

### **4. Statute prohibiting probation also applies to shock probation**

*Porter v. Commonwealth*, 869 S.W.2d 48 (Ky. App. 1993)

Defendant convicted of sodomy and sexual abuse was not entitled to shock probation; statute which precludes probation for such offenses also precludes shock probation.

### **5. Statute also applies to juveniles convicted as adults**

*Commonwealth v. Taylor*, 945 S.W.2d 420 (Ky. 1997)

Court found that Taylor, who had committed sexual offenses of substantial sexual contact against his younger sister, occupied a position of special trust within the meaning of KRS 532.045, and was prohibited from probation.

## **C. FIVE YEAR CONDITIONAL DISCHARGE**

### **1. Statute**

KRS 532.043 requires that any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS 510, KRS 529.100 involving commercial sexual activity, KRS 530.020, 530.064(1)(a), 531.310, or 531.320 \* shall be subject to a five (5) year period of conditional discharge following release from incarceration upon expiration of sentence or completion of a parole. Subsection 6 of statute has been rendered unconstitutional but does not involve discussion below.

- Rape; first, second and third degree
- Sodomy; first, second and third degree
- Incest
- Unlawful Transaction with a Minor; first degree
- Use of a Minor in a Sexual Performance
- Promoting a Sexual Performance by a minor
- Human Trafficking involving commercial sexual activity

## **2. Imposed at the time of sentencing and included in the judgment**

The five-year conditional discharge cannot be applied to offenses committed before the effective date of the statute (July 15, 1998).

*Purvis v. Commonwealth*, 14 S.W.3d 21 (Ky. 2000)

Imposition of sentence authorized by KRS 532.043 (three year conditional discharge conditioned upon completion of sex offender program) in addition to sentences authorized for offenses to which the defendant pled guilty, violated the ex post facto law because the offenses were committed prior to the enactment of the statute and the statute did increase the penalty for crime committed before its enactment.

See also *Lozier v. Commonwealth*, 32 S.W.3d 511 (Ky. App. 2000).

### **D. CRIME VICTIM'S IMPACT STATEMENT**

KRS 421.520 provides that the attorney for the Commonwealth shall notify the victim, upon conviction of a defendant, of the right to submit a written victim impact statement. The victim impact statement shall be considered by the court prior to any decision on the sentencing or release of the defendant.

*Matheny v. Commonwealth*, 37 S.W.3d 756 (Ky. 2001)

A crime victim's right to make his or her feelings, opinions or experience known to the trial court prior to sentencing has no bearing on the Commonwealth's obligation to adhere to the terms of a completed plea agreement.

NOTE on KRS 421.50 to be effective on November 3, 2020 if conditions met:

(1) The attorney for the Commonwealth shall notify the victim that, upon conviction of the defendant, the victim has the right to submit a written victim impact statement to the probation officer responsible for preparing the presentence investigation report for inclusion in the report or to the court should such a report be waived by the defendant.

(2) The impact statement may contain, but need not be limited to, a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim, the victim's need for restitution and whether the victim has applied for or received compensation for financial loss, and the victim's recommendation for an appropriate sentence.

(3) The victim impact statement shall be considered by the court prior to any decision on the sentencing or release, including shock probation, of the defendant.

*Legislative Research Commission Note (4-14-20): 2020 Ky. Acts ch. 101, sec. 8, provides that the repeal and reenactment of this statute in section 4 of that Act "shall take effect only upon the ratification, in the general election of November 3, 2020, of a Constitutional amendment providing for the protection of crime victims' rights. If such an amendment is not ratified, this Act shall be void."*

#### **E. HIV TESTING**

KRS 510.320 allows for the testing of a defendant for the human immunodeficiency virus upon conviction of any offense which has sexual intercourse or deviate sexual intercourse as an element, or has sexual contact as an element when the circumstances of the case demonstrate a possibility of transmission of the human immunodeficiency virus. The judge shall also notify the victim of the offense, or parent or guardian of the victim, that the defendant has been so notified.

The cost of testing shall be paid by the defendant unless the court determines the defendant to be indigent.

#### **F. RESTITUTION**

KRS 532.350 and 532.358 allows for restitution to a victim for counseling.

### **XI. POST CONVICTION ISSUES**

#### **A. PAROLE**

##### **1. Sex Offender Treatment Program is required for parole**

KRS 439.340 requires that a sex offender complete the Sex Offender Treatment Program before he can be granted parole. "No eligible sexual offender within the meaning of KRS 197.400 to 197.440 shall be granted parole unless he or she has successfully completed the Sexual Offender Treatment Program." And "Any prisoner who is granted parole after completion of the Sexual Offender Treatment Program shall be required, as a condition of his or her parole, to participate in regular treatment in a mental health program approved or operated by the Department of Corrections."

