No. _____

In The

Supreme Court of the United States

RICKY D. ULLMAN, JR.,
Petitioner,

v.

KENTUCKY,
Respondent.

On Petition for Writ of Certiorari
To The Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The records of the guilty plea, sentencing and probation revocation all reveal that the judge and apparently the prosecution incorrectly believed throughout these judicial functions that petitioner Ullman's plea of guilty to three counts of distribution of a matter portraying a sexual performance by a minor, a violation of KRS 531.340, was a statutory "sex crime" making him a statutory "sexual offender," which by law he was not, and under that erroneous belief ordered Ullman to be tested for HIV, to undergo a *sexual offender* presentencing report, to complete a sexual offender treatment program as a probation condition and to serve a five-year conditional discharge sentence, all of which are by law options for statutory defined "sex offenders," yet the Kentucky Supreme Court did not address Ullman's claim that the judge's erroneous belief repeatedly reflected in these court records deprived Ullman of the federal constitutional guarantee of due process in his sentencing and probation revocation.

Accordingly, the first question presented is:

> WHETHER A TRIAL JUDGE, WHO OPERATES UNDER THE ERRONEOUS BELIEF, REFLECTED IN THE RECORD, INCLUDING THE JUDGE'S ORDERS, THAT THE DEFENDANT HAS COMMITTED A SEXUAL OFFENSE AS DEFINED UNDER STATUTORY LAW, PROVIDES THE DEFENDANT FEDERAL DUE PROCESS IN THE CRIMINAL PROCEEDINGS AS ALL THE JUDGE'S DECISIONS WERE CONTAMINATED BY HIS MISUNDERSTANDING OF THE STATUTORY NATURE OF THE ACCUSED'S CRIME.

On appeal, contrary to Kentucky's appellate procedures, as reflected in rules and decisional law, without prior notice, the Kentucky Supreme Court treated Ullman, as if he were an appellant, when throughout this appeal Ullman has always been the appellee, and explicitly held Ullman to preservation requirements only applicable to appellees and refused to accord him the procedural benefits of being an appellee, depriving Ullman of review of a claim that the

Kentucky Supreme Court regarded as a palpable error potentially capable of creating a manifest injustice in Ullman's probation revocation.

Accordingly, the second question presented is:

WHETHER A STATE APPELLATE COURT THAT, WITHOUT NOTICE, DEVIATES FROM ITS ESTABLISHED APPELLATE PROCEDURES AND DECISIONAL LAW TO DENY APPELLATE REVIEW OF A REASON IN THE RECORD THAT COULD JUSTIFY AFFIRMING THE RULINGS BELOW IN FAVOR OF THE APPELLEE DENIES THE APPELLEE THE FEDERAL GUARANTEE OF APPELLATE DUE PROCESS IN VIOLATION OF SMITH V. ROBBINS, 528 U.S. 259, 277 (2000), EVITTS V. LUCEY, 469 U.S. 387, 405 (1985), AND SWARTHOUT V. COOKE, 562 U.S. 216 (2011).

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[1] The Statement of the Case contains how both federal questions were raised and decided below in compliance with Rule 14.1(g)(i).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Ricky D. Ullman, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Kentucky Supreme Court rendered April 18, 2024 in *Commonwealth of Kentucky v. Ricky D. Ullman, Jr.*, ____ S.W.3d ____ (Ky. 2024).

STATEMENT OF RELATED PROCEEDINGS

Commonwealth of Kentucky v. Ricky D. Ullman, Jr., ____ S.W.3d ____ (Ky. 2024), Kentucky Supreme Court, Opinion Reversing, Reinstating & Remanding, April 18, 2024, Rehearing Denied August 22, 2024.

Commonwealth of Kentucky v. Ricky D. Ullman, Jr., Kentucky Court of Appeals, Opinion Affirming, June 17, 2022.

Commonwealth v. Ullman, Oldham Circuit Court, No. 13-CR-00124, Order Granting in Part Civil Rule 60.02/Criminal Rule 11.42 Motion, December 21, 2020.

Commonwealth v. Ullman, Oldham Circuit Court, No. 13-CR-00124, Order Revoking Probation, May 24, 2018.

Commonwealth v. Ullman, Oldham Circuit Court, No. 13-CR-00124, Judgment and Sentence on a Plea of Guilty, June 5, 2015.

OPINIONS BELOW

The Kentucky Supreme Court's Opinion is found at *Commonwealth of Kentucky v. Ricky D. Ullman, Jr.*, ____ S.W.3d ____ (Ky. 2024), and is reproduced at Appendix ("App.") A , 1-45.[1]

[1] *Commonwealth v. Ullman*, ____S.W.3d____, 2024 WL 1709800 (Ky. 2024).

The Kentucky Supreme Court's order denying Ullman's rehearing petition on August 22, 2024 is unpublished and is reproduced at App. B, 46. The Kentucky Court of Appeals' *Opinion Affirming* rendered on June 17, 2022 is unpublished and is reproduced at App. C, 47-53. The Oldham Circuit Court's *Order Granting in Part CR (Civil Rule) 60.02/CR (Criminal Rule) 11.42 Motion* entered on December 21, 2020 is unpublished and is reproduced at App. D, 54-61. The Oldham Circuit Court's *Order Making Findings of Fact* entered on January 20, 2021 is unpublished and reproduced at App. E, 62-63. The Oldham Circuit Court's *Revocation Order* entered May 24, 2018 is unpublished and reproduced at App. F, 64. *The Judgment and Sentence on Plea of Guilty*, entered on June 5, 2015 in Oldham Circuit Court, is unpublished and reproduced at App. G, 65-67.

JURISDICTION

The date on which the Kentucky Supreme Court decided Petitioner's case was April 18, 2024. *Commonwealth of Kentucky v. Ricky D. Ullman, Jr.*, ____ S.W.3d ____ (Ky. 2024), App. A, 1-45. A timely petition for rehearing was denied by the Supreme Court of Kentucky on August 22, 2024, Kentucky Supreme Court, *Commonwealth of Kentucky v. Ricky D. Ullman, Jr.*, 2022-SC-0293-DG, App. B, 46. This Court by Justice Kavanaugh extended the deadline to file this petition for writ of certiorari from November 20, 2024 to and including January 19, 2025.[2] *Ricky D. Ullman, Jr., Applicant v. Kentucky, Application (24A481).*

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment Fourteen of the United States Constitution provides in pertinent part:

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[2] The filing deadline is January 21, 2025. Supreme Court Rule 30.1.

> Section 1. 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.

STATEMENT OF THE CASE

Ricky Ullman pled guilty, pursuant to a plea agreement, to three counts of distribution of a matter portraying a sexual performance by a minor in violation of Kentucky Revised Statute ("KRS") 531.340 and of being a second-degree persistent felony offender. The Oldham Circuit Court judge, in accordance with the plea agreement, sentenced Ullman to twelve (12) years, probated for five years. The circuit court imposed the conditions of probation recommended in the plea agreement including, *inter alia*, to complete a community-based sexual offender treatment program (SOTP). The circuit court, some three years later in 2018 revoked Ullman's probation for one reason – failure to complete SOTP. *Revocation Order,* May 24, 2018, App. F, 64.

While confined following his probation revocation, Ullman filed a combination CR 60.02 and RCr 11.42 motion[3] challenging the unlawful sentence containing, *inter alia*, the condition of probation requiring completion of SOTP as Ullman had not been convicted of a sex crime as his only offense, KRS 531.340, is not included in Kentucky's statutory enumeration of sex crimes.[4] Transcript of Record ("TR"), 181. As a result, Ullman had not plead guilty to a "sex crime" and

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[3] CR (Ky. Civil Rule) 60.02 is Kentucky's procedural version of the writ of coram nobis and RCr (Ky. Criminal Rule) 11.42 is Kentucky's collateral challenge rule to attack criminal proceedings.

[4] KRS 17.500(8) does not include KRS 531.340 as a "sex crime" and KRS 17.500(9) limits a "sexual offender" to "any person convicted of, pleading guilty to, or entering an Alford plea to a sex crime as defined in this section."

was not a "sexual offender." The RCr 11.42 portion of the motion raised, *inter alia*, the ineffective assistance of counsel provided by Ullman's public defender at his probation revocation hearing. The Oldham Circuit Court on December 21, 2020 granted in part the combination motion finding the probation condition of completing the SOTP an illegal sentence for a defendant not convicted of a sex crime, but did not rule on the ineffective assistance of counsel claim. The prosecution appealed this decision to the Kentucky Court of Appeals, which affirmed the circuit court's decision by a vote of 2 to 1. The prosecution sought and obtained discretionary review of the intermediate appellate court's decision. The Kentucky Supreme Court reversed the circuit court and the Court of Appeals, reinstated the probation revocation and remanded to the circuit court the claim of ineffective assistance of counsel for fact-finding. As of this time no proceedings on that remand to the Oldham Circuit Court have taken place.

As a result of the Kentucky Supreme Court's opinion, Ullman by a timely petition for rehearing, modification or extension raised two federal constitutional claims that the Kentucky Supreme Court had either failed to address or addressed incorrectly. The first is that the circuit court judge, who both sentenced Ullman and later revoked his probation, and perhaps the prosecutor mistakenly and incorrectly believed throughout the sentencing and probation revocation proceedings that Ullman had committed a "sex crime" and was a "sex offender" under Kentucky statutory law. While the Kentucky Supreme Court held in its opinion that a condition of probation requiring completion of SOTP did not require the defendant be convicted of a sex offense, that court failed to address the federal constitutional due process claim that the judge who sentenced and later revoked Ullman's probation did all this believing incorrectly Ullman had committed a statutory "sex crime."

For example, the order for the sexual offender examination states that Ullman "having

been convicted of a felony offense in KRS 532.050(4)," which he had not, revealing the judge's misunderstanding of Ullman's crimes. TR 82. The Order for DNA/HIV Testing states "[p]ursuant to KRS Chapter 510," which only applies to a defendant convicted of a sexual offense listed in KRS 510.320(2), which Ullman had not been. TR 81. On the Judgment of Registration Designation, the judge checked that Ullman had been convicted of a sex crime, which he had not. TR 84. In sentencing Ullman to a five-year period of conditional discharge, the judge said Ullman had been "found guilty of a felony under KRS Chapter 510, 529.100 involving sexual activity, 530.020, 530.064(1)(a), 531.310 or 531.120," which he had not. TR 89. Based on these records, Ullman was undeniably sentenced by a judge who erroneously believed he had committed a statutorily designated "sex crime" and was a "sex offender" under the law. Nothing in the record and nothing in the law refutes this claim. In fact, the Kentucky Supreme Court "do[es] not dispute that Ullman was not convicted of a 'sex crime'...." *Ullman*, 04/18/2024, p. 35. As the prosecutor never challenged these erroneous judicial conclusions, it appears the prosecutor incorrectly believed Ullman committed a "sex crime" and was a statutory "sexual offender."

Contrary to and despite all the record evidence revealing the judge erroneously believed Ullman had committed a "sex crime" and was therefore a "sexual offender," the Kentucky Supreme Court ignored that issue and held that "a sentencing court may impose completion of SOTP as a condition of probation for defendants not convicted of a 'sex crime' under KRS 17.500 *if the court finds that the condition is reasonable and is reasonably necessary* to ensure that the defendant will lead a law-abiding life or will assist him or her in doing so." Ullman, April 18, 2024, p. 38; (emphasis added). Of course, a judge erroneously believing the accused committed a "sex crime" could not find completing a sexual offender treatment program is

reasonable or reasonably necessary for a non-sexual offender. Additionally, as the judge mistakenly believed Ullman was a "sexual offender," required by statute to attend a SOTP, the court had no reason to and did not make any such findings of reasonable or reasonably necessary. Additionally, the judge was using a Comprehensive Sex Offender Presentence Evaluation ("SORA") instead of a normal Presentencing Report. Comprehensive Sexual Offender Pre-Sentence Evaluation, June 2, 2015, unpaginated in transcript of record. As the report states, Ullman "does not admit to committing all aspects of the sexual offense for which he was convicted." SORA, p. 4. This reveals that examiner who compiled this presentencing sexual offender report worked on the erroneous assumption that Ullman had plead guilty to a sex crime. That is probably because the judge in the Order for Evaluation stated "[t]he Defendant having been convicted of a felony offense as listed in KRS 532.050(4)," which was incorrect as Ullman's offense, a violation of KRS 531.340, is not included in KRS 532.050(4). Order for Evaluation, 04/15/2015. The judge in sentencing Ullman relied heavily on the SORA, which was prepared by an examiner who mistakenly believed Ullman had committed a "sex crime" and was a statutory "sex offender."

