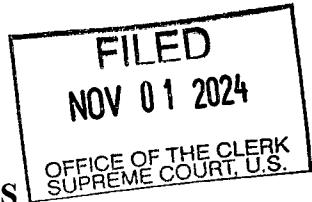


24-5921

No. \_\_\_\_\_

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES



CHRISTOPHER KOTERAS – PETITIONER

vs.

DANIEL AKERS, WARDEN, LEE ADJUSTMENT CENTER – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

*Christopher Koteras*  
Christopher Koteras, pro se  
Inmate #255779  
Lee Adjustment Center  
168 Lee Adjustment Center Dr.  
Beattyville, KY 41311

## **QUESTIONS PRESENTED**

### **Introduction.**

Mr. Koteras was tried by jury and convicted of multiple counts of sexual abuse of his minor daughter, Amanda.<sup>1</sup> During the trial while Amanda was testifying, a Victim's Advocate who is employed by the prosecutor's office stood behind the jury and non-verbally communicated with Amanda through use of head movements and hand gestures. Mr. Koteras filed a post-collateral motion to vacate his sentence and an evidentiary hearing was held during which the court took judicial notice of the actions by the Victim's Advocate. After the conclusion of evidence the court made oral findings and denied relief. Included in the findings the court held the actions by the Advocate had the effect to "give the witness a bit more confidence that a child witness usually has on the stand. (See Appendix J – at pg. 6).

### **Question I.**

When the interaction between the Prosecution's Victim's Advocate and a testifying witness has been determined by the trial court to have enhanced the witness's credibility, has the defendant's constitutional right of confrontation and to due process been violated?

### **Introduction.**

Prisoners wishing to collaterally attack their convictions do not have a Constitutional right to counsel, and thus no Sixth Amendment protection to the effective assistance of counsel. That being said, the due process clause of the Fifth and Fourteenth Amendments protect a prisoner's constitutional right to have a fundamentally fair process and meaningful judicial

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<sup>1</sup> Amanda is the pseudonym used throughout the majority of case proceedings to describe the complaining witness. Mr. Koteras continues to use it in this request for certiorari.

review of his/her claims. During appellate review of his post-collateral claims the Kentucky Court of Appeals announced “Christopher's brief is rife with errors[.]” *Koteras v. Commonwealth*, 589 S.W.3d 534, 540 (Ky. App. 2018).

**Question II.**

In the constitutional right to a fundamentally fair proceeding does the Due Process clause of the Fifth Amendment applied to the states through the Fourteenth Amendment require appellate counsel to provide a minimally competent level of assistance to ensure a meaningful review may occur?

**LIST OF PARTIES**

- All parties appear in the caption of the case on the cover page.
- All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

**RELATED CASES**

*Koteras v. Akers*, Case No. 23-5979, U.S. Court of Appeals for the Sixth Circuit.  
Denial of request for rehearing, Judgment entered August 5, 2024  
Denial of request for certificate of appealability, Judgment entered May 16, 2024.

*Koteras v. Akers*, Case No. 5:20-CV-186-CHB-MAS, U.S. District Court for the Eastern District of Kentucky, Lexington Division.  
Denial of petition for writ of habeas corpus, Judgment entered September 29, 2023  
Report and Recommendation, Judgment entered January 19, 2023

*Koteras v. Commonwealth*, Case No. 2019-SC-000035-D, Kentucky Supreme Court.  
Denial of motion for discretionary review, Judgment entered December 13, 2019

*Koteras v. Commonwealth*, Case No. 2017-CA-000506-MR, 589 S.W.3d 534 (Ky. App. 2018)  
Kentucky Court of Appeals, Affirming denial of post-collateral RCr 11.42 motion  
Judgment entered December 21, 2018

*Koteras v. Commonwealth*, Case No. 11-CR-00087, Jessamine Circuit Court.  
Denial of post-collateral RCr 11.42 motion – Judgment entered March 7, 2017  
Final Judgment and Sentence – Judgment entered September 20, 2012

Koteras v. Commonwealth Case No. 2012-SC-000649-MR  
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APPENDIX I Trial Court order denying post-collateral (RCr 11.42) motion.  
*Koteras v. Commonwealth*, Case No. Case No. 11-CR-00087, entered on Judgment entered March 7, 2017  
Jessamine Circuit Court.

APPENDIX J Petition for Certificate of Appealability  
*Koteras v. Akers*, Case No. 23 – 5979, submitted Nov. 6, 2023

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IN THE  
SUPREME COURT OF THE UNITED STATES

**PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

**OPINIONS BELOW**

For cases from federal courts

The opinion of the United States Court of Appeals appears at Appendix B to the petition and is:

reported at \_\_\_\_\_; or  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is:

reported at \_\_\_\_\_; or  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

**JURISDICTION**

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was December 12, 2023.

No petition for rehearing was timely filed in my case.  
 A timely petition for rehearing was denied by the United States Court of Appeals on Aug. 05, 2024, and a copy of the order denying rehearing appears at Appendix A.  
 An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **U.S. Constitution, Fifth Amendment:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **U.S. Constitution, Fourteenth Amendment, Section 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**KRS § 421.575** ..... Referenced on pg. 8, 11, 12, 15  
This document is current through all 2024 regular session legislation.