KRS 197.410 provides that a person is considered to be "sexual offender" when he has been adjudicated guilty of a sex crime as defined in KRS 17.500, or any similar offense in another jurisdiction.

##### **2. Application of statute is not Ex Post Facto**

*Garland v. Commonwealth*, 997 S.W.2d 487 (Ky. App. 1999)



Application of statute requiring completion of sex offender treatment program before being considered for parole of defendant whose crime was committed prior to the enactment of the statute did not violate the ex post facto clause, because the statute did not increase the penalty for the crime. Parole is a privilege, not a right.

*Lozier v. Commonwealth*, 32 S.W.3d 511 (Ky. App. 2000)

Loss of good time credit for failure to successfully complete sex offender treatment program is not ex post facto violation. KRS 197.045(4) which allows for the loss of good time credit for failure to successfully complete sex offender treatment program could be applied to a defendant who was not convicted and sentenced until after the effective date of the statute.

See *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002)

### **3. Application of statute is not a violation of double jeopardy or due process liberty interests**

*Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002)

Hyatt has been superseded by statute as discussed in unreported case *Jones v. Commonwealth*, 2003 WL 21713776.

### **4. Eligibility Guidelines**

Guidelines are located in 501 KAR 1:030

Sexual offenses fall under both twenty percent (20%) calculation and under the violent offense calculation (50% or 85% depending upon the date of the offense.)

KRS 439.3401 Parole for violent offenders. Provides, in part, that a "violent offender" is any person who has been convicted of or pled guilty to a Class A felony or B felony involving death of the victim or serious physical injury to the victim; the commission of attempted commission of a felony sexual offense in KRS 510; KRS 531.310; KRS 531.320; KRS 530.064(1)(a); KRS 529.100 involving commercial sexual activity where victim is a minor; and KRS 508.100.

If a defendant commits a Class A felony with a life sentence he shall not be released upon probation or parole until he has served at least twenty (20) years.

Upon a sentence for a Class A felony with a term of years, or a Class B felony, he shall not be released upon probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.

*Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008)

The Supreme Court held that the violent offender statute does not apply to juveniles who are adjudicated youthful offenders, abrogating *Mullins v. Commonwealth*, 956 S.W.2d 222 (Ky. 1997).

## **B. SEXUAL OFFENDER REGISTRATION AND NOTIFICATION**

### **1. Statute**

KRS 17.500-17.540 Sex Offender Registration Act. Kentucky has established a sex offender registry. KRS 17.500 sets forth who is required to register under the act.

### **2. Who must register**

KRS 17.500 (3) (a): Except as provided in paragraph (b) of this subsection, “criminal offense against a victim who is a minor” means any of the following offenses if the victim is under the age of eighteen (18) at the time of the commission of the offense:

1. Kidnapping, as set forth in KRS 509.040, except by a parent;
2. Unlawful imprisonment, as set forth in KRS 509.020, except by a parent;
3. Sex crime;
4. Promoting a sexual performance of a minor, as set forth in KRS 531.320;
5. Human trafficking involving commercial sexual activity, as set forth in KRS 529.100;
6. Promoting human trafficking involving commercial sexual activity, as set forth in KRS 529.110;
7. Promoting prostitution, as set forth in KRS 529.040, when the defendant advances or profits from the prostitution of a person under the age of eighteen (18);
8. Use of a minor in a sexual performance, as set forth in KRS 531.310;
9. Sexual abuse, as set forth in KRS 510.120 and 510.130;
10. Unlawful transaction with a minor in the first degree, as set forth in KRS 530.064(1)(a);
11. Any offense involving a minor or depictions of a minor, as set forth in KRS Chapter 531;
12. Any attempt to commit any of the offenses described in subparagraphs 1. to 11. of this paragraph;
13. Solicitation to commit any of the offenses described in subparagraphs 1. to 11. of this paragraph; or
14. Any offense from another state or territory, any federal offense, or any offense subject to a court martial of the United States Armed Forces, which is similar to any of the offenses described in subparagraphs 1. to 13. of this paragraph.