Ullman was entitled to be sentenced by a judge who understood his statutory offender classification, whether a sexual offender or non-sexual offender. Yet the Kentucky Supreme Court's Opinion never discussed this defect in the sentencing and probation revocation. Relying on these erroneous assumptions, the judge ordered a comprehensive sex offender presentence evaluation (SORA) to supplement the usual presentence investigation report, required a sexual offender registration, entered an order for DNA and HIV testing, and imposed a 5-year

conditional discharge sentence solely on the basis Ullman was a sexual offender.[5]

It has long been established that the sentencing process must satisfy the requirements of the federal Due Process Clause. Amendment XIV, U.S. Constitution. A defendant has a legitimate interest in the character of the procedure which leads to the imposition of a sentence. A judge who presides over a guilty plea, sentences a defendant, and revokes probation cannot provide due process if he or she incorrectly believes the crime in question is a statutory sex crime, making the defendant a sex offender, and makes all judicial decisions on the basis of that incorrect premise. The Kentucky Supreme Court denied the rehearing petition without addressing this contention.

This issue was emphasized Ullman's CR 60.02/RCr 11.42 motion in Oldham Circuit Court and presented to the Kentucky Supreme Court in Ullman's appellee's briefs.[6] CR 60.02/RCr 11.42 Motion, Oldham Circuit Court, 01/13/2020, *e.g.*, pp. 4-5; Appellee's Brief, Kentucky Supreme Court, pp. 1, 2-4, 8; Appellee's Brief, Kentucky Court of Appeals, pp. 1, 2-5, 7-8. Most significantly, Ullman in his timely Petition for Rehearing, Modification or Extension specifically asserted that "[t]he Opinion failed to address that the circuit court sentenced Ullman

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[5] The five-year sentence of conditional discharge was imposed on the erroneous basis that Ullman was a sexual offender and was a condition of the prosecution's plea agreement. At the circuit court level the prosecution acknowledged that the conditional discharge sentence was illegal as Ullman had not committed a "sex crime" and was not a "sexual offender." *Commonwealth v. Ullman*, April 18, 2024, *supra*, 11. This in itself establishes that both the judge and the prosecutor erroneously believed Ullman was a statutory "sex offender" eligible for a sentence of a five-year sentence of conditional discharge.

[6] This section of the statement of the case complies with the requirement to demonstrate how this federal question was raised and decided below.

while under the erroneous belief that Ullman had committed sex crimes and was a sexual offender by law in violation of his federal constitutional right to due process at sentencing." Rehearing Petition, p. 5. Kentucky Rule of Appellate Procedure ("RAP") 43(B), *Petition for rehearing.*

On a separate claim, the Kentucky Supreme Court's Opinion repeatedly denied Ullman his federal constitutional right to appellate due process by continually denying him the guarantees of Kentucky established procedures for affirming a decision below on any basis in the record.

The Kentucky Supreme Court held:

> We decline to address Ullman's arguments concerning the circuit court's failure to abide by KRS 439.3106, as that error was not properly preserved for our review, and he has not requested and briefed for palpable error.

Commonwealth v. Ullman, 04/18/2024, p. 16.

The opinion added:

> Specifically, Ullman argues that the circuit court failed to make any finding that Ullman's failure to comply with the conditions of his probation constituted a significant risk to his victim or the community at large and that he could not be appropriately managed in the community....
>
> However, Ullman failed to challenge this alleged error before the circuit court, and it is not therefore not preserved for our appellate review.... And, nowhere in Ullman's brief to this Court does he request review for palpable error pursuant to RCr 10.26.... Based on the foregoing, we cannot conclude that the circumstances of the case warrant sua sponte review for palpable error.

Ullman, pp. 42-43.

First, Ullman did raise this claim before the circuit court. In his CR 60.02/RCr 11.42 Reply, Ullman asserted:

> The probation revocation order contained neither a finding that Mr. Ullman's failure to abide by a condition of supervision constituted a significant risk to prior

> victims or the community at large nor that Mr. Ullman cannot be managed in the community before probation may be revoked. Both are statutorily mandated findings before a defendant's probation can be revoked. KRS 439.3106; *Andrews*, [448 S.W.3d 773, 777 (Ky. 2014)]. Mr. Ullman's revocation was illegal and void.

Thus claim was raised in the Oldham Circuit Court and was addressed by the Commonwealth below.[7] As the Kentucky Supreme Court noted, Ullman's "RCr 11.42 motion also sought to vacate the revocation order." *Ullman*, 04/18/24, p. 10.[8] The Kentucky Supreme Court acknowledged that before that court Ullman argued "the circuit court failed to make the required findings to revoke under KRS 439.3106." *Ullman*, 16.

Second, there is no requirement in Kentucky law or procedure for an *appellee*, such as Ullman, who is seeking to affirm the decisions of the courts below, to preserve an issue for appellate review as long as the basis for affirming the courts below is supported by the record. This issue was discussed on appeal.

"In instances where a trial court is correct in its ruling, an appellate court, which has de novo review on questions of law, can affirm, even though it may cite other legal reasons than those stated by the trial court. The trial court in that instance reached the correct result, and thus will not be reversed." *Fischer v. Fischer*, 348 SW 3d 582, 589-590 (Ky. 2011). "But when an appellate court determines to reverse a trial court, it cannot do so on an unpreserved legal ground

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[7] This section of the statement of the case complies with the requirement to demonstrate how this federal question was raised and decided below.

[8] The 60.02/11.42 motion specifically identified that the circuit court did not "comply with the mandatory requirements of KRS 439.3106 and" *Commonwealth v. Andrews*, 448 S.W.3d 773, 777 (Ky. 2014), "in deciding whether to revoke Mr. Ullman's probation." Motion, 01/13/2020, p. 24. "[T]the judgment of a lower court can be affirmed for any reason in the record." *Fischer*, 591-592.

unless it finds palpable error, because the trial court has not had a fair opportunity to rule on the legal question." *Id.*

As an appellee, such as Ullman was, has no obligation to preserve an error for appellate review, Kentucky's palpable error provision is inapplicable. The opinion apparently has treated Ullman as an appellant seeking to reverse the courts below, when Ullman was actually an *appellee* seeking to affirm the decisions below.[9] This is an error that fatally contaminates this appellate opinion and denies Ullman appellate due process.

The Kentucky Supreme Court was not free to change the rules of the game and treat Ullman. *an appellee*, unlike other appellees who have litigated in this tribunal. The Kentucky Supreme Court's adjudication of this claim was arbitrary, unfair and a violation of federal appellate due process by treating Ullman's claims differently than established Kentucky appellate law and procedure guarantee.

Ullman raised this claim in his rehearing petition as Ullman did not know that the Kentucky Supreme Court would misapply the well-established rules until that court did it in its opinion. Ullman's Rehearing Petition, 1-4.

This petition for certiorari is not challenging the rulings of the Kentucky Supreme Court on matters of Kentucky decisional or statutory law, but is raising federal constitutional claims of denial of appellate due process generated by that court's opinion and not addressed in the order denying Ullman's rehearing petition.

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[9] The *Ullman* Opinion cites *Lainhart v. Commonwealth*, 534 S.W.3d 234, 237 (Ky. App. 2017), which is inapplicable because Lainhart was an appellant raising a palpable error, not an appellee like Ullman. *Ullman* (04/18/24), p. 42. This is another example of treating Ullman differently. Ullman was never in these proceedings an appellant, but always an appellee in both of Kentucky's appellate courts.

REASONS FOR GRANTING THE WRIT

1. *The Decision Below Failed to Address That the Circuit Court Judge Sentenced Ullman,, Probated Him and Revoked That Probation While Under the Erroneous Belief, as Established by the Record Entries, that Ullman had Committed "Sex Crimes" and was a "Sexual Offender" by Law in Violation of his Federal Constitutional Right to Due Process at Sentencing.*

Throughout these proceeding both in the circuit court and both appellate courts, Ullman has emphasized that the sentencing judge and most likely the prosecutor erroneously believed that Ullman had committed "sex crimes" and was a "sexual offender" as defined by Kentucky statutory law. Ullman was entitled to be sentenced by a judge who understood his statutory offender classification, whether a sexual offender or non-sexual offender. Yet the Kentucky Supreme Court's opinion never discussed this defect in the sentencing, even when this omission was reasserted in the rehearing petition.

"[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* "Probation revocation ... is not a stage of a criminal prosecution, but does result in a loss of liberty." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

"The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black v. Romano*, 471 U.S. 606, 610 (1985), citing *Bearden v. Georgia*, 461 U. S. 660, 666, and n. 7 (1983).

Even though the revocation of probation is not a part of the criminal prosecution, the loss of liberty entailed is a serious deprivation requiring that the probationer be accorded due process.

A probationer must be accorded due process at a revocation hearing. *Gagnon, supra,* 785. That due process requires " an independent decisionmaker," not one that erroneously believes the probationer is a "sex offender," while the only charge the probationer is guilty of is not a "sexual crime" under Kentucky law. *Id.*, 786.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process." *Id.*, citing *Carey v. Piphus*, 435 U. S. 247, 259-262, 266-267 (1978). "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken *on the basis of an erroneous or distorted conception of the facts or the law.*" *Marshall, supra,* 242; (emphasis added).

Unlike the accused in *Lankford v. Idaho*, 500 U.S. 110 (1991), neither Ullman nor his trial attorney could not have known from the offense he pled to that his judge, who took his guilty plea, sentenced him and revoked his probation, erroneously believed the charge by law was for a "sex offense" that made Ullman a statutory "sexual offender." As in *Lankford,* "[t]he point, however, is that petitioner's counsel had no way of knowing that the court was even considering such a finding," which was contrary to the statutory law. *Id.*, 123.

"In broad strokes, the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction.'" *Rosales-Mireles v. US*, 138 S. Ct. 1897, 1908 (2018), quoting Bowers & Robinson, Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility, 47 Wake Forest L. Rev. 211, 215-216 (2012).

"A judge shall perform judicial and administrative duties, competently and diligently." American Bar Association Model Code of Judicial Conduct (2020 Edition), Canon 2, Rule 2.5, *Competence, Diligence, and Cooperation.* "Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office." *Id.*, Comment [1].[10]

A trial judge's erroneous belief that the only crime Ullman plead to was a statutory "sex crime" that made Ullman a "sex offender" demonstrated a lack of the requisite "legal knowledge, skill, thoroughness, and preparation" to perform competently as Ullman's judge for taking his guilty plea, evaluating the prosecution's recommended sentence including all conditions in the plea agreement, and in revoking Ullman's probation.

"The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice." ABA Standards for Criminal Justice: Special Functions of the Trial Judge, 3d ed., © 2000, Standard 6-1.1(a), *General responsibility of the trial judge.* "The trial judge should give each case individual treatment; and the judge's decisions should be based on the particular facts of that case." *Id.,* Standard 6-1.1(b).

The judge's misunderstanding of Ullman's actual status as a non-sex offender and the judge's resort to sentencing him and revoking him under that mistaken belief raises federal constitutional due process defects in "the character of the procedure which lead[] to the imposition of sentence" and the revocation of Ullman's probation.

The trial judge on the basis of an erroneous belief that Ullman was by law a "sex

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[10] See Kentucky Supreme Court Rule ("SCR") 4.300, Kentucky Code of Judicial Conduct, Canon 2, Rule 2.5(A), *Competence, Diligence, and Cooperation.*

offender" accepted the prosecution's recommended sentence[11] and after securing a sex offender presentence report required Ullman as a sex offender to attend a sex offender treatment program as a condition of probation. When Ullman did not complete that treatment program the judge still believing incorrectly that Ullman was a "sex offender" revoked his probation. The judge's mistaken belief that Ullman was a sex offender as well as the same incorrect belief by the prosecution deprived Ullman of federal due process in his sentencing and probation revocation.[12]

"Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion —the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973).