KRS § 421.575. Role of victim advocates in court proceedings.

In all court proceedings, a victim advocate, upon the request of the victim, shall be allowed to accompany the victim during the proceeding to provide moral and emotional support. The victim advocate shall be allowed to confer orally and in writing with the victim in a reasonable manner. However, the victim advocate shall not provide legal advice or legal counsel to the crime victim in violation of KRS 421.570 and 524.130.

#### **History**

Enact. Acts 1996, ch. 189, § 5, effective July 15, 1996.

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**KRS § 15.760(6)(a) (in relevant part) . . . . .** Referenced on pg. 12  
KRS § 15.760. Staff of Commonwealth's attorneys — County's duty to provide grand jury and witness rooms — Victim advocate.

(6)(a) Each Commonwealth's attorney shall be authorized to employ individually or jointly with one (1) or more other Commonwealth's attorneys at least one (1) victim advocate to counsel and assist crime victims as defined in KRS 421.500.

**Complete Statute at Appendix K**

**KRS § 421.500 . . . . .** Referenced on pg. 12  
421.500. "Victim" defined for KRS 421.500 to 421.575 — Applicability — Required notifications — Duties of public officers and agencies — Restitution — Construction of KRS 421.500 to 421.575.

**Complete Statute at Appendix L**

**Kentucky Revised Statute ( KRS) §31.110. (in relevant part) . . . . .** Referenced on pg. 4  
KRS 31.110. Persons entitled to department representation and services — Extent of representation and services — Rights of representation for persons subject to proceedings under KRS Chapter 202C.

(1) A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, or who is accused of having committed a public or status offense or who has been committed to the Department of Juvenile Justice or Cabinet for Health and Family Services for having committed a public or status offense as those are defined by KRS 610.010(1), 610.010(2)(a), (b), (c), or 630.020(2) is entitled:

(a) To be represented by an attorney to the same extent as a person having his or her own counsel is so entitled;

(2) A needy person who is entitled to be represented by an attorney under subsection (1) of this section is entitled:

(b) To be represented in any appeal;

**Complete Statute at Appendix M**

**Hawaii Revised Statutes (HRS) § 621-28 . . . . .** Referenced on pg. 13  
This document is current through Act 253 of the 2024 Legislative Session.

**HRS § 621-28. Accompaniment of children at judicial proceedings.**

A child less than fourteen years of age, involved in a judicial proceeding, including a grand jury proceeding, shall have the right to be accompanied by a parent, a victim- witness counselor, or other adult designated by the court. The accompanying person may be placed side by side with the child at the discretion of the presiding judge or court officer; provided that this position does not interfere with the proceedings of the court. The accompanying person shall not communicate in any manner with the child unless directed by the presiding judge or court officer.

**History**

L 1985, c 185, § 1.

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**Utah Code Title 77 Chapter 37 Victims' Rights . . . . .** Referenced on pg. 13  
Current through the 2024 4th Special Session.

**Utah Code Ann. § 77-37-1(2) Legislative intent.**

(1) The Legislature recognizes the duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, the essential nature of citizen cooperation to state and local law enforcement efforts, and the general effectiveness and well-being of the criminal justice system of this state. In this chapter, the Legislature declares its intent to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity, and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law in a manner no less vigorous than protections afforded criminal defendants.

(2) The Legislature finds it is necessary to provide child victims and child witnesses with additional consideration and different treatment than that usually afforded to adults. The treatment should ensure that children's participation in the criminal justice process be conducted in the most effective and least traumatic, intrusive, or intimidating manner.

**History**

C. 1953, 64A-1-1, enacted by L. 1987, ch. 194, § 1; recodified as C. 1953, 77-37-1.

Utah Code Annotated

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**California Penal Code, Part 2, Title 3, Chapter 7, §868.5 . . . . .** Referenced on pg. 16  
Cal Pen Code § 868.5 Attendance of persons to support prosecuting witness in specified cases

**Complete Statute at Appendix N**

**Kentucky Civil Rule Procedure (CR) 76.12(4)(c)(v) . . . . .** Referenced on pg 21  
Ky. CR Rule 76.12. Briefs.

**Complete Ky. CR 76.12 at Appendix O**

**STATEMENT OF FACTS RELEVANT TO THE GRANTING OF MR. KOTERAS'S  
PETITION FOR CERTIORARI**

Mr. Koteras was indicted on twenty-four identical counts of sexual abuse in May of 2011. A trial by jury commenced on July 24, 3012, on eight counts, the Commonwealth having moved to dismiss the remaining counts. The first witness called by the Commonwealth was Amanda.<sup>1</sup> As her testimony began a Victim's Advocate, employed by the Commonwealth Attorney's office, stood behind the jury and communicated non-verbally with Amanda through use of head movements and hand gestures. (See Appendix C – 6). Mr. Koteras immediately brought her actions to his counsel's attention, but they took no immediate action. (See Appendix C – 6). After thirty minutes of direct examination, Counsel objected before starting cross examination. (See Appendix C – 6). The following day the jury returned a verdict of guilty and Mr. Koteras was sentenced to serve twenty (20) years in prison. (See Appendix C – 1). The conviction was affirmed by the Kentucky Supreme Court. (See Appendix C – 1-2).