3(b) Conduct which is criminal only because of the age of the victim shall not be considered a criminal offense against a victim who is a minor if the perpetrator was under the age of eighteen (18) at the time of the commission of the offense;

KRS 17.500(8) “Sex crime” means:

(a) A felony offense defined in KRS Chapter 510, KRS 529.100 or 529.110 involving commercial sexual activity, 530.020, 530.064(1)(a), 531.310, 531.320, or 531.335;

(b) A felony attempt to commit a felony offense specified in paragraph (a) of this subsection; or

(c) A federal felony offense, a felony offense subject to a court-martial of the United States Armed Forces, or a felony offense from another state or a territory where the felony offense is similar to a felony offense specified in paragraph (a) of this subsection;

KRS 17.500(5) “Registrant” means:

(a) Any person eighteen (18) years of age or older at the time of the offense or any youthful offender, as defined in KRS 600.020, who has committed:

1. A sex crime; or

2. A criminal offense against a victim who is a minor; or

(b) Any person required to register under KRS 17.510; or

(c) Any sexually violent predator; or

(d) Any person whose sexual offense has been diverted pursuant to KRS 533.250, until the diversionary period is successfully completed;

**Defendant convicted of criminal attempt must register:**

*Gullett v. Commonwealth*, 266 S.W.3d 835, 837 (Ky. App. 2008)

(Case deals with former version of statutes) Gullett argued that he should not have been required to register as a sex offender because he neither committed a “sex crime” nor “a criminal offense against a victim who is a minor,” as those terms are defined above. The Commonwealth responded that “[a]ppellant was required to register, not because he committed a sex crime, but because he committed ‘a criminal offense against a victim who is a minor.’” The Court agreed with the Commonwealth.

A person has committed “a criminal offense against a victim who is a minor” if he attempted to commit a sex crime and the victim was under 18 years of age. See KRS 17.500(3)(a)3. and 11. The definition of “sex crime” includes a “felony offense defined in KRS Chapter 510[.]” See KRS 17.500(8)(a). Sexual abuse in the first degree is an offense defined in KRS Chapter 510 (see KRS 510.110) and is, therefore, a “sex crime.” Thus, as argued by the Commonwealth, because Gullett committed “a criminal offense against a victim who is a minor,” he was required to register as a sex offender. See KRS 17.510(6).

### 3. Out of state and other convictions

KRS 17.510(6) (a): Except as provided in paragraph (b) of this subsection, any person who has been convicted in a court of any state or territory, a court of the United States, or a similar conviction from a court of competent jurisdiction in any other country, or a court martial of the United States Armed Forces of a sex crime or criminal offense against a victim who is a minor and who has been notified of the duty to register by that state, territory, or court, or who has been committed as a sexually violent predator under the laws of another state, laws of a territory, or federal laws, or has a similar conviction from a court of competent jurisdiction in any other country, shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register with the appropriate local probation and parole office in the county of residence within five (5) working days of relocation. No additional notice of the duty to register shall be required of any official charged with a duty of enforcing the laws of this Commonwealth.

(b) No person shall be required to register under this subsection for a juvenile adjudication if such an adjudication in this Commonwealth would not create a duty to register. This paragraph shall be retroactive.

(7) (a) Except as provided in paragraph (b) of this subsection, if a person is required to register under federal law or the laws of another state or territory, or if the person has been convicted of an offense in a court of the United States, in a court martial of the United States Armed Forces, or under the laws of another state or territory that would require registration if committed in this Commonwealth, that person upon changing residence from the other state or territory of the United States to the Commonwealth or upon entering the Commonwealth for employment, to carry on a vocation, or as a student shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register within five (5) working days with the appropriate local probation and parole office in the county of residence, employment, vocation, or schooling. A person required to register under federal law or the laws of another state or territory shall be presumed to know of the duty to register in the Commonwealth. As used in this subsection, “employment” or “carry on a vocation” includes employment that is full-time or part-time for a period exceeding fourteen (14) days or for an aggregate period of time exceeding thirty (30) days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit. As used in this subsection, “student” means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade or professional institution, or institution of higher education.

(b) No person shall be required to register under this subsection for a juvenile adjudication if such an adjudication in this Commonwealth would not create a duty to register. This paragraph shall be retroactive.

*Bullitt v. Commonwealth*, 595 S.W.3d 106 (Ky. 2019)

Evidence was sufficient to establish that defendant, who had out-of-state statutory rape conviction, committed a sex crime against a minor, thus supporting finding he was persistent felony offender (PFO) subject to enhanced sentence for subsequent first-degree rape conviction; defendant argued that because Commonwealth did not prove statutory rape victim's age, it did not prove he was guilty of a prior felony sex crime against a minor under comparable Kentucky law, as required for PFO status, but term "statutory rape" was generally understood to involve sexual intercourse with a minor less than 16 years old.