The Kentucky Supreme Court's refusal to adjudicate or even to consider the federal constitutional questions raised by Ullman should not preclude a grant of certiorari. On this record, this Court could grant certiorari and adjudicate this claim on the merits. Another available procedure, if necessary, is the grant-vacate-remand (GVR). "Title 28 U. S. C. § 2106 appears on its face to confer upon this Court [the U. S. Supreme Court] a broad power to GVR: 'The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment,

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[11] "If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea...." Kentucky Rule of Criminal Procedure 8.10, *Withdrawal of plea.*

[12] It is noteworthy that the prosecutor never attempted to correct the judge's erroneous findings in the court's orders and sentencing documents that Ullman had committed a "sex crime" and was a "sexual offender" under the statutory law.

decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances.'" *Lawrence v. Chater*, 516 U.S.163, 166 (1996).[13] "The GVR order has, over the past 50 years [prior to 1996], become an integral part of th[is] Court's practice, accepted and employed by all sitting and recent Justices." *Id.*

This Court uses its decision to grant certiorari, vacate a lower court judgment, and remand the case [GVR] as a cautious and deferential measure designed to aid the court below by flagging a particular issue that it does not appear to have fully considered and assist the United States Supreme Court by obtaining the benefit of the lower court's insight. For example, where this Court has "reason to believe the court below did not fully consider [a claim], which reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we [this Court] believe, potentially appropriate." *Id.*, 167.

The Kentucky Supreme Court's failure to decide or reach a federal constitutional claim presented to it by Ullman does not preclude a grant of certiorari. A state appellate court is not free to decline to address a federal constitutional claim and thereby immunize it from a grant of certiorari from this Court.

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[13] "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U. S. C. § 2106.

Federal constitutional claims of a denial of due process in the sentencing/probation revocation process and in the appellate process are important federal questions in the administration of criminal justice. This Court has "granted certiorari to consider a constitutional question of importance in the administration of criminal justice." *Bordenkircher v. Hayes*, 434 U.S. 357, 360 (1978).

This case is an excellent vehicle for this Court to resolve this important federal question. The issue is framed as a clear cut clash between the Kentucky Supreme Court playing fast and loose with a trial judge's on-the-record repeated demonstrations of the Court's erroneous belief Ullman had committed a statutory "sex crime" that tainted his sentencing of Ullman as well as the revocation of Ullman's probation with this Court's well established holding that a convicted defendant is entitled to federal due process in the sentencing process, including probation revocation. Based on the record, this Court should grant this certiorari petition and decide this issue on its merits. Conversely, this Court could grant this certiorari petition, if only in the form of a GVR, to require the Kentucky Supreme Court to address this federal constitutional claim of a denial of due process in the sentencing and revocation of probation.

A writ of certiorari should be granted on this federal constitutional claim.

2. *The Kentucky Supreme Court in Its Opinion Denied Ullman, an Appellee, the Federal Constitutional Guarantee of Appellate Due Process by Denying Him a Fair Opportunity to Obtain an Adjudication on the Merits of His Appeal When That Court Refused to Apply Established Kentucky Law and Procedure Regarding an Appellee's Rights on Appeal Even Though Ullman was Always an Appellee Throughout This Appeal, Which Violated Smith v. Robbins, 528 U.S. 259, 277 (2000), and Evitts v. Lucey, 469 U.S. 387, 405 (1985).*

The Kentucky Supreme Court held:

> We decline to address Ullman's arguments concerning the circuit court's failure to abide by KRS 439.3106, as that error was not properly preserved for our review, and he has not requested and brief for palpable error.

Commonwealth v. Ullman, 04/18/2024, p. 16.

The opinion added:

> Specifically, Ullman argues that the circuit court failed to make any finding that Ullman's failure to comply with the conditions of his probation constituted a significant risk to his victim or the community at large and that he could not be appropriately managed in the community....
>
> However, Ullman failed to challenge this alleged error before the circuit court, and it is therefore not preserved for our appellate review.... And, nowhere in Ullman's brief to this Court does he request review for palpable error pursuant to RCr 10.26.... Based on the foregoing, we cannot conclude that the circumstances of the case warrant sua sponte review for palpable error.

Ullman, pp. 42-43.

First, Ullman did raise this claim before the circuit court. In his CR 60.02/RCr 11.42 Reply, Ullman asserted:

> The probation revocation order contained neither a finding that Mr. Ullman's failure to abide by a condition of supervision constituted a significant risk to prior victims or the community at large nor that Mr. Ullman cannot be managed in the community before probation may be revoked. Both are statutorily mandated findings before a defendant's probation can be revoked. KRS 439.3106; *Andrews*, [448 S.W.3d 773, 777 (Ky. 2014)]. Mr. Ullman's revocation was illegal and void.

CR 60.02/RCr 11.42 Reply, 05/18/2020, Oldham Circuit Court, p. 30.

This claim was raised in the circuit court below and was addressed by the Commonwealth below. As the Opinion noted, Ullman's "RCr 11.42 motion also sought to vacate the revocation order." *Ullman*, 04/18/24, p. 10. The Kentucky Supreme Court acknowledged that before it Ullman argued "the circuit court failed to make the required findings to revoke under KRS 439.3106." *Ullman*, 16.

Second, there is no requirement in Kentucky law or procedure for an *appellee*, such as Ullman, who is seeking to affirm the decisions of the courts below, to preserve an issue for

appellate review as long as the basis for affirming the courts below is supported by the record.

In *Fischer v. Fischer*, 348 SW 3d 582 (Ky. 2011), the *Fischer* court explained:

> In instances where a trial court is correct in its ruling, an appellate court, which has de novo review on questions of law, can affirm, even though it may cite other legal reasons than those stated by the trial court. The trial court in that instance reached the correct result, and thus will not be reversed. See *Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 812 n. 3 (Ky.2010). But when an appellate court determines to reverse a trial court, it cannot do so on an unpreserved legal ground unless it finds palpable error, because the trial court has not had a fair opportunity to rule on the legal question.

Fischer, 589-590.

Fischer added:

> But as noted above, it is also the rule in this jurisdiction that the judgment of a lower court can be affirmed for any reason in the record. See *Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 812 n. 3 (Ky.2010) (noting that a court may affirm for any reason appearing in the record). This rule applies equally to both the judgment of a trial court and the judgment of an appellate court.[2] Under this rule, this Court has repeatedly stated that "[w]here the prevailing party seeks only to have the judgment affirmed, it is entitled to argue without filing a cross-appeal that the trial court reached the correct result for the reasons it expressed and for any other reasons appropriately brought to its attention." *Com., Corrections Cabinet v. Vester*, 956 S.W.2d 204, 205-06 (Ky.1997). The same rule applies to the judgment of an appellate court. See *Hale v. Combs*, 30 S.W.3d 146, 150 (Ky.2000) (stating "the prevailing party need not file a cross-appeal in order to assert that the lower court. . . reached the right result for the wrong reason" where the alternative issue was not decided by the Court of Appeals); *Com. ex rel. Cowan v. Telcom Directories, Inc.*, 806 S.W.2d 638, 642 (Ky.1991) (declining to treat unaddressed and un-cross-appealed issues as procedurally barred where lower court held there was no jurisdiction over the case).

Id., 591-592.[14]

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[14] "[A]n appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result." *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 575-76 (Ky.2009). "'[I]t is ... the rule in this jurisdiction that the judgment of a lower court can be affirmed for any reason in the record.'" *Mark D. Dean, PSC v. Commonwealth Bank*, 434 S.W.3d 489, 495-496 (Ky. 2014).

As an appellee has no obligation or duty to preserve an error for appellate review, Kentucky's palpable error provision is inapplicable to appellees such as Ullman.[15] The opinion apparently treated Ullman as an appellant seeking to reverse the courts below, when Ullman was actually an *appellee* seeking to affirm the decisions below.[16] This is an error that fatally contaminates this Kentucky Supreme Court opinion and denies Ullman federal appellate due process.

Long ago, this Court "held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985), citing *McKane v. Durston*, 153 U. S. 684 (1894). "Nonetheless, if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' [citation omitted], the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts, supra.*

Kentucky has created such a state constitutional right to a system of appeals in civil and criminal cases. "In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court... Ky. Const., § 115, *Right of appeal -- Procedure.* "Procedural rules shall provide for expeditious and inexpensive appeals." *Id.*

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[15] Kentucky's unanticipated reversal of the procedural rules for appellants and appellees "is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 349 (1984).

[16] The *Ullman* Opinion cites *Lainhart v. Commonwealth*, 534 S.W.3d 234, 237 (Ky. App. 2017), which is inapplicable because Lainhart was an appellant raising a palpable error, not an appellee like Ullman. *Ullman* (04/18/24), p. 42. This is another example of treating Ullman differently and unfairly.

The Kentucky Supreme Court is not free to change the rules of the game and treat Ullman, *an appellee*, unlike other appellees who have litigated in that tribunal. This Opinion's adjudication of this claim was arbitrary, unfair and a violation of federal appellate due process by treating Ullman's claims differently than established Kentucky appellate law and procedure guarantee.[17]

"In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution — and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, *supra*, 469 U.S. at 401. "'Due Process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated.'" *Id.*, 405. "'[D]ue process . . . [requires] States . . . to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.'" *Smith v. Robbins*, 528 U.S. 259, 277 (2000), quoting *Evitts*, 405. To deprive Ullman of his conditional freedom on the basis of distorted and erroneous preservation principles is a violation of federal due process.

"When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures." *Swarthout v. Cooke*, 562 U.S. 216, 131 S. Ct. 859, 862 (2011).

The Kentucky Court's Opinion repeatedly denied Ullman his federal constitutional right

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[17] It matters not that the issue involved was a state law claim when the Kentucky Supreme Court violated the federal guarantee of appellate due process in resolving it. Amendment, XIV, *supra*.

to appellate due process by consistently denying him the guarantees of established procedures for affirming a decision below on any basis in the record. This was all clarified and restated in Ullman's timely filed rehearing petition, which was denied by the Kentucky Supreme Court.

Ullman's appellate counsel was entitled to rely on long established appellate rules and procedures in Kentucky's appellate courts. Ullman's appellate counsel received no prior notice that Kentucky would during Ullman's appeal in the Kentucky Supreme Court have those rules and procedures suspended or disregarded so the court could deny Ullman relief on appeal. This is the essence of denying an appellate litigant the basic elements of the federal guarantee of appellate due process.

Substantial federal constitutional issues were presented to the Kentucky Supreme Court in this appeal even though the Kentucky Supreme Court may have declined to address or resolve them except by affirming the Commonwealth's appeal. This claim was restated and emphasized in Ullman's rehearing petition[18] RAP 43(B)(1)(a). Yet a rehearing was denied without addressing this federal constitutional claim of a denial of appellate due process.

The Kentucky Supreme Court may not manipulate its well established rules of appellate procedure to deprive an appellee, such as Ullman, from the on-the-record basis to affirm the relief granted him by the courts below and still provide appellate due process.[19] To deprive

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[18] Addressing the illegal probation conditions of post incarceration supervision and HIV testing, the Kentucky Supreme Court again disregarded Ullman's arguments on those issues because, in part, "the circuit court's decision was not based on a violation of either of those conditions." *Ullman*, 04/18/2024, 12. As Ullman was seeking affirmance of the decisions below, the Kentucky Supreme Court should have affirmed on those grounds because the Opinion admitted the record reflected those errors. *Fischer*, *supra*, 589-592. Ullman was again denied appellate due process.

[19] It matters not that the issue involved was a state law claim when the Kentucky

Ullman of his conditional freedom on the basis of distorted and erroneous preservation principles is a violation of federal appellate due process.

The Kentucky Supreme Court Opinion repeatedly denied Ullman his federal constitutional right to appellate due process by not allowing him the guarantees of Kentucky's established procedures for affirming a decision below on any basis in the record.

This was all clarified and restated in Ullman's timely filed rehearing petition, which was denied by the Kentucky Supreme Court without addressing any of the claims in the rehearing petition.

Substantial federal constitutional issues were presented to the Kentucky Supreme Court on Ullman's appeal even though the Kentucky Supreme Court declined to address or resolve them except by affirming the Commonwealth's appeal.

Kentucky elected to provide such a system of appeals for CR 60.02 and RCr 11.42 motions in criminal cases and subject such appeals to Kentucky's appellate rules and procedures.

The Kentucky Supreme Court acknowledged that "Ullman's arguments concerning the circuit court's failure to abide by KRS 439.3106" could have been reviewed for palpable error had Ullman requested such review in his appellee's brief. *Commonwealth v. Ullman*, 04/18/2024, pp. 16, 42-43. Kentucky's RCr 10.26, *Substantial error*, states: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

Supreme Court violated the federal guarantee of appellate due process in resolving it.

The Kentucky Supreme Court recognized the significance of the claimed error, but, either negligently or intentionally, turned its back on its own controlling precedents or mistakenly viewed Ullman as an appellant, even though Ullman was throughout the proceedings an appellee. In that status, Ullman had no preservation responsibility as Kentucky precedents required the Kentucky Supreme Court to affirm the courts below on any basis in the record.