In August of 2015, Mr. Koteras submitted a post-collateral motion pursuant to RCr 11.42 raising claims of ineffective assistance of trial counsel (IATC) and claims against counsel from his direct appeal (IAAC). (See Appendix D – 2). Based on statutory provisions Counsel was appointed in accordance with Kentucky Revised Statute (KRS) §31.110. who submitted a supplement clarifying some of the pro se claims as well as presenting new claims. (See Appendix D – 2). An evidentiary hearing was held. (See Appendix D – 2). One of the issues argued was based on the actions of the Victim's Advocate non-verbal communication with Amanda. (See Appendix C – 6-7). The actions by the Victim's Advocate were admitted to and described during

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1 Amanda is the pseudonym used throughout the majority of case proceedings to describe the complaining witness. Mr. Koteras continues to use it in this request for certiorari. However the court of appeals of appeals chose to use the initials A.K., in the place of Amanda.

her testimony at the hearing. (See Appendix C – 6-7). In addition to the non-verbal communication the Victim's Advocate admitted she accompanied Amanda when the Commonwealth's Attorney discussed the trial testimony to be given. (See Appendix C – 16). The court also took judicial notice of the Advocate's actions and explained the camera placement at the time did not cover the area where the Victim's Advocate was standing. (See Appendix D – 5).

At the conclusion of the hearing, the court before denying relief made oral findings, including the determination that the actions by the Victim's Advocate had the affect to “give the witness a bit more confidence than a child witness usually has on the stand.” (See Appendix J – 6). Shortly after the hearing the court rendered its written ordered. (See Appendix I). The order failed to make findings on a pro se claim of IAAC. The oversight was brought to the courts attention through objections filed by Mr. Koteras. (See Appendix J – 22). Appointed counsel failed to request findings on the claim as required by RCr 11.42(6). (See Appendix D - 13).

Before withdrawing from the case, counsel filed a timely notice of appeal. New counsel was appointed for appeal. In response to his opening brief the Commonwealth moved the court to strike Mr. Koteras's brief, which was granted in part (See Appendix G – 1-5). Instead of striking the entire brief, in a separate order the court “choose instead to strike offending portions of the brief and ignore all references to family court records outside the certified record on appeal.” (See Appendix G – 4). In a section of the published opinion “ADHERENCE TO RULES OF APPELLATE PROCEDURE” the court began by saying “Christopher's brief is rife with errors[.]” *Koteras v. Commonwealth*, 589 S.W.3d 534, 540-41 (Ky. 2018). (Paper copy at Appendix H). The court continued to chastise counsel for: inclusion of a detailed summary which was not part of the record on appeal, attempts to supplement the record and factual

misstatements, violating appellate court rules by failing to include a statement of preservation for three of the nine numbered issues, presenting an unnumbered claim for the first time on appeal and the failure to adhere to the rules for documents attached in the appendix. *Koteras*, 589 S.W.3d at 540-41.

Further into the opinion addressing claim number five the court found the inclusion of an IAAC claim tied to an IAC claim “as an aside and not as a numbered claim” was not ruled upon by the trial court and was not properly before appellate court for failure to give the trial court an opportunity to correct any oversight as required by rule. *Koteras*, 589 S.W.3d at 547. In the end the appellate court denied relief in light of the totality of the evidence, there was not a reasonable probability the “jurors would have reasonably doubted his guilt and acquitted him.” *Koteras*, 589 S.W.3d at 550.

After the denial by the court of appeals, Mr. Koteras submitted a motion for discretionary (MDR) review to the Kentucky Supreme Court. (See Appendix F – 1-16). Mr. Koteras specifically requested the court to reject the court of appeal's distinguishing and support of the actions by the Advocate in his case from the same actions committed by a family friend that were condemned in *Sharp*<sup>2</sup> and found to require reversal of conviction. (See Appendix F – 9-10). In the same line he requested the court to review the application of KRS 421.575<sup>3</sup> to the facts of his case by the court of appeals. (See Appendix F – 8-9). Mr. Koteras started off his MDR by requesting the court to explain if counsel followed the trial court's direction to summarize the family court proceedings. (See Appendix F – 6-8). And he ended the MDR requesting the court to determine if his appeal was given meaningful review. (See Appendix F – 13-15).

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2 *Sharp v. Commonwealth*, 925 F.2d 449, 453 (Ky. 1996).

3 KRS 421.575. Role of victim advocates in court proceedings. (See pg. 2, *supra*)

Having failed to find relief in state court, Mr. Koteras filed in Kentucky's Eastern District Court his §2254 habeas corpus petition presenting nine claims for relief with claim number three having two parts. Adopting the Magistrate Judge's recommendation the district court denied all of his claims and declined to grant a certificate of appealability (COA). (See Appendix C – 24-25). Of importance to this petition is the court found three claims to be procedurally defaulted by being abandoned on appellate review in state court and part B of claim three was defaulted because counsel failed to have the trial court issue a ruling on the claim as required by rule. (See Appendix C – 12).