#### **4. Change of residence**

##### KRS 17.510(10)(a) (10)

(a) If the residence address of any registrant changes, but the registrant remains in the same county, the person shall register, on or before the date of the change of address, with the appropriate local probation and parole office in the county in which he or she resides.

(b) 1. If the registrant changes his or her residence to a new county, the person shall notify his or her current local probation and parole office of the new residence address on or before the date of the change of address.

2. The registrant shall also register with the appropriate local probation and parole office in the county of his or her new residence no later than five (5) working days after the date of the change of address.

(c) If the:

1. Motor vehicle operator's license number or any other government-issued identification card number of any registrant changes; or

2. Registrant obtains for the first time a motor vehicle operator's license number or any other government-issued identification card number;

the registrant shall register the change or addition no later than five (5) working days after the date of the change or the date of the addition, with the appropriate local probation and parole office in the county in which he or she resides.

## **5. Failure to register**

KRS 17.510(11) (12): Any person required to register under this section who knowingly violates any of the provisions of this section or prior law is guilty of a Class D felony for the first offense and a Class C felony for each subsequent offense.

Any person required to register under this section or prior law who knowingly provides false, misleading, or incomplete information is guilty of a Class D felony for the first offense and a Class C felony for each subsequent offense.

## **6. Verification of address**

KRS 17.510(13)

(a) The cabinet shall verify the addresses, names, motor vehicle operator's license numbers, and government-issued identification card numbers of individuals required to register under this section. Verification shall occur at least once every ninety (90) days for a person required to register under KRS 17.520(2) and at least once every calendar year for a person required to register under KRS 17.520(3).

(b) If the cabinet determines that a person has:

1. Moved without providing his or her new address; or
2. A new name, motor vehicle operator's license number, or government-issued identification card number that he or she has not provided; to the appropriate local probation and parole office or offices as required under subsection (10)(a), (b), and

(c) of this section, the cabinet shall notify the appropriate local probation and parole office of the new address, name, motor vehicle operator's license number, or government-issued identification card number used by the person. The office shall then forward this information as set forth under subsection (5) of this section. The cabinet shall also notify the appropriate court, Parole Board, and appropriate Commonwealth's attorney, sheriff's office, probation and parole office, corrections agency, and law enforcement agency responsible for the investigation of the report of noncompliance.

(c) An agency that receives notice of the noncompliance from the cabinet under paragraph (a) of this subsection:

1. Shall consider revocation of the parole, probation, post-incarceration supervision, or conditional discharge of any person released under its authority; and
2. Shall notify the appropriate county or Commonwealth's Attorney for prosecution.

## 7. Residential Prohibitions for Sex Offenders

KRS 17.510(9) For the purposes of sex offender registration a post office box shall not be considered an address.

KRS 17.545:

(1) No registrant, as defined in KRS 17.500, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned or leased playground, or licensed day care facility. The measurement shall be taken in a straight line from the nearest property line to the nearest property line of the registrant's place of residence.

(2) No registrant, as defined in KRS 17.500, nor any person residing outside of Kentucky who would be required to register under KRS 17.510 if the person resided in Kentucky, shall be on the clearly defined grounds of a high school, middle school, elementary school, preschool, publicly owned or leased playground, or licensed day care facility, except with the advance written permission of the school principal, the school board, the local legislative body with jurisdiction over the publicly owned or leased playground, or the day care director that has been given after full disclosure of the person's status as a registrant or sex offender from another state and all registrant information as required in KRS 17.500. As used in this subsection, "local legislative body" means the chief governing body of a city, county, urban-county government, consolidated local government, charter county government, or unified local government that has legislative powers.

(3) For purposes of this section:

(a) The registrant shall have the duty to ascertain whether any property listed in subsection (1) of this section is within one thousand (1,000) feet of the registrant's residence; and

(b) If a new facility opens, the registrant shall be presumed to know and, within ninety (90) days, shall comply with this section.

(4) (a) Except as provided in paragraph (b) of this subsection, no registrant who is eighteen (18) years of age or older and has committed a criminal offense against a victim who is a minor shall have the same residence as a minor.

(b) A registrant who is eighteen (18) years of age or older and has committed a criminal offense against a victim who is a minor may have the same residence as a minor if the registrant is the spouse, parent, grandparent, stepparent, sibling, stepsibling, or court-appointed guardian of the minor, unless the spouse, child, grandchild, stepchild, sibling, stepsibling, or ward was a victim of the registrant.