Ullman's claimed KRS 439.3106 errors were according to the Kentucky Supreme Court "palpable errors" that had the potential to restore Ullman to conditional liberty as a probationer rather than a confined prisoner. Following his probation revocation on May 24, 2018 until the Oldham Circuit Court restored him to the status of a probationer on December 17, 2020, Ullman was confined and serving his sentence of incarceration. From December 17, 2020 to the present Ullman has been in the status of a probationer.

Federal appellate due process should not allow even the highest appellate court of a state to simply disregard its own rules and precedents to deny a party the right to a fair hearing on his or her appellate claims. This case presents this Court with an opportunity to flesh out the parameters of federal appellate due process. At the minimum, this Court should grant this petition, vacate the Kentucky Supreme Court's opinion and remand this matter to the Kentucky Supreme Court to review Ullman's KRS 439.3106 arguments under Kentucky's established procedures and decisional law. This Court should grant this petition for a writ of certiorari on this federal constitutional claim.

CONCLUSION

On the basis of the first question presented that the judge's repeated mistaken belief that Ullman committed a statutory "sexual offense" deprived Ullman of his federal constitutional

claim of due process in his sentencing and probation revocation, this Court should grant the writ of certiorari and either decide this claim on the merits as established by the evidence of record or, if necessary, grant the writ, vacate the opinion below and remand this claim to the Kentucky Supreme Court to address this federal constitutional claim.

On the basis of the second question presented that the Kentucky Supreme Court denied Ullman his federal constitutional right to appellate due process, this Court should grant the writ of certiorari, vacate the opinion below and remand this federal constitutional claim to the Kentucky Supreme Court to be addressed.

Respectfully submitted,

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January 21, 2025

No. _____

In The

Supreme Court of the United States

RICKY D. ULLMAN, JR.,
Petitioner,

v.

KENTUCKY,
Respondent.

On Petition for Writ of Certiorari
To The Kentucky Supreme Court

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICKY D. ULLMAN, JR., – PETITIONER,

VS

COMMONWEALTH OF KENTUCKY – RESPONDENT

APPENDIX
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RENDERED: APRIL 18, 2024
TO BE PUBLISHED

Supreme Court of Kentucky

2022-SC-0293-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NOS. 2021-CA-0077, 2021-CA-0111,
& 2021-CA-0112
OLDHAM CIRCUIT COURT NO. 13-CR-00124

RICKY D. ULLMAN, JR. — APPELLEE

OPINION OF THE COURT BY JUSTICE LAMBERT

REVERSING, REINSTATING, & REMANDING

Ricky Ullman pled guilty to three counts of distribution of a matter portraying a sexual performance by a minor and of being a second-degree persistent felony offender (PFO). The Oldham Circuit Court sentenced him to twelve years, probated for five years. The circuit court imposed several conditions on Ullman's probation including, *inter alia*, to complete a community-based sex offender treatment program (SOTP), maintain sobriety, and report to the Division of Probation and Parole as directed. The circuit court later revoked his probation based on his failure to complete SOTP, his multiple failed drug screens, and for absconding from probation and parole.

Nearly two years after his probation was revoked, he filed a CR[1] 60.02 motion challenging the circuit court's revocation order on the basis that he could not be legally required to complete SOTP. The circuit court granted him CR 60.02 relief and vacated its revocation order. The Court of Appeals affirmed. After thorough review, we hold that Ullman's challenge to the condition that he complete SOTP was untimely and order that the circuit court's revocation order be reinstated. We further hold that a sentencing court may, in accordance with KRS[2] 533.030, impose SOTP as a condition of probation for defendants who have not been convicted of a "sex crime" as that term is defined by KRS 17.500. Finally, we hold that that Ullman's secondary challenge to the circuit court's revocation order under KRS 439.3106 was not properly preserved for our review, and that this case must be remanded for consideration of Ullman's RCr[3] 11.42 claim that has not yet been addressed by the circuit court.

I. FACTS AND PROCEDURAL BACKGROUND

On September 13, 2013, an Oldham County Grand Jury returned a seven-count indictment against Ullman. Count I and Count II charged Ullman with first-degree unlawful transaction with a minor; Count III charged use of a minor in a sexual performance; Count IV charged rape in the third-degree; Count V charged unlawful use of electronic means to induce a minor to engage

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[1] Kentucky Rule of Civil Procedure.

[2] Kentucky Revised Statute.

[3] Kentucky Rule of Criminal Procedure.

in sexual activity; Count VI charged sexual abuse in the first-degree; and Count VII charged Ullman with being a first-degree PFO.

Although this case was resolved by a plea agreement, this Court discerns from the record before us that the factual basis for Ullman's indictment can be fairly recounted as follows. From approximately June 18, 2013, to June 23, 2013, Ullman, who was thirty-two years old, exchanged sexually explicit text messages and photographs with the victim in this case, who was fourteen years old. The victim, Jane,[4] lived in the same apartment complex as Ullman and was a friend of Ullman's twelve-year-old daughter. On June 23, 2013, Jane had a sleepover with Ullman's daughter at his apartment. After Ullman's daughter went to sleep, Jane stayed up with Ullman and at approximately 4:30 am she and Ullman went into his bedroom. Ullman then vaginally raped Jane for approximately ten minutes and ejaculated on her stomach. Jane disclosed what occurred to her mother five days later, and her mother reported the incident to the Oldham County Police Department.

In November 2014, after the Commonwealth made an initial plea offer and had been engaged in plea negations with Ullman for several months, the Commonwealth informed the circuit court that Jane had recanted some of her allegations concerning the rape. The Commonwealth explained that Jane recanted in text messages sent to Ullman's daughter, but she did not recant to law enforcement or anyone else. Nevertheless, the Commonwealth recognized

[4] The victim is referred to via pseudonym to protect her privacy.

that Jane's recantation "complicated" its ability to prove the non-cellphone related offenses in Ullman's indictment. It accordingly decided to revise its initial offer on a plea of guilty and resume negotiations with Ullman. It remained undisputed that Ullman had at least three sexually explicit photographs of Jane on his cellphone.

On April 2, 2015, Ullman accepted the Commonwealth's revised offer, which was as follows: Counts I, II, and III were each amended to distribution of a matter portraying a sexual performance by a minor;[5] Counts IV, V, and VI were dismissed; and Count VII was amended to charge Ullman with being a second-degree persistent felony offender. The Commonwealth recommended a ten-year sentence on Count I based on the persistent felony offender enhancement of Count VII, two years on Count II, and two years on Count III. Counts I and II would run consecutive to one another and concurrent with Count III for a total of twelve years.[6] The Commonwealth required that Ullman serve one year of imprisonment starting from the date of the entry of his guilty plea with the balance probated for five years.

Under the terms of the plea agreement, Ullman also agreed to several recommended conditions of probation. Namely, that he: submit to a sex offender presentence evaluation pursuant to KRS 439.265(6); submit to HIV

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[5] A Class D felony. KRS 531.340(3)(a). We clarify that KRS 531.340(2) provides a rebuttable presumption of intent to distribute if an individual has more than one unit of material of a matter portraying a sexual performance by a minor.

[6] We note that under the terms of the plea agreement, the twelve-year sentence under the indictment in 13-CR-0124 was to run concurrent with an unrelated five-year sentence for flagrant non-support, Oldham Circuit Court, No. 12-CR-0086.

testing pursuant to KRS 510.320; submit a DNA sample to law enforcement pursuant to KRS 17.170; successfully complete an SOTP pursuant to KRS 197.400, *et seq*; register as a sex offender pursuant to KRS 17.495, *et seq*; be subject to a five-year period of postincarceration supervision pursuant to KRS 532.043; and not have "any missed, diluted, refused, or positive drug screens." After a thorough *Boykin*[7] colloquy, the circuit court accepted Ullman's unconditional guilty plea and postponed the entry of his sentence until after his presentence sex offender evaluation was completed. On the same day, the court also entered an order requiring him to submit to HIV and DNA testing.

On June 5, 2015, following a sentencing hearing, the circuit court entered a judgment and sentence on a plea of guilty on a standard AOC[8]-445 Form (sentencing order) and an accompanying order of probation on an AOC-455 Form (probation order).

In accordance with the Commonwealth's recommendation, the sentencing order sentenced Ullman to "a maximum term of 12 years. . . probated with an alternative sentence as stated in the attached Order of Probation." The sentencing order further mandated that Ullman be subject to a five-year period of postincarceration supervision and that he submit a sample of his DNA to law enforcement. The court also entered a separate judgment of registration designation order on an AOC-454 Form wherein the court checked separate boxes finding that Ullman was guilty of a "sex crime" and a "criminal

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[7] *Boykin v. Alabama*, 395 U.S. 238 (1969).

[8] Administrative Office of the Courts.

offense against a victim who is a minor" and found that he was therefore mandated to register as a sex offender. As he was adjudged guilty of "two or more felony criminal offenses against a victim who is a minor," he was required to be a lifetime registrant.

In the probation order the court sentenced Ullman to "probation with an alternative sentence. . . under the supervision of the Division of Probation and Parole [for] 5 years[.]" In accordance with his plea agreement, Ullman was to serve one year with credit for time served beginning from April 2, 2015, the date of his plea. The court ordered several "additional conditions" of probation. In relevant part, it ordered Ullman to: "Avoid injurious or vicious habits"; "Undergo available medical, substance abuse[,] or psychiatric treatment as follows: S.O.T.P. offered by state (approved) in community based txt program. Must complete successfully; no changing providers [without] court order"; "Report to probation officer as directed"; "Obey all rules and regulations imposed by Probation and Parole"; and "Other:[9] (1) 25 sup. fee (2) no new off, prob. voil'n, missed refused positive diluted drug screens (3) all cond'ns of plea offer are incorporated (4) all conditions listed in SORA[10] are incorporated herein, see attached, (5) defendant allowed contact with his children[.]" The SORA conditions referred to by the court were attached to the probation order and stated, in relevant part:

> *Supervision Considerations*: For Mr. Ullman to maintain an offense-free lifestyle, in the context of his being found guilty of the charges

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[9] What follows was handwritten by the court.

[10] Sex Offender Risk Assessment.

as described above, and to minimize his chances of acting out again, it is recommended that he:

> • Enter a counseling program that is specifically designed to address sexual deviancy and sex offender issues. It would be best for this counseling to be conducted by a professional who is experienced in working with sex offender issues and has been designated by the Sex Offender Risk Advisory Board as an "Approved Provider" of sex offender treatment. He should follow all program rules, maintain adequate treatment participation, and complete the program satisfactorily, as judged by the program therapist.
>
> . . .
>
> **NOTE: Unless these recommendations are made conditions of Mr. Ullman's release plan, his adhering to these recommendations would be entirely voluntary, and there is no reason to expect that he would do so.**[11]

The parties agreed that Ullman would participate in a community based SOTP program, meaning that he would not be enrolled in an SOTP program until after he had served his one-year sentence.

Following Ullman's sentencing, the record is uneventful until March 28, 2017, when the Division of Probation and Parole filed a "violation of supervision report." The report recounted four separate violations of Ullman's conditions of probation. On January 10, 2017, Ullman reported to his probation officer for a scheduled drug screen but stated he could not produce a sample. The officer

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[11] An order concerning Ullman's SORA dated June 8, 2015, and entered on June 12, ruled in relevant part: "Based upon the victim's recantation, and the Commonwealth's agreement to dismiss the charges as well as the Defendants (sic) dispute of the accuracy of these allegations, the Court enters this Order to reflect that the Presentencing Investigation Report should be stricken with regard to any allegations of sexual intercourse or other facts which would lead to any inference of guilt on Counts IV, V, and VI. Counts I, II, and III remain unchanged and those consist of Matter Portraying Sex Performance by a Minor, First Offense, three counts, as well as finally Count VII, plea of guilty status as [PFO 2nd]."

instructed him to come back the next day for a drug screen, but he failed to report. On March 1, 2017, he failed to report for a scheduled meeting with this probation officer. On March 22, 2017, he reported for a drug screen and admitted to using Lortab and the drug screen showed the presence of both Lortab and methamphetamine. Ullman filled out an admission sanction form acknowledging his use of both drugs and was taken into custody the same day. Finally, the report notes that Ullman "was terminated from the sex offender treatment program as directed, for violating the drug policy, by testing positive on a drug test." A separate report from the treatment program indicated this occurred on March 27, 2017. Revocation of Ullman's parole was requested based on the foregoing violations.