In his request to the Sixth Circuit Court of Appeals, Mr. Koteras presented five facts essential to determining if the Victim's Advocate violated his right to a fundamentally fair trial. (See Appendix J – 6). Neither the state nor federal courts have addressed fact number four – in which the trial judge determined the Victim's Advocate caused Amanda to have a bit more confidence than a child witness usually has on the stand. The Sixth Circuit denied issuing a COA on this claim and agreed with the District Court's determinations in denying Mr. Koteras's request for COA on all remaining issues. (See Appendix B). Mr. Koteras petitioned for panel rehearing was denied on August 5, 2024. (See Appendix A).

Mr. Koteras now presents his reasons and arguments in support of granting his petition.

## **REASONS FOR GRANTING THE PETITION**

### **Reason for Granting Review for Question I.**

Mr. Koteras believes the disparity in the holdings by the state courts of last resort determining the permissible interaction between a Victim's Advocate and a testifying child witness to be an important federal question needing resolution of how to balance a defendant's federal constitutional protections to a fundamentally fair trial with the need to support a testifying child witness as a compelling reason for review and the granting of his petition.

Mr. Koteras has been unable to find any federal case law directly on point and believes this is a case of first impression.

### **Reason for Granting Review for Question II.**

For his compelling reason to grant review, Mr. Koteras presents Kentucky's refusal to consider his claim that Appellate Counsel failed to meet the minimally competent assistance required by the due process clause of the Fourteenth Amendment embodied from the Fifth Amendment – to ensure meaningful review of his claims – is an important federal question which has not been discussed by this Honorable Court since before Strickland became the benchmark for evaluating the performance of counsel's assistance which concluded the transition of measuring ineffective assistance claims from the Fifth Amendment to the Sixth Amendment.

Petitioner believes the following arguments explain why it is necessary for this Court to grant review of his petition.

## **ARGUMENTS IN SUPPORT OF GRANTING THE PETITION**

**Argument I:** Due Process is Violated when Interaction Between a Victim's Advocate and a Testifying Child Witness has been Determined to have Affected the Credibility of the Testimony placed before the jury.

Nearly all if not every state has created provisions which allow for designated people to accompany a child witness during court proceedings to provide moral and emotional support. Kentucky's provision, KRS 421.575 (located on pg. 2, *supra*) allows for communication between a victim's advocate and testifying child witness drastically conflicts with those of other state courts of last resort. With the exception of the victim's advocate, Kentucky recognizing the inherent prejudice to the concept of a fair trial has condemned the communication between a testifying child witness and a person wishing to provide support.

In 1993 the Kentucky Supreme Court was faced with a case where a family friend admitted to gesturing and to mouthing words of support to a testifying child witness. *Sharp v. Commonwealth*, 849 S.W.2d 542 (Ky. 1993). The court found "it would be impossible to say that the witness did not derive confidence and assurance from this positive reinforcement which influenced the jury to believe her." *Id.*, at 547. The prejudice is not dependent on the jury's awareness of the attempt to comfort and encourage the witness. The prejudice results from the derived confidence and assurance from the positive reinforcement which influences the jury to believe the witness. *Id.*, at 547. In remanding for a new trial, the court found the actions were "so egregious and inimical to the concept of a fair trial that they cannot be disregarded in the name of trial court discretion. *Id.*

The next year the Kentucky Legislature enacted: "the Commonwealth's attorney shall be authorized to employ individually or jointly . . . at least one (1) victim advocate (hereinafter

advocate) to counsel and assist crime victims as defined in KRS 421.500." KRS 15.760(6)(a) (See Appendix K & L). Two years after that the Legislature provided provisions that "[i]n all court proceedings, an advocate, upon the request of the victim, shall be allowed to accompany the victim during the proceeding to provide moral and emotional support. KRS 421.575 (located on pg. 2). The wording in this sentence is comparable to all other states which have created similar law. It is the following sentence of the statute is diametrically different to all other states. "The victim advocate shall be allowed to confer orally and in writing with the victim in a reasonable manner." *Id.*<sup>4</sup> (c.f. KRS 421. 575 on pg. 2 with HRS 621-28 on pg.4). The *Sharp* case became the standard for any claims of witness tampering. See *Epperson v. Commonwealth*<sup>5</sup>.

Applying the *Sharp* standard the court in *Banks* agreed with the appellant that the "voiceless communication between an officer of the prosecution [Detective Isenberg was seated at the counsel table with the prosecutor] and a testifying witness was improper."<sup>6</sup> The *Banks* court distinguished the two cases finding because "the improper interaction was far more limited in both scope and duration," the prejudice suffered did not warrant a mistrial. *Id.*

In the case of *Golden*, a local attorney, Joseph Holbrook who was not directly involved with the case but watched part of the trial noticed during cross examination what he perceived to

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4 In *Koteras v. Commonwealth*, 589 S.W.3d 534, 545 (Ky. 2018) cert denied, the court of appeals interpreted this sentence to include communication while the child witness is testifying. (See Appendix H).