(c) This subsection shall not operate retroactively and shall apply only to a registrant that committed a criminal offense against a victim who is a minor after July 14, 2018.

(5) Any person who violates subsection (1) or (4) of this section shall be guilty of:

- (a) A Class A misdemeanor for a first offense; and
- (b) A Class D felony for the second and each subsequent offense.

(6) Any registrant residing within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility on July 12, 2006, shall move and comply with this section within ninety (90) days of July 12, 2006, and thereafter, shall be subject to the penalties set forth under subsection (5) of this section.

(7) The prohibition against a registrant:

- (a) Residing within one thousand (1,000) feet of a publicly leased playground as outlined in subsection (1) of this section; or
  - (b) Being on the grounds of a publicly leased playground as outlined in subsection (2) of this section;
- shall not operate retroactively.

(8) This section shall not apply to a youthful offender probated or paroled during his or her minority or while enrolled in an elementary or secondary education program.

## **8. Duty to inform of registration requirement**

KRS 17.510

(2) A registrant shall, on or before the date of his or her release by the court, the parole board, the cabinet, or any detention facility, register with the appropriate local probation and parole office in the county in which he or she intends to reside. The person in charge of the release shall facilitate the registration process.

(3) Any person required to register pursuant to subsection (2) of this section shall be informed of the duty to register by the court at the time of sentencing if the court grants probation or conditional discharge or does not impose a penalty of incarceration, or if incarcerated, by the official in charge of the place of confinement upon release. The court and the official shall require the person to read and sign any form that may be required by the cabinet, stating that the duty of the person to register has been explained to the person. The court and the official in charge of the place of confinement shall require the releasee to complete the acknowledgment form and the court or the official shall retain the original completed form. The official shall then send the form to the Information Services Center, Department of Kentucky State Police, Frankfort, Kentucky 40601.



## KRS 17.510

(6) (a) Except as provided in paragraph (b) of this subsection, any person who has been convicted in a court of any state or territory, a court of the United States, or a similar conviction from a court of competent jurisdiction in any other country, or a court martial of the United States Armed Forces of a sex crime or criminal offense against a victim who is a minor and who has been notified of the duty to register by that state, territory, or court, or who has been committed as a sexually violent predator under the laws of another state, laws of a territory, or federal laws, or has a similar conviction from a court of competent jurisdiction in any other country, shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register with the appropriate local probation and parole office in the county of residence within five (5) working days of relocation. No additional notice of the duty to register shall be required of any official charged with a duty of enforcing the laws of this Commonwealth.

(b) No person shall be required to register under this subsection for a juvenile adjudication if such an adjudication in this Commonwealth would not create a duty to register. This paragraph shall be retroactive.

(7) (a) Except as provided in paragraph (b) of this subsection, if a person is required to register under federal law or the laws of another state or territory, or if the person has been convicted of an offense in a court of the United States, in a court martial of the United States Armed Forces, or under the laws of another state or territory that would require registration if committed in this Commonwealth, that person upon changing residence from the other state or territory of the United States to the Commonwealth or upon entering the Commonwealth for employment, to carry on a vocation, or as a student shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register within five (5) working days with the appropriate local probation and parole office in the county of residence, employment, vocation, or schooling. A person required to register under federal law or the laws of another state or territory shall be presumed to know of the duty to register in the Commonwealth. As used in this subsection, “employment” or “carry on a vocation” includes employment that is full-time or part-time for a period exceeding fourteen (14) days or for an aggregate period of time exceeding thirty (30) days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit. As used in this subsection, “student” means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade or professional institution, or institution of higher education.

(b) No person shall be required to register under this subsection for a juvenile adjudication if such an adjudication in this Commonwealth would not create a duty to register. This paragraph shall be retroactive

Signed acknowledgement is required.

### **9. Period of registration**

KRS 17.520

(2) (a) Lifetime registration is required for:

1. Any person who has been convicted of kidnapping, as set forth in KRS 509.040, when the victim is under the age of eighteen (18) at the time of the commission of the offense, except when the offense is committed by a parent;
2. Any person who has been convicted of unlawful imprisonment, as set forth in KRS 509.020, when the victim is under the age of eighteen (18) at the time of the commission of the offense, except when the offense is committed by a parent;
3. Any person convicted of a sex crime:
  - a. Who has one (1) or more prior convictions of a felony criminal offense against a victim who is a minor; or
  - b. Who has one (1) or more prior sex crime convictions;
4. Any person who has been convicted of two (2) or more felony criminal offenses against a victim who is a minor;
5. Any person who has been convicted of:
  - a. Rape in the first degree under KRS 510.040; or
  - b. Sodomy in the first degree under KRS 510.070; and
6. Any sexually violent predator.