Two months later, on May 25, Ullman appeared before the circuit court for a revocation hearing. The Commonwealth and Ullman's counsel came to an agreement, which was sanctioned by the court, that Ullman could be released from custody that day and continue probation if he could later prove that he was employed, that he had undergone a mental health assessment, and that he had re-enrolled in SOTP. Apparently, the community based SOTP that Ullman had been in would allow a terminated participant to re-enroll after 180 days if it was the first time he or she had been terminated from the program. Over the course of three subsequent court dates—one in June 2017, one in September 2017, and one in October 2017—Ullman was able to prove those three requirements to the court's satisfaction.

Later, the Division of Probation and Parole filed two additional violation of supervision reports dated March 20, 2018, and April 18, 2018, respectively. The violations alleged across both reports were as follows: Ullman began substance use disorder treatment with an outpatient program on September 6, 2017, and was discharged from the program on September 28 for excessive absences and multiple missed drug screens; on October 9, 2017, he missed a scheduled meeting with his probation officer; on February 22, 2018, his drug screen was positive for Oxycodone; he failed to report to his probation officer on March 16, March 21, March 28, and April 17, 2018; on March 21, 2018, he was discharged from his substance use disorder class for excessive absences; on April 18, 2018, his probation officer attempted a home visit unsuccessfully and left a note directing Ullman to report to the officer the next day and he did not; and, finally, on April 4, 2018, Ullman was terminated from his SOTP for the second time for violating the following terms of the program's contract: failing to take ownership of crime, having two unexcused absences within 90 days of one another, failing to complete a therapy task within 120 days, failing a drug screen, failing to complete substance use disorder classes, and failing to make any of the $5 per month payments for the SOTP classes. Ullman was later taken into custody based on an arrest warrant for absconding from supervision, and the Division of Probation and Parole again requested that his probation be revoked based on the foregoing violations.

On May 24, 2018, the circuit court held a revocation hearing and entered a revocation order on the same day. The Commonwealth requested that

Ullman's probation be revoked as he had been given several chances and had demonstrated he was not going to comply with the conditions of his probation. The circuit court agreed and orally ruled, "I am going to revoke him on this. He knows, he's been in front of me many times, he knows he had to do this, and he did not get it done so I'm going to go ahead and revoke his probation." The court's revocation order simply stated that Ullman "stipulated to violations of probation" and a handwritten annotation on the order said, "failure to complete SOTP, + others."

On January 13, 2020, one year and eight months after Ullman's probation was revoked, Ullman filed a combined motion under CR 60.02 and RCr 11.42. His CR 60.02 motion sought to vacate the June 5, 2015, sentencing and probation orders as well as the May 24, 2018, revocation order. His RCr 11.42 motion also sought to vacate the revocation order.

Ullman asserted in his CR 60.02 motion, arguing under *Phon v. Commonwealth*, 545 S.W.3d 284 (Ky. 2018), *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), and *Ladriere v. Commonwealth*, 329 S.W.3d 278 (Ky. 2010), that the sentencing and probation orders imposed sentences that were illegal and therefore void by mandating that he: submit to a sexual offender risk assessment, submit to HIV testing, complete an SOTP, and be subject to a five-year period of postincarceration supervision. He further argued that the revocation order was void because the court's reason for revocation was his failure to complete SOTP, which was an illegal condition of probation. Relatedly, he asserted that he did not meet the criteria to be a

lifetime sexual offender registrant and should have instead been classified as a 20-year registrant. Ullman also argued under RCr 11.42 that the revocation order was void on the grounds that he was provided ineffective assistance of counsel at his revocation hearing because his counsel did not move to vacate the conditions of his probation he asserted were "illegal and void" and failed to challenge the "illegal" revocation of his probation.

In response, the Commonwealth conceded that Ullman could not be subjected to a five-year period of postincarceration supervision because it would have arguably extended his sentence when his crime of conviction did not qualify for postincarceration supervision under KRS 532.043. Apart from that concession, the Commonwealth argued that the remaining challenged conditions of probation were valid and enforceable and, even assuming arguendo that the conditions were improper, Ullman was barred from challenging them. Relying on *Butler v. Commonwealth*, 304 S.W.3d 78 (Ky. App. 2010) and *Weigand v. Commonwealth*, 397 S.W.2d 780 (Ky. 1965), it asserted that Ullman was required to challenge any allegedly improper condition of probation at the time it was imposed instead of agreeing to the condition, receiving the benefit of probation, violating the condition, and then challenging its validity only after his probation was revoked. It also asserted that Ullman was correctly ordered to be a lifetime sex offender registrant.

In July 2020, after oral argument was held on Ullman's motion and additional briefing was completed, Oldham Circuit Court Judge Karen Conrad, who had presided over the case since Ullman's arraignment, entered an order

recusing herself from further participation in the case. The order explained that Ullman's revocation hearing attorney, against whom his RCr 11.42 motion was leveled, now worked for Judge Conrad as a staff attorney. Special Judge Charles Hickman was assigned to the case in her stead. In his order entered on December 21, 2020, Judge Hickman ruled:

> [P]ursuant to CR 60.02(f) "for any reason of an extraordinary nature justifying relief," the Court **HEREBY VACATES** the portion of the Judgment and Order on Plea of Guilty entered on June 5, 2015, that required Ullman to undergo a sexual offender risk assessment, submit to HIV testing, complete [an] SOTP (Sexual Offender Treatment Program), and be subject to a five-year period of postincarceration supervision, as those requirements are not authorized by statute.[12] The Revocation Order entered on May 24, 2018 is **HEREBY VACATED, Ullman shall be immediately released from the custody of the Department of Corrections,** and **Ullman is hereby returned to probation for a term of five years subject to all his original conditions of probation, except for those conditions which have been determined herein to not be authorized by statute.**
>
> The Court finds that the Oldham Circuit Court correctly determined that Ullman was a lifetime registrant for the Sexual Offender Registry, and makes no alteration on that matter.

Judge Hickman did not address Ullman's RCr 11.42 argument in the order.

Thereafter, the Commonwealth filed a motion for additional findings under CR 52.02 and to alter, amend or vacate under CR 59.05. In its motion, the Commonwealth asked the court to specifically address its argument under

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12 To clarify, the Commonwealth conceded that Ullman could not be subjected to a five-year period of post incarceration supervision pursuant to KRS 532.043. That portion of his sentence therefore remains vacated. In addition, as the Appellant in this case the Commonwealth does not challenge the circuit court's ruling to vacate the condition that Ullman submit to HIV testing. We consequently do not address Ullman's arguments concerning either of those conditions and would further note that the circuit court's decision to revoke Ullman's probation was not based on a violation of either of those conditions.

Butler and *Weigand* that Ullman was precluded from challenging his conditions of probation after revocation occurred. In doing so, the Commonwealth noted that this Court's opinion in *Commonwealth v. Jennings*, 613 S.W.3d 14 (Ky. 2020), rendered four days before the circuit court's December 2020 order was entered, reaffirmed the holdings in *Butler* and *Weigand*, respectively. In the alternative, the Commonwealth requested that the court make specific findings regarding the timeliness of Ullman's challenge to his probation conditions so that the issue could be addressed on appeal.

On January 14, 2021, the circuit court entered an order denying the Commonwealth's motion to alter, amend, or vacate, and granting its motion for additional findings by making the following finding:

> [T]his Court FINDS that [*Butler* and *Weigand*] do not involve illegal and void sentences imposed in violation of the separation of powers doctrine and are, therefore, irrelevant to Mr. Ullman's claims, and, instead, controlling precedents such as [*Phon*, *McClanahan*, and *Ladriere*], hold that a sentence imposed beyond the limitations of the legislature as statutorily imposed is unlawful, void, a legal nullity, an abuse of discretion, void (sic), *correctable at any time*, and *a defendant's consent to an unlawful sentence is irrelevant.* As a result, defendant Ullman's illegal sentences, as addressed in this Court's December 21, 2020 Order, were required to be vacated without regard to the lack of any previous challenge to those sentences.

The order neither cited nor addressed the *Jennings* opinion. Following the ruling, the Commonwealth appealed.

A split Court of Appeals panel affirmed the circuit court's December 2020 and January 2021 orders. *Commonwealth v. Ullman*, 2021-CA-0077-MR, 2022 WL 2182801, at *3 (Ky. App. June 17, 2022). Like the circuit court, the Court

of Appeals summarily dismissed the Commonwealth's argument that Ullman was barred from challenging the conditions of his probation because he failed to object to them at the time they were imposed. *Id.* at *2. The Commonwealth again cited *Jennings*, *Butler*, and *Weigand*, in support of its argument, but the court did not address any of those precedents. *Id.* Instead, the entirety of its analysis on the issue was as follows:

> We do not agree with the Commonwealth's argument and instead quote the following in support of our decision:
>
> > We hold today that a sentence imposed beyond the limitations of the legislature as statutorily imposed is unlawful and void. This holding is narrow: **only a sentence that is illegal and was illegal at the time it was imposed would fall within this holding. It is because these sentences are void and unlawful that CR 60.02 provides the proper remedy for relief.**
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> *Phon*, 545 S.W.3d at 304 (emphasis added). The circuit court did not abuse its discretion in granting Ullman relief under CR 60.02. *Phon*, 545 S.W.3d at 290.

Ullman, 2022 WL 2182801, at *2. The Court of Appeals also rejected the Commonwealth's assertion that it should be permitted to renegotiate the 2015 plea agreement because it relied on Ullman's acceptance of the conditions of his probation to its detriment. *Id.* The court's reasoning was that the plea agreement was based on both the victim's partial recantation of her allegations and Ullman's willingness to accept conditions that "were not statutorily authorized." *Id.* Further, it concluded, "[t]he conviction itself is not void, only the order of revocation based upon violation of the illegally imposed conditions.

[*Phon*, 545 S.W.3d at 309]." *Id.* The court declined to address Ullman's RCr 11.42 argument, as his CR 60.02 relief was dispositive. *Id.* at *3.

The Commonwealth appealed and now seeks further review from this Court. Additional facts are discussed below as necessary.

II. ANALYSIS

The Commonwealth asks this Court to reverse the Court of Appeals and reinstate the circuit court's May 24, 2018, revocation order. It argues that the Court of Appeals erred by failing to apply the controlling precedents of *Jennings*, *Butler*, and *Weigand*, all of which hold that a defendant may not challenge a condition of probation for the first time after revocation and must instead object to the condition at the time it is imposed by the sentencing court. It asserts that Ullman's challenge to the condition that he complete community based SOTP was untimely in accordance with those precedents. The Commonwealth further contends that even if Ullman's challenge had been timely, the circuit court acted within its broad discretion under KRS 533.030 to impose any "reasonable condition" of probation. And, that under the facts of this case, requiring Ullman to complete SOTP was reasonable.

In response, Ullman contends that the circuit court and Court of Appeals were correct in relying on *Phon* and *McClanahan* which both direct that an illegal sentence is void and therefore may be challenged at any time. In the alternative, he maintains that even if the circuit court did act within its discretion in ordering that Ullman complete SOTP, the revocation order must nevertheless remain vacated because the circuit court failed to make the

required findings to revoke under KRS 439.3106. In the event that this Court does not affirm the Court of Appeals, Ullman requests that we remand to the circuit court for consideration of his argument that he received ineffective assistance of counsel during his revocation hearing.

We hold that Ullman's challenge to his condition of probation was untimely and should not have been considered by the circuit court or Court of Appeals. The circuit court's revocation order is accordingly reinstated. We additionally hold that ordering Ullman to complete SOTP as a condition of his probation was not improper. We decline to address Ullman's arguments concerning the circuit court's failure to abide by KRS 439.3106, as that alleged error was not properly preserved for our review, and he has not requested and briefed review for palpable error. Nevertheless, we agree with his request for remand so that the circuit court may address his RCr 11.42 claims.

A. Ullman's challenge to the probation condition that he complete SOTP was untimely.

To begin, we reiterate that the circuit court granted Ullman relief based on a motion filed pursuant to CR 60.02. "Whether to grant relief pursuant to CR 60.02 is a matter left to the 'sound discretion of the [trial] court and the exercise of that discretion will not be disturbed on appeal except for abuse.'" *Phon*, 545 S.W3d at 290 (citing *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996) (quoting *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959)). This Court is therefore without authority to disturb the circuit court's ruling unless it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

Predictably, we must next address the cases of *Weigand*, *Butler*, and *Jennings*, which the Commonwealth asserts in favor of its argument, and *McClanahan* and *Phon*, argued by Ullman. We also felt it necessary to include a discussion of *Commonwealth v. Moreland*, 681 S.W.3d 102 (Ky. 2023). *Moreland* was rendered after briefing was concluded in this appeal but is a member of the *McClanahan* and *Phon* family of case law.