5 *Epperson v. Commonwealth*, 2005 WL 1051106, 2005 Ky. App. Unpub. LEXIS 945, \*3, Case No. 2004-CA-000208-MR, quoting *Sharp*, 849 S.W.2d at 547 ("In setting forth the standard the Court in *Sharp* noted that when determining whether a mistrial should be granted the circuit court is faced with the question of "whether the impropriety would likely influence the jury.").

6 *Banks v. Commonwealth*, 2015 WL 1544294, 2015 Ky. Unpub. LEXIS 12, \*7-8, Case No. 2014-SC-000176-MR.

be signals from the prosecutor to the child witness.<sup>7</sup> Holbrook alerted defense counsel who in turn approached the bench and informed the trial court of the prosecutor's actions. *Id.* During review the Kentucky Supreme Court held "we construe the ambiguous record as a finding of the trial court that signaling did not occur." *Id.*, Lexis at 14-15. In so finding the court citing *Sharp* warned "[o]f course, it should go without saying that no one in the courtroom during a trial, especially the attorneys trying the case, may signal or otherwise communicate answers to a testifying witness, whether it be for the purpose of guiding the testimony or lending encouragement and moral support. *Id.*, at 13-14.

Up to this point Kentucky's appellate courts had not been presented with a case which involved the actions of an advocate which mimicked those described in *Sharp*. That changed in the case of *Koteras v. Commonwealth*, 589 S.W.3d 534, 545-46 (Ky. 2018). At the evidentiary hearing, the advocate admitted she signaled to Amanda to keep her voice up as the prosecutor had directed her to do. *Id.*, at 545, & 545n.8. After the presentation of evidence was concluded the trial court made oral findings of facts based on the testimony given. The trial court found the advocate's actions "gave the witness a bit more confidence than a child witness usually has on the stand." (See Appendix J – 6). c.f. *Sharp*, 849 S.W.2d at 547 ("[T]he witness received encouragement, approval and comfort . . . it would be impossible to say that the witness did not derive confidence and assurance . . . which influenced the jury to believe her.") While the actions are nearly indistinguishable and had the same affect the court designated "A victim advocate is distinct from a bystander." *Koteras*, 589 S.W.3d at 545. The holding by the court in *Koteras* has set controlling precedent allowing for an advocate to communicate with a testifying

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<sup>7</sup> *Golden v. Commonwealth*, 2017 WL 1536253, 2017 Ky. LEXIS 149, \* 11-12, Case No. 2016-SC-000179-MR.

child witness. The distinction by Kentucky is contrary to the holdings by several other state courts.

In Kansas the court in *State v. Dayhuff*, 158 P.3d 330, 343 (Kan. App. 2007) directly compared the actions by a child advocate with *Sharp*. In remanding for a new trial, the court took issue with the trial court's failure to develop the record when the objection was made allowing to investigate the matter as to how the child advocate's conduct may have impacted the child's testimony and affected the jury. From the available record the court determined:

It is undisputed that Adams moved around the courtroom, nodded, and smiled to H.D. during her testimony. Although the conduct falls short of the behavior in *Sharp*, Adams was actively supporting and encouraging H.D. at the time her credibility was being assessed by the jury. As in *Sharp*, it would be impossible to say that the witness did not derive confidence and assurance from this positive reinforcement which influenced the jury to believe her. 849 S.W.2d at 547. Moreover, the trial court has an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment to the United States Constitution. *Wheat v. United States*, 486 U.S. 153, 161(1988). *State v. Jenkins*, 898 P.2d 1121 (1995).

*Dayhuff*, 158 P.3d at 344.

Also the court looked into earlier Kansas cases that had researched holdings from other jurisdictions and found "the common thread running through the holdings is that when the accompanying party does not speak, prompt the witness, or in any manner attempt to disrupt or influence the trial," it is within the trial judge's discretion to permit "an adult support person to be in close proximity to a minor while the minor testifies." *Dayhuff*, 158 P.3d at 343 quoting *State v. Rowray*, 860 P.2d 40, 43 (Kan. App. 1993).

Hawaii like Kentucky enacted specific legislation to provide for support persons designated by the court to accompany a child witness during court proceedings to provide moral

and emotional support:

A child less than fourteen years of age, involved in a judicial proceeding, including a grand jury proceeding, shall have the right to be accompanied by a parent, a victim-witness counselor, or other adult designated by the court. The accompanying person may be placed side by side with the child at the discretion of the presiding judge or court officer; provided that this position does not interfere with the proceedings of the court. The accompanying person shall not communicate in any manner with the child unless directed by the presiding judge or court officer.

Hawaii Revised Statutes (HRS) § 621-28

Reversing and remanding for a new trial the Hawaii Supreme Court focusing on the last sentence of the statute prohibiting any communication between support person with the child witness. *State v. Rulona*, 785 P.2d 615, 617 (Haw. 1990) overruled on other grounds by *State v. Mueller*, 76 P.3d 943, 948 (Haw. 2003). The court emphasized “communication is not always verbal, and the procedure followed here was fraught with opportunity for a violation of that sentence.” *Rulona*, 785 P.2d at 617.