(3) All other registrants are required to register for twenty (20) years following discharge from confinement or twenty (20) years following the maximum discharge date on probation, shock probation, conditional discharge, parole, or other form of early release, whichever period is greater.

(4) If a person required to register under this section is re-incarcerated for another offense or as the result of having violated the terms of probation, parole, post-incarceration supervision, or conditional discharge, the registration requirements and the remaining period of time for which the registrant shall register are tolled during the re-incarceration.

(5) A person who has pled guilty, entered an Alford plea, or been convicted in a court of another state or territory, in a court of the United States, or in a court-martial of the United States Armed Forces who is required to register in Kentucky shall be subject to registration in Kentucky based on the conviction in the foreign jurisdiction. The Justice and Public Safety Cabinet shall promulgate administrative regulations to carry out the provisions of this subsection.

(6) The court shall designate the registration period as mandated by this section in its judgment and shall cause a copy of its judgment to be mailed to the

Information Services Center, Department of Kentucky State Police, Frankfort, Kentucky 40601.

*Dever v. Commonwealth*, 300 S.W.3d 198 (Ky. App. 2009)

Defendant's acts of first-degree sexual abuse against a seven-year-old girl and a six-year-old girl, committed when defendant was 15 years old, were criminal based solely upon the age of victims and not because he used forcible compulsion, and therefore the statutory exception to definition of "criminal offense against a minor victim" applied so as to remove defendant from lifetime sex-offender registration requirement, where facts, as stated in Commonwealth's offer at guilty plea hearing, did not mention forcible compulsion as the basis for the charges.

*McEntire v. Commonwealth*, 344 S.W.3d 125 (Ky. App. 2010)

Requirement that defendant, convicted of rape and kidnapping, register as sex offender for lifetime did not constitute cruel and unusual punishment; registration as a sex offender was not a punishment but simply a status.

**XII. RESOURCES**

**PDFs of the Following Resources are available by visiting**  
<https://ag.ky.gov/about/Office-Divisions/OCAHTPP/Pages/Toolkit-Resources.aspx>

Resource	Author	Description
Adult Sex Offender Typologies	Luis C. deBaca, Director, Sex Offender Management Assessment and Planning Initiative, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Office of Justice Programs, U.S. Department of Justice	Research brief regarding offense typologies for adult sex offenders.
Adverse Childhood Experiences Study	CDC-Kaiser Permanente	The study is one of the largest investigations of childhood abuse and neglect and household challenges and later-life health and well-being.
Advocacy in DNA Court	Amy Burke, Assistant Deputy Attorney General, Criminal Division, Office of the Attorney General	Powerpoint presentation on prosecuting cases of dependency, neglect, or abuse (DNA)
Certification of Records Form		Blank certification of records form.
Checklist for Adjudication of Child Abuse Cases and Judicial Commandments		Checklist for prosecutors when adjudicating child abuse cases.
Child Abuse and Neglect Fatalities 2017: Statistics and Interventions	Children’s Bureau, U.S. Department of Health and Human Services	Factsheet describing data on child fatalities and how communities can respond to this issue and prevent deaths.
Child Forensic Interviewing: Best Practices	U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention	Bulletin that consolidates the current knowledge of professionals from several major forensic interview training programs on best

Resource	Author	Description
		practices for interviewing children in cases of alleged abuse.
Forensic Interviewing: A Primer for Child Welfare Professionals	Children’s Bureau, U.S. Department of health and Human Services	Factsheet on forensic interviews.
Handbook of Interpersonal Violence Across the Lifespan	Robert Geffner, Jacquelyn W. White, L. Kevin Hamberger, Alan Rosenbaum, Viola Vaughan-Eden, Victor Vieth	Comprehensive state-of-the-science reference work for researchers, practitioners, and policy makers, which utilizes adverse childhood experiences as a basic developmental framework along with the traumatic effects all forms of interpersonal violence tend to produce.
Kentucky Sex Crimes and Offenses	Office of the Attorney General	Quick reference guide of sex crimes and related offenses per KRS.
Medical Aspects of Child Abuse for the MDT	Midwest Regional Children’s Advocacy Center	Course Manual for a training developed with the intent to provide the members of the multidisciplinary team a high-level synopsis about the different types of child abuse, including the important medical aspects related to them.
Medical Release Forms		HIPPA release forms for local hospitals.
Model Response to Sexual Violence for Prosecutors (RSVP Model)	The Justice Management Institute, AEquitas	A series of handbooks for prosecutors regarding the prosecution of sexual violence. <ul style="list-style-type: none"> <li>• Volume 1: Prosecution Practices</li> <li>• Volume 2: Performance Management</li> <li>• Appendices</li> </ul>
National Human Trafficking Prosecution Best Practices Guide	National District Attorneys Association, Women Prosecutors Section	Guide highlighting current best practices in the prosecution of human trafficking.
Sample Opening Statements	Various	Examples of opening statements.