First, in *Weigand*, Roland Weigand pled guilty to two counts of writing bad checks and was sentenced to four years. 397 S.W.2d at 780. The trial court probated his sentence on the sole condition that he be banished from the country; Weigand was a German national and the legality of his presence in the U.S. at that time was uncertain. *Id.* at 780-81. Weigand later violated that condition, and the trial court revoked his probation. *Id.* at 781.

As Ullman now agues to this Court, Weigand argued on appeal that "the substantive effect of imposing a requirement on appellant 'to remain out of the country' rendered the order void ab initio," and, consequently, "[i]ts revocation for a violation of its condition. . .[was] without authority in law." *Id.* Significantly, there was no question whatsoever that Weigand's condition of banishment was not legally imposable, as the Commonwealth conceded that "it [was] beyond the power of a court to inflict banishment as an alternative to imprisonment." *Id.* But this Commonwealth's then-highest court nevertheless affirmed the trial court's order of revocation, holding that

> although probation of a sentence may be a benefit conferred upon a convicted criminal for an invalid reason, the order of probation is separable from the conviction itself and the judgment entered

> thereon. The fact that the probationary order is void does not render the conviction and the judgment void.
>
> The probation itself being a nullity there is nothing left for appellant to do but serve his sentences. Probation was granted upon his own motion with the advice of his counsel. He could have appealed from the original order had he disliked the condition imposed. Instead he chose to accept the void probation and, subsequently, to violate it. Appellant had the assistance of adequate counsel who was presumed to have known the limitations of the authority of the trial court.

Id. (internal citations omitted).

In a very similar case, *Butler*—rendered forty-five years after *Weigand*—Lakinda Butler pled guilty to possession of marijuana in Fayette County District Court and was sentenced to one year which the court probated for two years on the condition that Butler, a Tennessee resident, be banished from Fayette County except to pay fines. 304 S.W.3d at 79. Less than one year later Butler violated the condition of banishment, and her probation was revoked. *Id.* Butler's appeal to Fayette Circuit Court was unsuccessful, and the Court of Appeals granted discretionary review to address whether the district court's revocation violated her constitutional right to free travel.[13] *Id.* at 80. Relying on *Weigand*, the *Butler* Court agreed that the condition of banishment was void, as "Kentucky courts have no authority to impose banishment on a person as a condition of probation[.]" *Id.* Yet it still upheld Butler's probation revocation. *Id.* The Court of Appeals reasoned that

> [d]espite the fact that a convicted criminal may be subjected to an improper condition of probation, the judgment of conviction is

[13] U.S. Const. amend. XIV § 1.

> separable and, thus, survives the void probation order. *Weigand*, 397 S.W.2d at 781. Under such circumstances, "[t]he probation itself being a nullity there is nothing left for [an] appellant to do but serve [her sentence]." *Id.* To prevent this occurrence, a person must challenge the improper condition at the time it is imposed. *Id.*
>
> In this case, Butler accepted the benefit of an invalid probation order but violated the order and was sent to county jail. Although Butler now contends that her constitutional right to freely travel within the United States was violated by the probation condition, she was required to make this argument at the time the condition was imposed. *Id.* Rather, she accepted the void probation with the benefit of avoiding jail and, subsequently, violated it. Therefore, Butler's service of her twelve-month sentence is not a violation of her constitutional rights.

Id.

Finally, in *Jennings*, rendered just four years ago, this Court unanimously adopted the rationale of *Weigand* and *Butler.* Keith Jennings pled guilty to failing to register as a sex offender and of being a PFO 1st and was sentenced to seven and one-half years' imprisonment. 613 S.W.3d at 15. The trial court probated his sentence for five years on several conditions, one of which was that he would have "no access to the internet." *Id.* About one month after his sentencing hearing, Jennings successfully moved to have the circuit court modify two conditions of his probation, neither of which concerned his ability to access the internet. *Id.* Less than four months later, Jennings violated that condition of his probation by accessing social media websites and the Commonwealth sought revocation of his probation.[14] *Id.* at 16.

[14] Initially, the Commonwealth asserted as a second grounds to revoke that Jennings had been charged with violating a provision of the Kentucky Sex Offender

Following a revocation hearing, the circuit court found that Jennings had violated the condition that he not access the internet and that the condition did not violate his right to free speech, but it nevertheless declined to revoke his probation. *Id.* Instead, the court sentenced him to four months' incarceration, the amount of time he had been incarcerated while waiting for the revocation hearing, as a sanction for his violation. *Id.* Jennings appealed the circuit court's ruling to the Court of Appeals which vacated and remanded, holding that "such a restriction was not narrowly tailored, burdened more First Amendment rights than necessary to further the government's interests, and did not increase public safety," and because the restriction was unconstitutionally vague for various reasons. *Id.*

The *Jennings* Court's opinion seemed inclined to agree with Jennings' contention that the total internet ban may have violated his First Amendment Rights. *Id.* at 16-17. The Court agreed with the Court of Appeals' holding that "complete bans on internet use may, in certain extraordinary cases, pass constitutional muster," but cautioned that "[c]omplete bans should be exceedingly rare." *Id.* Nevertheless, this Court explicitly declined to address whether Jennings' internet ban was appropriate, because his challenge was

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Registration Act that prohibited access to social media sites. *Id.* at 16. But, while revocation was pending, the United States Supreme Court rendered *Packingham v. North Carolina*, 582 U.S. 98 (2017), which had invalidated a state statute that prohibited registered sex offenders from accessing certain commercial social media websites on First Amendment grounds. *Jennings*, 613 S.W.3d at 15. The Commonwealth withdrew the pending criminal charge in light of *Packingham*, making Jennings' violation of the condition that he not access the internet the sole ground asserted for revoking his probation. *Id.* at 16.

untimely. *Id.* at 17. The Court explained that "Jennings did not appeal the probation order, did not object to inclusion of the restriction prohibiting internet access, and did not otherwise seek to modify that condition although he did challenge other terms of the probationary order[,]" and that "[i]t was not until after he had violated the internet restriction that he raised any challenge." *Id.* It held:

> "[A]lthough probation of a sentence may be a benefit conferred upon a convicted criminal for an invalid reason, the order of probation is separable from the conviction itself and the judgment entered thereon. The fact that the probationary order is void does not render the conviction and the judgment void." *Weigand v. Commonwealth*, 397 S.W.2d 780, 781 (Ky. 1965) (citations omitted). A probationer is required to challenge the offending provision at the time it is imposed. *Butler v. Commonwealth*, 304 S.W.3d 78, 80 (Ky. App. 2010) (citing *Weigand*, 397 S.W.2d at 781).
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> Jennings does not challenge his conviction but merely contends the trial court's total ban on internet access was improper. However, by accepting the probation, Jennings evaded serving a lengthy jail sentence, only to face sanctions when he promptly violated its terms. Jennings' failure to challenge the probation restriction prohibiting all access to the internet at the time it was imposed is fatal to his current request for relief. *Id.*

Jennings, 613 S.W.3d at 17. The Court held that Jennings' constitutional rights were not violated by the imposition of the four-month jail sentence as a sanction for violating his probation, and that "[t]he Court of Appeals should not have entertained the untimely challenge." *Id.*

Additionally, we highlight that KRS 533.020(6) provides that "[n]otwithstanding the fact that a sentence to probation, probation with an alternative sentence, or conditional discharge can subsequently be modified or

revoked, a judgment which includes such a sentence shall constitute a final judgment for the purposes of appeal." This lends further credence to the notion that the proper means for a probationer to attack an allegedly illegal condition of probation is to object to the condition when it is imposed or within a reasonable time thereafter and appeal if the sentencing court does not rule in his or her favor.

In this case, Ullman entered a guilty plea and agreed to a sentence of twelve years probated for five years. As a condition of granting Ullman the privilege of probation,[15] the circuit court ordered him to, *inter alia*, complete a community based SOTP program. We need not address here whether imposing SOTP as a condition of probation was appropriate[16] because, as in *Weigand*, *Butler*, and *Jennings*, it is immaterial. The question is not whether the sentencing court's challenged condition was improper, as it unquestionably was in *Weigand* and *Butler* and as it likely was in *Jennings*. Instead, the question is whether Ullman challenged that condition at the time it was imposed. He did not. His failure to do so rendered him unable to accept the alleged invalid condition of probation to avoid serving a twelve-year sentence, enjoy the privilege of probation for at least two years, violate the condition, have his probation revoked based in part on that violation, and then challenge the probation condition as illegal for the first time one year and eight months

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[15] *See Butler*, 304 S.W.3d at 80 (citing *Brown v. Commonwealth*, 564 S.W.2d 21, 23 (Ky. App. 1977)).

[16] That argument is instead addressed in Section II(B) of this opinion.

after his probation was revoked. The circuit court's revocation order must accordingly be reinstated.

Moreover, even if we were to agree with Ullman that the condition was improper, the outcome here would not change. "The fact that the probationary order is void does not render the conviction and the judgment void." *Weigand*, 397 S.W.2d at 781. So even if the probation order was void by virtue of it requiring that Ullman complete SOTP, "there is nothing left for appellant to do but serve his sentences." *Id.*

McClanahan, *Phon*, and *Moreland* do not compel us to conclude otherwise. In *McClanahan*, Raymond McClanahan entered into a set of plea agreements with the Commonwealth to resolve three separate indictments. 308 S.W.3d at 696. In exchange, the Commonwealth agreed to recommend a ten-year sentence and objected to McClanahan receiving probation. *Id.* However, pending sentencing, the Commonwealth agreed to release him on his own recognizance if he agreed to "hammer clauses" in each of his plea agreements that provided that if he did not return for sentencing, failed to make himself available for a presentence investigation, or was charged with a new offense, he would serve a much higher sentence than ten-years. *Id.* McClanahan later failed to appear for sentencing and the circuit court sentenced him to thirty-five years. *Id.* at 697.

The *McClanahan* Court reversed the convictions because the "thirty-five-year sentence exceeded the lawful range of punishment established by the General Assembly" and violated the Separation of Powers Doctrine. *Id.* at 698.

It therefore could not be upheld regardless of whether McClanahan agreed to it. *Id.* The Court reasoned that, in accordance with KRS 532.110[17] and KRS 532.080[18], the maximum allowable sentence for McClanahan's convictions was twenty years and that the trial court did not have "leeway to impose a greater sentence." *Id.* at 699. Moreover, it held that "[a] sentence that lies outside the statutory limits is an illegal sentence, and the imposition of an illegal sentence is inherently an abuse of discretion." *Id.* at 702. The Court therefore reversed and remanded to the trial court to allow McClanahan to withdraw his guilty pleas and resume plea negotiations with the Commonwealth. *Id.*

The *McClanahan* Court relied upon several precedents to support its holding. *Id.* at 698-701. For example, in *Jones v. Commonwealth*, 955 S.W.2d 363 (Ky. 1999), which involved a hammer clause similar to the one at issue in

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[17] KRS 532.110(1)(c) states:

(1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

(c) The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years[.]

[18] KRS 532.080(6)(b) provides:

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

(b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.

McClanahan, the Court upheld a plea agreement that provided for six years' imprisonment unless Jones failed to appear for sentencing, which would result in the Commonwealth recommending a twenty-year sentence. *McClanahan*, 308 S.W.3d at 699. Jones failed to appear, the twenty-year sentence was imposed, and the *Jones* Court upheld the sentence. *Id.* The *McClanahan* Court noted that "[c]ritical to [the *Jones*] decision was our recognition of the fact that the sentence of twenty years was within the range established by our legislature for Jones's crimes. . . [t]he same cannot be said for [McClanahan's] sentence in this case." *Id.* The *McClanahan* Court further noted the cases of *Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky. 2006) and *Neace v. Commonwealth*, 978 S.W.2d 319 (Ky. 1998), of which it said:

> We have otherwise consistently recognized that sentences falling outside the permissible sentencing range cannot stand uncorrected. In *Ratliff v. Commonwealth*, 194 S.W.3d 258, 277 (Ky. 2006), a trial judge failed to note in the final judgment which of the several multiple sentences totaling 105 years were to be served concurrently and which were to be served consecutively. We held, "[i]f the omission was a clerical error and the trial judge intended to impose a sentence in excess of seventy years, the sentence violates KRS 532.110(1)(c). The judgment must be vacated ... insofar as it imposes a maximum aggregate sentence in excess of seventy years." In the opposite direction, *Neace v. Commonwealth*, 978 S.W.2d 319, 322 (Ky. 1998) holds that the trial court properly corrected a jury verdict setting a lower sentence than the minimum provided by the statutes. We recognized that "[a]ny other result would permit juries to re-write penalty statutes and effectively nullify the sentencing laws ... [T]he jury's sentencing recommendation fell outside the required statutory range, and the trial court properly corrected the sentence to conform to the law."