The Hawaiian statute and Kentucky statute which allow for a child witness to be accompanied by a support person are directly at odds with one another.

The accompanying person shall not communicate in any manner with the child unless directed by the presiding judge or court officer.

HRS § 621-28.

The victim advocate shall be allowed to confer orally and in writing with the victim in a reasonable manner.

KRS § 421.575.

Both states cannot be correct. Hawaii's version protects the defendant's right to due process. While Kentucky's statute guarantees the rights of the child witness to prevail over the

due process protections of the defendant.

In wishing to preserve rights for those who have been victims both Utah and California have enacted laws which allow for a support person to accompany a testifying child witness to the stand. Utah Code §77-37-1(2) (located at pg. 4) & Cal Pen Code § 868.5 (See Appendix N). Notwithstanding both states have made clear any type of communication is prohibited. Discussing the role of victim advocates the Supreme Court of Utah held: “[i]t is established law . . . a witness of tender years may be accompanied by an adult to ease the emotional turmoil of testifying in court. We find no provision in the Victims' Rights Act that applies to assistance in testifying at trial.” *State v. Harrison*, 24 P.3d 936, 940 & 940n.2 (Utah 2001). Likewise California remained steadfast in their position that: “It is established that a support person's mere presence with a witness on the stand, pursuant to section 868.5, does not infringe upon a defendant's due process and confrontation clause rights, unless the support person improperly interferes with the witness's testimony, so as to adversely influence the jury's ability to assess the testimony.” *People v. Spence*, 212 Cal. App.4th 478, 514, 151 Cal. Rptr. 3d 374, 402 (2012) (citations omitted).

The courts of several other states have interpreted victim's rights legislation or prior court rulings to protect the rights of a child witnesses.<sup>8</sup> Most of these states allowing for a child witness to sit on a support person's lap or in close proximity, or to be accompanied by a therapy

<sup>8</sup> *Czech v. State*, 945 A.2d 1088, 1093 (Del. 2008) (finding it is permissible for an adult support person to sit in close proximity to a child complainant testifying before a jury provided that adequate procedural safeguards are imposed. See also: *Gadberry v. State*, 877 S.W.2d 941, 945 (Ark. App. 1994); *People v. Whitman*, 205 P.3d 371, 378 (Colo.App. 2007); *State v. Menzies*, 603 A.2d 419, 429 (Conn. App. 1992); *Miles v. State*, 411 S.E.2d 566, 569 (Ga. App. 1991); *State v. Nuss*, 446 P.3d 458, 462 (Ida. App. 2019); *State v. Letendre*, 13 A.3d 249, 256 (N.H. 2011); *State v. T.E.*, 775 A.2d 686, 695 (N.J. 2001); *State v. Dompier*, 764 P.2d 979, 980 (Or. App. 1988); *Commonwealth v. Pankraz*, 554 A.2d 974, 979 (Pa. Super. 1989); *State v. Alidani*, 609 N.W.2d 152, 157 (S.D. 2000); *State v. Jones*, 362 S.E.2d 330, 332 (W. Va. 1987).

dog have instituted one or more procedural safeguards such as: a) requiring the state to prove there was a compelling need to have the support person sit next to the child; b) issuing a cautionary instruction both to the jury and to the support person; or c) or allowing the defendant to suggest alternatives to the procedure. “The use of such safeguards allows a trial court to strike the proper balance between the possible prejudice to the defendant’s constitutional right to a fair trial and the interest of the State in presenting testimonial evidence.” *Czech v. State*, 945 A.2d 1088, 1093 (Del. 2008).

Unlike the multitude of other states previously mentioned, post *Koteras* the Kentucky Supreme Court passed on the opportunity to clearly establish parameters of acceptable interaction between an advocate and child witness, and articulate why the prejudice attributed to non-authorized persons supporting the child witness are distinguishable from the state’s advocate.<sup>9</sup> In *Graham* as the child witness was leaving the courtroom during a recess from testifying a bystander who appeared to be a counselor made a thumbs up gestures to the child witness. *Graham v. Commonwealth*, 571 S.W.3d 575, 582-83 (Ky. 2019). Determining the gestures did not occur while the child witness was testifying the court denied relief. *Id.*, at 584. Although the court did not find prejudice in the gestures of the bystander/counselor, the court did issue a warning for future behavior. (“we caution attorneys that it would be wise to warn any bystanders present in the courtroom for the support of witnesses that such interaction in view of the jury is improper.”). *Id.*, at 584. However the court stopped short of harmonizing the rulings in which it is improper for a family friend, support person such as a counselor, a detective working

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<sup>9</sup> The court rendered its ruling in *Graham v. Commonwealth*, 571 S.W.3d 575 (Ky. Apr. 19 2019) after the binding precedent in *Koteras v. Commonwealth*, 589 S.W.3d 534 (Ky. Dec. 21, 2018) was issued and before the court denied Koteras’s motion for discretionary review on Dec. 13, 2019.

for the prosecution, to make gestures to a testifying child witness, but that the court supports a victim's advocate working for the prosecutor's office to make those same gestures.