Resource	Author	Description
Portable Guides to Investigating Child Abuse	U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention	<p>A series of eight guides on investigating child abuse. The series includes:</p> <ul style="list-style-type: none"> <li>• Battered Child Syndrome: Investigating Physical Abuse and Homicide</li> <li>• Burn Injuries in Child Abuse</li> <li>• Diagnostic Imaging of Child Abuse</li> <li>• Forming a Multidisciplinary Team to Investigate Child Abuse</li> <li>• Law Enforcement Response to Child Abuse</li> <li>• Recognizing When a Child’s Injury or Illness is Caused by Abuse</li> <li>• Sexually Transmitted Diseases and Child Sexual Abuse</li> </ul>
Preparation, Persuasion and Self: Defending Fellow Human Beings	Ray Kelly, Esq., Attorney at Law	Resources for preparing for a criminal trial.
Prosecution Resource Documents	Various	<p>Miscellaneous forms and resource documents to assist with prosecutions. Resources include:</p> <p style="padding-left: 40px;">Disclosure of Expert Forms Response Motions Sample Motions 404 Motions</p>
Recognizing When a Child’s Injury or Illness is Caused by Abuse	U.S. Department of Justice Office of Justice Programs	Investigative guide to assist in determining whether a child’s injuries are accidental or intentional.
Sexual Violence Law in Kentucky, A	Kentucky Association of Sexual Assault Programs in partnership with	A comprehensive reference tool for advocates and attorneys who work

Resource	Author	Description
Handbook of Criminal, Civil, and Administrative Law	Jenna McNeal Cassady, JD, and Laela Kashan, JD	with individuals who were sexually harassed, abused, or assaulted.
Social Media Law Enforcement Guides	Operational guidelines for law enforcement officials seeking account records from social media platforms.	The law enforcement guides include: <ul style="list-style-type: none"> <li>• Chatstep.com</li> <li>• Instagram</li> <li>• Kik</li> <li>• MeetMe, Inc.</li> <li>• Omegle.com</li> <li>• Snap Inc./Snapchat</li> <li>• Wickr</li> </ul>
Ten Tips for Developing Your Case Theme	American Bar Association	Ten tips to develop a compelling case theme.
The Evaluation of Children in the Primary Care Setting When Sexual Abuse is Suspected	Pediatrics, The Official Journal of the American Academy of Pediatrics	<a href="http://pediatrics.aappublications.org/content/132/2/e558.full.html">http://pediatrics.aappublications.org/content/132/2/e558.full.html</a> Clinical report updating a 2005 report from the American Academy of Pediatrics on the evaluation of sexual abuse in children.
The Prosecution of Child Sexual Abuse: A Partnership to Improve Outcomes	Stephanie D. Block, Ph.D. and Linda M. Williams, Ph.D.	A report describing research findings on prosecutorial outcomes and obstacles to obtaining justice for child victims in child sexual abuse cases.
The Trial Notebook	InfoQuest	Document outlining how to prepare a trial notebook.
Working with the Courts in Child Protection, U.S. Department of Health and Human Services, Administration for Children and Families, Administration	The Honorable William G. Jones	Part of the Child Abuse and Neglect User Manual Series to provide guidance on child protection and child maltreatment.

Resource	Author	Description
on Children, Youth and Families, Children’s Bureau, Office on Child Abuse and Neglect		
Voir Dire Examples	Various	Examples of Voir Dire
Warrant		Sample Warrant
Your Guide to Kentucky’s Children’s Advocacy Centers	Children’s Advocacy Centers of Kentucky	Handbook on the coalition of fifteen designated regional centers in the Commonwealth designed to serve as a network of service providers that work to enhance the lives of children in all areas of Kentucky.
2019 Kentucky Rules of Evidence, Summary Trial Guide		Summary of the Kentucky Rules of Evidence