McClanahan, 308 S.W.3d at 700-01.

In the same vein, in *Phon*, this Court vacated the imposition of life without the possibility of parole (LWOP) for a juvenile after concluding that the sentence violated our juvenile sentencing statutes. 545 S.W.3d at 299-307. In 1996, sixteen-year-old Sophal Phon entered the home of Khamphao Phromratsamy and Manyavanh Boonprasert and killed them "execution style." *Id.* at 289. Phon also shot the victims' daughter in the head, but she survived. *Id.* In an attempt to avoid the death penalty, Phon agreed with his attorney's recommendation to enter a guilty plea and present a robust mitigation case to a jury prior to sentencing. *Id.* Phon further agreed that LWOP, a then-newly – available punishment in the Commonwealth, be available as a sentencing option before the jury. *Id.* Following Phon's sentencing hearing, the jury was presented with the following sentencing options: "death, LWOP, life without the possibility of parole for 25 years (LWOP 25), life imprisonment, or twenty years or more." *Id.* The jury recommend a sentence of LWOP, and the trial court imposed it. *Id.*

After two attempts to overturn his conviction on other grounds, in June 2013 Phon filed for CR 60.02 relief, citing recent U.S. Supreme Court cases concerning the imposition of LWOP for juvenile offenders. *Id.* at 290. Both the circuit court and the Court of Appeals denied his request, and this Court granted discretionary review to determine whether Phon's sentence was legally enforceable. *Id.* After thorough consideration, the *Phon* Court first concluded that the U.S. Constitution's Eighth Amendment did not categorically forbid juvenile offenders from being sentenced to LWOP so long as the sentencing

procedures complied with the U.S. Supreme Court's directives in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). *Id.* at 291-94. It further concluded that "the imposition of an LWOP sentence for a juvenile under *certain circumstances* does not offend the Kentucky Constitution." *Id.* at 299.

Instead, the Court held that Phon's LWOP sentence had to be vacated because it violated a Kentucky juvenile sentencing statute: KRS 640.040(1). *Id.* at 299-307. At the time Phon was sentenced, KRS 640.040 provided that "[a] youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years." *Id.* at 300. In the interim, the legislature added LWOP to our penal code as an available penalty but "LWOP was never added as an enumerated sentence within [KRS 640.040]." *Id.* This Court had previously clarified in *Shepherd v. Commonwealth*, 251 S.W.3d 309 (Ky. 2008), that LWOP was not an available sentence for a youthful offender convicted of a capital crime pursuant to the plain language of KRS 640.040. *Phon*, 545 S.W.3d at 300. Instead, the *Shepherd* Court "interpreted the provision of KRS 640.040(1) to be an exhaustive listing of potential penalties for juveniles convicted of a capital offense: all the penalties for Class A felonies (twenty to fifty years or life) and LWOP 25." *Id.*

After concluding that *Shepherd* applied to Phon's case retroactively, this Court held that "applying *Shepherd* to Phon's case leads to the conclusion that

Phon's sentence was statutorily prohibited[;]" at the time Phon was sentenced "LWOP 25 would have been the maximum permissible sentence and LWOP was not allowable under the juvenile code." *Id.* at 300-01. Next, relying on *McClanahan*, the *Phon* Court reversed the Court of Appeals' holding that Phon's challenge was untimely, placing particular emphasis on the separation of powers violation that occurs when a sentencing court imposes a sentence that is not authorized by statute. *Id.* at 301. It held:

> What matters here is the judiciary's involvement. This Court cannot go beyond the limits that the legislature has placed upon the judicial branch. Part of this conscription of power is why, even when the issue of illegal sentence is not presented to the trial court, this Court is constrained from affirming a sentence found to be contrary to legislative boundaries. This limitation stems from the separation of powers doctrine. "Sections 27 and 28 of the Kentucky Constitution explicitly require separation of powers between the branches of government[.]" *Prater v. Commonwealth*, 82 S.W.3d 898, 901 (Ky. 2002).
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> . . .
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> Determining what should be a crime and setting punishments for such crimes is a legislative function. "[T]he legislature makes the laws, deciding what is a crime and the amount of punishment to impose for violations thereof." *Jones v. Commonwealth*, 319 S.W.3d 295, 299 (Ky. 2010) (citing *Wilfong v. Commonwealth*, 175 S.W.3d 84, 92 (Ky. App. 2004)). . . In contrast, "[t]he judiciary determines guilt and selects or implements a sentence within the legislative range." *Jones*, 319 S.W.3d at 299 (citing *Wilfong*, 175 S.W.3d at 92). This Court in *McClanahan* specifically held that the trial court's imposition of a sentence in violation of legislative directive was "a violation of the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution, and is an abuse of discretion." *McClanahan*, 308 S.W.3d at 698. "Under our Constitution, it is the legislative branch that by statute establishes the ranges of punishments for criminal conduct. It is error for a trial jury to disregard the sentencing limits established by the legislature, and no less erroneous for a trial judge to do so

> by the acceptance of a plea agreement that disregards those statutes." *Id.* at 701.

Phon, 545 S.W.3d at 302-03. The separation of powers violation that results from a sentence exceeding the available statutory range is what led the *Phon* Court to conclude, reluctantly, that "the defendant's timeliness in bringing the attack is immaterial." *Id.* at 303. It reasoned that "the timeliness issue is not one of rewarding a defendant for an appeal that is lacking in form or punctuality[,]" and was instead "about preventing the judiciary from overstepping its bounds and legislating through inaction or, in the trial court's case, action." *Id.* Because of this, the *Phon* Court held that

> a sentence imposed beyond the limitations of the legislature as statutorily imposed is unlawful and void. This holding is narrow: only a sentence that is illegal and was illegal at the time it was imposed would fall within this holding. It is because these sentences are void and unlawful that CR 60.02 provides the proper remedy for relief.

Id. at 304. Accordingly, because the General Assembly made its policy clear through KRS 640.040 that LWOP is not an appropriate sentence for juvenile offenders, Phon's sentence of LWOP was void and therefore unenforceable. *Id.* at 307. The Court remanded the case for the trial court to correct the unlawful sentence and to impose a sentence of LWOP 25.[19] *Id.* at 309.

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[19] The *Phon* Court discussed that under Kentucky case law "even if an illegal sentence is void, it is void only as to the excess portion of the sentence." *Id.* at 306. Phon's sentencing jury had made an unchallenged fact finding that the Commonwealth had proven the presence of aggravating factors sufficient to substantiate the imposition of LWOP 25, LWOP, or death. *Id.* at 309. "Thus, the legal aggravated sentences presented to the jury have been diminished to only one: LWOP 25." *Id.*

Last, in *Moreland*, Daniel Moreland pled guilty in relation to two indictments. 681 S.W.3d at 104. Under the terms of the first plea agreement, he entered guilty pleas to two counts of first-degree sexual abuse and agreed to a ten-year sentence of imprisonment for both counts to be served consecutively for a total of twenty years. *Id.* Under the second, he pled guilty to one count of first-degree sexual abuse and agreed to a sentence of ten years' imprisonment. *Id.* Both the Commonwealth's offer on a plea of guilty and the trial court's judgment and sentence on a plea of guilty required that Moreland's twenty-year sentence be a "split sentence": he would serve ten years' imprisonment followed by ten years of probation after the conclusion of his prison term. *Id.*

After serving his ten-year sentence, Moreland was released from prison and began supervised probation in accordance with his plea agreement. *Id.* Three years later, the Commonwealth moved to revoke his probation and Moreland objected, arguing that sentencing him to probation after serving his sentence of imprisonment was illegal. *Id.* The trial court ruled it was without authority to alter the sentence and revoked his probation, and Moreland appealed the ruling. *Id.* The Court of Appeals reversed based on its holding that the sentencing scheme established by the General Assembly did not allow for a period of probation to be served after a sentence of imprisonment. *Id.* Moreover, citing *Phon*, the Court of Appeals noted that an illegal sentence may be set aside at any time, and a defendant's consent to an illegal sentence was irrelevant. *Id.* The Court of Appeals went on to hold that the only remedy was to release Moreland from custody. *Id.* at 105.

This Court thereafter granted the Commonwealth's motion for discretionary review. *Id.* The *Moreland* Court affirmed the Court of Appeals insofar as it held Moreland's sentence was illegal and void.[20] *Id.* at 106-107. The Court began by noting that because "'probation is a statutory creature, this Court is bound by the plain meaning of the probation statutes.'" *Id.* at 106 (quoting *Conrad v. Evridge*, 315 S.W.3d 313, 317 (Ky. 2010)). As was germane to Moreland's case, KRS 533.020(1) mandated that "when a person is convicted of or pleads guilty to an offense, and 'is not sentenced to imprisonment, the court shall place him on probation if he is in need of the supervision, guidance, assistance, or direction that the probation service can provide[,]'" while KRS 533.020(4) stated that, "[w]hen the offense is a felony, the period of probation "'shall not exceed five (5) years, or the time necessary to complete restitution, whichever is longer[.]'" *Id.* Based on these statutory directives, the Court held that

> the probation Moreland received violated the statute in that it was for ten years, contrary to the five-year limitation declared in KRS 533.020(4). The trial court also violated the statute by supposing to begin the probationary period ten years in the future, consecutive to a term of imprisonment in state prison for another offense that Moreland had already been sentenced to serve. . . [T]he statutory language is unambiguous, that probation is only available "[w]hen a person . . . who has entered a plea of guilty to an offense *is not sentenced to imprisonment*[.]" KRS 533.020(1) (emphasis added). Moreland was sentenced to imprisonment for

[20] The Court reversed the Court of Appeals' holding that the proper remedy was to release Moreland from custody. *Id.* at 108-09. It instead ruled: "Given that we have held this issue is one of illegal sentencing and is a failure to follow the statutory parameters for when probation is available, we hold the remedy in this case is to remand for resentencing." *Id.* at 109.

> twenty years and ordered to serve ten years of it. Therefore, probation was not available to him.
>
> . . .
>
> [S]ince implementation of incarceration was ordered in Moreland's case, the sentence purporting to probate ten years of that prison sentence is unlawful. KRS 533.020(1). The statutory scheme creates an "either/or" option, not a "both/and" option.

Moreland, 681 S.W.3d at 106-07. Significantly, this Court went on to explicitly state that "[o]ur ruling in [*Jennings*] does not control here." *Id.* at 106. It expounded that in that case "we held a probationer's challenge to a condition of probation ought to have been brought at the time probation was imposed[,]" as "[a]cceptance of an improper condition of probation is tantamount to waiver." *Id.* In contrast, "Moreland [was] not challenging any conditions of probation[,]" but rather "the imposition of probation in and of itself." *Id.* And, because Moreland's "probation was imposed in conjunction with a term of imprisonment," the Court believed that the *McClanahan* rule allowing an illegal sentence to be challenged at any time was applicable. *Id.* at 106-07. Accordingly, it remanded Moreland's case for resentencing. *Id.* at 110.

Based on the foregoing, our jurisprudence clearly distinguishes between when alleged illegal condition of probation may be challenged and when a sentence that falls outside the available statutory range may be challenged. A condition of probation must be challenged at the time it is imposed, or within a reasonable time thereafter, and prior to revocation, whereas an illegal sentence may be challenged at any time. Ullman's sentence was not a "split sentence" like the one at issue in *Moreland*, and what he challenges is a condition of

probation, not the imposition of probation itself. He is accordingly entitled to no relief pursuant to *Moreland*. And, he could only seek refuge under the umbrella of *McClanahan* and *Phon* if his twelve-year sentence fell outside the permissible statutory sentence range for his convictions on three counts of distributing a matter portraying a sexual performance by a minor, enhanced by his status as a PFO 2nd. It does not, nor has he ever claimed that it does. Distributing a matter portraying a sexual performance by a minor, first offense, is a Class D felony.[21] Class D felonies have an available sentencing range of one to five years' imprisonment,[22] which was enhanced to a potential sentence of five to ten years for each count based on Ullman's PFO 2nd status.[23] The trial court could therefore have sentenced Ullman to a maximum of thirty years' imprisonment, meaning that his twelve year sentence was well-within the available statutory range and was not an illegal and void under *McClanahan* or *Phon*.