Central to fundamental fairness is the right of an accused to have his guilt or innocence determined solely on the evidence produced at trial. *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). “[O]ur system of law has always endeavored to prevent even the probability of unfairness.” *In re Murchison*, 349 U.S. 133, 136 (1955). To assure criminal prosecutions are conducted fairly our founding fathers made as a part of the First Amendment to the United States Constitution that our courts would remain open to the public and press. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980). This constitutional protection serves the purpose to guarantee trial outcomes are not based on secret bias or partiality nor by civil unrest to shocking crimes. *Id.*, at 569. “To work effectively it is important that society's criminal process satisfy the appearance of justice. *Id.*, at 571-72 quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Kentucky has set binding precedent sanctioning victim's advocate employed by the Commonwealth Attorney's Office to communicate with a testifying child witness. By upholding the Commonwealth's judgment Kentucky's Eastern District Federal Court and the Sixth Circuit Court of Appeals have condoned this practice. Intervention by this Honorable Court is necessary to reinstate integrity and impartiality our system was founded upon.

While comity requires the Federal Government to respect the autonomy of the States, Mr. Koteras prays this Honorable Court to grant review to set boundaries which uphold a defendant's right to a fair trial while still protecting testifying children.

**Argument II: Due Process Requires appointed Post Collateral Appellate Counsel to Provide a Minimally Competent Level of Assistance to Ensure a Meaningful Review.**

Counsel appointed by statute, rather than a constitutional right, consistent with due process guaranteed by the Fifth Amendment through the Fourteenth Amendment must render competent assistance to ensure the appellant is given a meaningful review of his/her claims.

The root of the requirement that a criminal defendant must have the effective assistance of counsel was founded upon the Due Process Clause of the Fourteenth Amendment in *Powell v. Alabama*. *Gideon v. Wainwright*, in extending the Sixth Amendment right to counsel in all felony proceedings to state court defendants through the Fourteenth Amendment's Due Process Clause, shifted the theoretical root of the right to assistance of counsel, which in turn shifted the focus of the effectiveness inquiry to one based upon the Sixth Amendment.

*In re K.L.*, 91 S.W.3d 1, 7-8 (Tex. App. 2<sup>nd</sup> Dist. 2002) (Footnotes and citations omitted).

Thirteen years after *Powell* and eighteen years before *Gideon*, the District of Columbia Circuit Court in *Diggs v. Welch*, 148 F.2d 667, 668-69 (D.C. Cir 1945) established the "farce and mockery" standard of review of counsel's performance based on the protections of the Fifth Amendment's guarantee of a fair trial. See *Trapnell v. United States*, 725 F.2d 149, 154 (2<sup>nd</sup> Cir. 1983). The *Diggs* Court held to secure relief base solely on the ground that counsel acted incompetently and negligently a petitioner must show that the proceedings were a farce and a mockery of justice. *Beasley v. United States*, 491 F.2d 687, 693-94 (6<sup>th</sup> Cir. 1974). This holding was based the Court's "view that the Sixth Amendment guarantees no more than the formal appointment of competent counsel and the performance of counsel must be judged on the Fifth Amendment alone." *Id.* Over the next thirty years courts across the country transitioned to the belief that the "effective assistance, like the right to counsel itself, derives not only from the due

process clause, but from the sixth amendment's more stringent requirements." *United States v. DeCoster*, 487 F.2d 1197, 1202-03 (D.C. Cir. 1973) (citations omitted). In 1984 the holding in *Strickland* completed the transition to the Sixth Amendment. Since then evaluations of counsel's performance have based on the Sixth Amendment as set forth in *Strickland* and its progeny.

The right to post collateral proceedings in Kentucky are granted through state statute and court rules. That is to say Kentucky prisoners do not have a Sixth Amendment right to counsel, nor the effective assistance protection thereof when seeking redress of ineffective assistance of trial and/or post conviction counsel claims.<sup>10</sup> Nonetheless when a State has chosen to create a process through statute or rule that is an integral part of the system for finally adjudicating the guilt or innocence of a defendant that process must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (citations omitted). Once counsel has been appointed in post collateral proceedings the failure to hold counsel to some standard of minimally competence renders the review to a meaningless ritual. *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985). Counsel must be held to a standard which provides the appellant an opportunity to present his/her claims fairly to allow for a meaningful review. "[A] party whose counsel is unable to provide minimally competent assistance is in no better position than one who has no counsel at all." *Id.*, at 396.

The question then becomes: what is considered minimally competent assistance required by the due process clause protected of the Fifth Amendment applied to the states through the Fourteenth Amendment? History would dictate the lack of counsel's assistance must have "shocked the conscience of the Court and made the proceedings a farce and a mockery of

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10 The preference in Kentucky is that claims of ineffective assistance of trial counsel are not properly raised on direct appeal, but rather must be raised for the first time by way of a post-trial motion under Rule 11.42. See *Woolbright v. Crews*, 791 F.3d 628, 635 (6<sup>th</sup> Cir. 2015).

justice.” *Diggs*, 148 F.2d at 670. The failure by counsel to follow simple rules set in place for appellate review should shock the conscience of the court into finding the error denied the appellant of due process.