**XIII. WEBSITES AND ONLINE RESOURCES**

Resource	Website	Description
Children’s Advocacy Centers of Kentucky	<a href="https://cackentucky.org/">https://cackentucky.org/</a>	All Kentucky children have access to one of 15 Children’s Advocacy Centers. Each CAC provides specialized child friendly interviews, medical exams, therapy, and advocacy to children entering the justice system as part of an investigation of abuse.
Children’s Bureau, An Office for the Administration of Children and Families, U.S. Department of Health and Human Services	<a href="https://www.acf.hhs.gov/cb/about">https://www.acf.hhs.gov/cb/about</a>	The Children’s Bureau partners with federal, state, tribal and local agencies to improve the overall health and well-being of our nation’s children and families.
Child Welfare Information Gateway, Children’s Bureau, U.S. Department of Health and Human Services	<a href="https://www.childwelfare.gov/topics/systemwide/sgm/">https://www.childwelfare.gov/topics/systemwide/sgm/</a>	Children’s Bureau website for State publications that describe child welfare services and provide guidance to professionals and families.
Face It: A Movement to End Child Abuse	<a href="https://faceitabuse.org/">https://faceitabuse.org/</a>	The Face It® Movement, conceived and created in 2012 as a response to the public outcry against the increasing number of child abuse deaths in the Commonwealth, officially launched in April 2013 as an initiative led by Kosair Charities.
Kentucky Association of Sexual Assault Programs, Inc.	<a href="http://www.kasap.org">www.kasap.org</a>	The Kentucky Association of Sexual Assault Programs, Inc. (KASAP) is the statewide coalition of the 13 rape crisis centers in the Commonwealth. The mission of KASAP is to speak with a unified voice against sexual victimization.

Resource	Website	Description
Kentucky Cabinet for Health and Family Services Standards of Practice Online Manual	<a href="https://manuals.sp.chfs.ky.gov/Pages/index.aspx">https://manuals.sp.chfs.ky.gov/Pages/index.aspx</a>	Manual outlining the standards of practice employed by the Kentucky Cabinet for Health and Family Services.
Kentucky Crime Victim’s Bill of Rights Handbook	<a href="https://ag.ky.gov/AG%20Publications/Crime-Victim-BoR-Handbook.pdf">https://ag.ky.gov/AG%20Publications/Crime-Victim-BoR-Handbook.pdf</a>	Handbook providing general information about the rights of crime victims and the roles and responsibilities of the professionals involved in criminal proceedings.
Kentucky Youth Advocates	<a href="https://kyyouth.org/">https://kyyouth.org/</a>	Nonprofit organization that advocates for policies that give children the best possible opportunities for a brighter future.
National Children’s Advocacy Center	<a href="https://www.nationalcac.org/">https://www.nationalcac.org/</a>	NCAC serves as a model for the 1000+ Children’s Advocacy Centers (CACs) now operating in the United States and in more than 34 countries throughout the world.
National Organization of Male Sexual Victimization	<a href="https://malesurvivor.org/">https://malesurvivor.org/</a>	MaleSurvivor is a 501(c)(3), non-profit, public benefit organization committed to preventing, healing, and eliminating all forms of sexual victimization of boys and men through support, treatment, research, education, advocacy, and activism.
National Sexual Assault Hotline: Rape, Abuse and Incest National Network (RAINN)	<a href="https://www.rainn.org/">https://www.rainn.org/</a>	RAINN is the nation's largest anti-sexual violence organization. RAINN created and operates the National Sexual Assault Hotline in partnership with more than 1,000 local sexual assault service providers across the country.
National Sexual Violence Resource Center	<a href="https://www.nsvrc.org/earning/child-sexual-abuse">https://www.nsvrc.org/earning/child-sexual-abuse</a>	The National Sexual Violence Resource Center (NSVRC) is the leading nonprofit in providing information and tools to prevent and respond to sexual violence.

<p>Victim Information and Notification Everyday (VINE)</p>	<p><a href="https://corrections.ky.gov/victim-services/pages/vine-info.aspx">https://corrections.ky.gov/victim-services/pages/vine-info.aspx</a></p>	<p>VINE (Victim Information and Notification Everyday) is a free automated notification system that alerts victims and concerned citizens about a change in custody of an offender. The system gathers information from jail booking systems, prisons and mental health facilities.</p>
<p>Zero Abuse Project</p>	<p><a href="https://www.zeroabuseproject.org/">https://www.zeroabuseproject.org/</a></p>	<p>Zero Abuse project works to protect children from abuse and sexual assault, by engaging people and resources through a trauma-informed approach of education, research, advocacy, and advanced technology.</p>