In criminal cases counsel is a necessity, not a luxury. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The necessity does not cease as the judicial process moves from trial to post conviction. *Penson v. Ohio*, 488 U.S. 75, 85 (1988).

To prosecute the appeal, a criminal appellant must face an adversary proceeding that, like a trial, is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant, like an unrepresented defendant at trial, is unable to protect the vital interests at stake.

*Evitts*, 469 U.S., at 396.

A party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. *In re K.L.*, 91 S.W.3d at 8 quoting *Evitts*, 469 U.S., at 396. It stands to reason to provide minimally competent assistance counsel must bring to bear such knowledge and skill that is superior to a rudimentary base knowledge of the law. Kentucky requires pro se litigants to abide by the appellate rules of procedure. “All of the rules for preparing a brief before this Court are contained in CR 76.12<sup>11</sup> or rules cited therein. Lack of a legal education is not an impediment to following these rules.” *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). In 2019 the court of appeals stressed:

In sum, while Matthew is a pro se litigant, that does not exempt him from the rules. He is bound by the same rules of appellate procedure as his opposing counsel and any other party before this court. And it is not as if Matthew did not have opportunity to correct these errors. In his reply brief, after being made aware of

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<sup>11</sup> Former Ky. Civil Rule (CR) 76.12 has been replaced with Ky. Rule of Appellate Procedure (RAP) 32: Organization and Content of Briefs. (For Ky. CR 76.12 see Appendix O).

his noncompliance, he could have supplied this court with sufficient citations to the record and authorities—but he did not. On the contrary, he contends that he is a "personal litigant and the brief should be accepted on the merits of the facts of the argument in this case." Reply Brief of Appellant, p. 1. Therefore, we dismiss his appeal for non-compliance with CR 76.12. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. App. 1990); *Hallis, supra*.

*Koester v. Koester*, 569 S.W.3d 412, 415 (Ky. App. 2019).

After reviewing Supreme Court precedent and applicable state cases the Texas Appellate Court concluded "that a statutory right to appointed counsel without any meaningful procedure by which to address counsel's effectiveness does not comport with due process." *In re K.L.*, 91 S.W.3d at 11-12, c.f. *Evitts*, 469 U.S., at 397 ("the promise of Douglas that a criminal defendant has a right to counsel on appeal -- like the promise of Gideon that a criminal defendant has a right to counsel at trial -- would be a futile gesture unless it comprehended the right to the effective assistance of counsel."). To hold otherwise would render the appointment of counsel "meaningless," "illusory," "a nullity," "worthless," "of little value," or an "empty formality." *Id.*, at 12-13 (citations omitted).

In *Evitts* there was no challenge to the district court's finding the failure of counsel to follow simple court rules resulted in ineffective assistance in violation of the Fourteenth Amendment. *Evitts*, 469 U.S., at 392. As a result the Court found no reason to decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. *Id.* The Court did note "counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits." *Id.*, at 394n.6. Irrespective of the standard chosen to evaluate the performance of post collateral appellate counsel, the failure to adhere to the basic rules falls below any minimal judgment of competency required by the Fifth

and Fourteenth Amendments.

In line with *Evitts* and its cited authorities post collateral counsel appointed to represent *Koteras* failed to live up to the minimal requirements demanded by due process. In the published opinion the court dedicate a section to the heading Adherence to rules of Appellate Procedure. The court's opening to this section begins with "Christopher's brief is rife with errors." *Koteras v. Commonwealth*, 589 S.W.3d 534, 540 (Ky. 2018). The court criticized counsel for failing to adhere to rules and attempting to raise a claim for the first time on appeal. *Id.*, at 540-41. These errors along with attempts to supplement the record and factual misstatements culminated in the Commonwealth moving to strike Christopher's brief, which was granted in part. (See Appendix G – 1-5).

In Kentucky just as this Court described in *Martinez*: "When the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Martinez v. Ryan*, 566 U.S. 1, 11 (2011). It has become axiom that proceedings whether initiated by constitutional entitlement or discretionary through statute or rule must abide by the due process requirements of the Fourteenth Amendment. Once the state has granted the appointment of counsel in discretionary proceedings the same due process requires the representation provided to be minimally competent. Any error by counsel that denies an appellant a complete and meaningful review of those decisions fails to provide minimally competent representation required by due process.

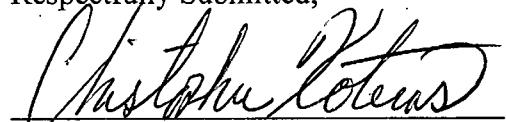
Mr. Koteras prays this Honorable Court to grant review and set forth minimal guidelines in which to evaluate counsel's performance necessary to uphold a full and fundamentally fair

appeal consistent with due process.

### CONCLUSION

Mr. Koteras has raised two issues which go to the heart of the fundamental fairness demanded in our justice system's trial procedures and appellate process. His petition for a writ of certiorari should be granted to allow for briefing of both issues.

Respectfully Submitted,



Christopher Koteras, pro se

Date: 10-30-2024