Accordingly, because Ullman's challenge to his condition of probation was untimely, the circuit court's decision to grant his motion for relief under CR 60.02 was a clear abuse of discretion pursuant to *Weigand*, *Butler*, and

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[21] KRS 531.340(3)(a).

[22] KRS 532.060(2)(d).

[23] KRS 532.080(5) provides that "[a] person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted." Class C felonies carry a potential sentence of five to ten years. KRS 532.060(2)(c).

Jennings. We must therefore reverse the Court of Appeals and reinstate the circuit court's May 2018 revocation order.

B. A sentencing court may order a defendant not convicted of a "sex crime" under KRS 17.500 to complete SOTP as a condition of probation if the court deems the condition "reasonably necessary" in accordance with KRS 533.030.

Notwithstanding our holding that the primary issue in this case is resolved pursuant to the foregoing section of this opinion, this case presents us with an opportunity to clarify an important point of law regarding the authority of our sentencing courts to impose conditions of probation. We therefore take this opportunity to address, as a matter of first impression, whether a trial court's broad discretion under KRS 533.030 includes the ability to order a defendant that has not been convicted of a "sex crime" under KRS 17.500 to complete an SOTP as a condition of probation. We conclude that it does.

KRS 17.500(8)(a) defines a "sex crime," in relevant part, as "[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[.]" Ullman's convictions for distribution of matter portraying a sexual performance by a minor, KRS 531.340, is not included in KRS 17.500's definition of a "sex crime." It is instead considered a "criminal offense against a minor." KRS 17.500(3)(a)(11). In turn, the statutes governing SOTPs provide that "[t]he department [of corrections] shall operate a specialized treatment program for sexual offenders," and define "sexual offender" as an individual that "has been adjudicated guilty of a sex crime, as defined in KRS 17.500[.]" Consequently, Ullman argues that the circuit court erred by requiring him to

complete SOTP as a condition of his probation because he was not convicted of a "sex crime" under KRS 17.500. We disagree.

While we do not dispute that Ullman was not convicted of a "sex crime," we hold that the trial court nevertheless did not err by requiring him to complete an SOTP as a condition of his probation. "In the first place, it is entirely within the discretion of the trial court whether a defendant shall be given his liberty conditionally. This is regarded as a privilege or a 'species of grace extended to a convicted criminal' for his welfare and the welfare of organized society.'" *Ridley v. Commonwealth*, 287 S.W.2d 156, 158 (Ky. 1956) (quoting *Darden v. Commonwealth*, 125 S.W.2d 1031, 1033 (Ky. 1939)". *See also Burke v. Commonwealth*, 506 S.W.3d 307, 314 (Ky. 2016) (noting "the granting of probation is wholly within the discretion of the trial court.)." This discretion has been codified by the General Assembly via KRS 533.030 which states, in pertinent part:

> (1) The **conditions of probation** and conditional discharge **shall be such as the court, in its discretion, deems reasonably necessary to ensure that the defendant will lead a law-abiding life or to assist him or her to do so**. The court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation.
>
> (2) When imposing a sentence of probation or conditional discharge, the court may, **in addition to any other reasonable condition**, require that the defendant. . .

(emphasis added). The statute then provides a list of twelve potential conditions of probation that may be imposed by the court. The "Kentucky

Crime Commission/LRC Commentary" that accompanies KRS 533.030 clarifies that

> It is not intended that the list [in subsection (2)] be exhaustive **or that it limit in any way the discretion of a trial court in tailoring the conditions of probation** or conditional discharge **to the rehabilitative needs of individual offenders. . . The only limitation** on the trial judges with respect to such conditions is contained in subsection (1). This provision **requires that conditions imposed** upon a convicted offender **be considered "reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so."**

(Emphasis added). Accordingly, by statute, a sentencing court has the discretion to impose *any reasonable condition* of probation that it deems *reasonably necessary* to ensure that the defendant will lead a law-abiding life or that will assist him or her in doing so.

Here, the circuit court was presented with a defendant in his thirties who, without question, had multiple sexually explicit images of a fourteen-year-old girl on his cellphone[24] and pled guilty to distribution of a matter portraying a sexual performance by a minor. Even if his crimes were not "sex crimes" under KRS 17.500, they were indisputably of a sexual nature. Moreover, the circuit court was advised by the Department of Corrections, via Ullman's SORA evaluation, that in order to ensure that Ullman "[maintains] an offense-free lifestyle. . . and to minimize his chances of acting out again" he should

[24] Despite Ullman's counsel's attempt to victim blame during the oral arguments held in this case by proclaiming that Jane sent the photographs to Ullman, the fact remains that Ullman is an adult, the victim is a child, and having those images is a felony offense.

complete a treatment program for sexual offenders, and that he was unlikely to do so in the absence of a court order.

Furthermore, while the statutes that govern SOTP—KRS 197.400 through KRS 197.440—direct that the Department of Corrections "shall operate a specialized treatment program for sexual offenders,"[25] i.e., individuals convicted of a "sex crime" under KRS 17.500,[26] nothing in those statutes explicitly precludes individuals not convicted of a "sex crime" from participating in an SOTP. Likewise, KRS 532.045, which mandates that completion of a community based SOTP be ordered as a condition of probation for defendants convicted of a sex crime,[27] does not explicitly state that those not convicted of a sex crime cannot be ordered to complete SOTP. Put simply, just because SOTP is *mandated* for certain offenses does not mean it is *precluded* for others. This is a sensible conclusion because SOTP is not a punishment, it is a rehabilitative *treatment program* that endeavors to ensure that sex offenders do not commit additional sexual offenses. If the General Assembly believes in the efficacy of SOTP to such an extent that it has mandated it for certain offenses, why then would we preclude participation by a defendant who may benefit from it simply because they were not convicted of

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[25] KRS 197.400.

[26] KRS 197.410.

[27] KRS 532.045(4) ("If the court grants probation or conditional discharge, the offender shall be required, as a condition of probation or conditional discharge, to successfully complete a community-based sexual offender treatment program operated or approved by the Department of Corrections or the Sex Offender Risk Assessment Advisory Board.").

a crime for which it is mandated? We therefore hold that a sentencing court may impose completion of SOTP as a condition of probation for defendants not convicted of a "sex crime" under KRS 17.500 if the court finds that the condition is reasonable and is reasonably necessary to ensure that the defendant will lead a law-abiding life or that it will assist him or her in doing so.

There are two cases that give this Court pause in coming to this conclusion: *Ladriere*, *supra*, and *Miller v. Commonwealth*, 391 S.W.3d 801 (Ky. 2013). They accordingly warrant discussion. In *Ladriere*, Robert Ladriere watched a ten-year old girl use the bathroom in a restroom stall of a county library. 329 S.W.3d at 279. Ladriere entered the girl's stall before she could leave and backed her against the wall but fled when the girl screamed. *Id.* at 279-80. He eventually entered a guilty plea to kidnapping and was sentenced to twenty years' imprisonment. *Id.* at 280. Although the sentencing court acknowledged that kidnapping was not a sex offense *per se*, it further imposed several conditions on his sentence based on his duty to register as a sex offender, including that he complete SOTP. *Id.*

The *Ladriere* Court, reviewing for palpable error, first held that Ladriere could not be subjected to a five-year period of conditional discharge under KRS 532.043 because kidnapping is not listed as a qualifying offense. *Id.* at 282. It then held that he could not be required to complete SOTP, and the entirety of its analysis was as follows:

> For the same reasons, ordering Ladriere to complete a Sex Offender Treatment Program (SOTP) was not statutorily authorized. SOTP is a treatment program for sexual offenders. Participation in the program may be ordered when the sentencing court, department officials, or both determine that a sexual offender may have a mental, emotional, or behavioral disorder and is likely to benefit from the program. KRS 197.010(4). However, "sexual offender" as used in KRS Chapter 197 is a person who has committed a "sex crime" as defined by KRS 17.500. KRS 197.410(1). Given that Ladriere did not commit an offense within the purview of the statute's definition of "sex crime," it stands to reason that he is not a "sexual offender" for purposes of the SOTP provisions either.

Id. This Court vacated the portions of Ladiere's sentencing order that imposed the five-year period of conditional discharge and ordered him to complete SOTP.[28] *Id.* at 283.

But, as Ladriere was not granted probation and was instead required to complete SOTP as part of his sentence, the trial court's broad discretion under KRS 533.030 was not implicated or considered. Further, as explained *supra*, this Court does not believe it is prudent to bar defendants that would benefit from SOTP from participation simply because they were not convicted of an offense enumerated in KRS 17.500. This, likewise, was not explicitly considered by the *Ladriere* Court.

Next, in *Miller*, Elmer Miller pled guilty to criminal attempt to commit first-degree unlawful transaction with a minor, victim over the age of sixteen, a Class A misdemeanor. 391 S.W.3d at 803. He was sentenced to one year, which the court probated for two years. *Id.* As a condition of probation, the

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[28] It also vacated the requirement that he submit to HIV testing based on the same reasoning. *Id.* at 283.

court ordered him to "[a]ttend any counseling recommended by probation and parole." *Id.* In turn, probation and parole recommended that Miller enroll in SOTP, and he did so. *Id.* However, SOTP typically took three years to complete, and the length of Miller's probation was only two years. *Id.* Shortly before Miller's probationary period expired, his parole officer informed the court that Miller would be unable to complete the program before his probation expired. *Id.* The court ordered briefing on the issue of whether his probationary period could be extended beyond the two-year limit for misdemeanor offenses provided by KRS 533.020(4), and ultimately found that it could under KRS 532.045(4), which required the completion of SOTP as a probation condition for sex crimes. *Id.*

The *Miller* Court vacated the circuit court's ruling and ordered that Miller be discharged from probation. *Id.* at 809. The Court first held that the circuit court could not extend Miller's probation based on the plain language of KRS 533.020(4). *Id.* at 805. It further disagreed with the circuit court's conclusion that the two-year probation time limit in KRS 533.020(4) was "trumped" by KRS 532.045's requirement that SOTP be completed because Miller was not convicted of a "sex crime" under KRS 17.500 and was therefore not "statutorily required" to complete SOTP. *Id.* More importantly, though, the Court concluded that Miller was never ordered to complete SOTP as a condition of his probation. *Id.* at 808. Rather, "the trial court's probation order. . . conditioned Miller's probation on his '[a]ttend[ing] any counseling recommended by probation and parole[]'" and said nothing about completing SOTP. *Id.* Rather,

"[t]hat condition only appeared when Probation and Parole recommended that Miller complete sex offender treatment, which Probation and Parole believed, incorrectly, was required by statute." *Id.* Accordingly, the Court held that Miller did not violate the imposed probation condition that he attend "any counseling recommended by probation and parole." *Id.* His probation could therefore not be extended absent his consent, which he did not provide. *Id.* at 809.

Miller is distinguishable from this case because Miller was never ordered to complete SOTP as a condition of his probation. And, as in *Ladriere*, the *Miller* Court did not consider the sentencing Court's discretion under KRS 533.030. Though, even if the court had imposed SOTP, because Miller's conviction was for a misdemeanor, and he therefore could not complete SOTP before the expiration of his probationary period, we would agree that it could not have been considered a "reasonable condition" by the sentencing court.

Based on the foregoing, we hereby hold that under KRS 533.030, a sentencing court may impose SOTP as a condition of probation if the court finds it is reasonable condition within the facts of the case before it and that it is reasonably necessary to ensure that the defendant will lead a law-abiding life or that it will assist him in doing so.

C. Ullman's assertion that the circuit court's revocation order failed to comply with KRS 439.3106 was not properly preserved for review.

Ullman further asserts that, in the event that we reinstate the circuit court's revocation order based on the Commonwealth's argument that his

challenge was untimely, as we do in Section II(A) of this opinion, we must nevertheless uphold the circuit court's later decision to vacate the revocation order because the circuit court did not make fact findings sufficient under KRS 439.3106 and *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014) to support the revocation decision. Specifically, Ullman argues that the circuit court failed to make any finding that Ullman's failure to comply with the conditions of his probation constituted a significant risk to his victim or the community at large and that he could not be appropriately managed in the community. KRS 439.3106(1)(a); *Andrews*, 448 S.W.3d at 780 (holding "that KRS 439.3106(1) requires trial courts to consider whether a probationer's failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and whether the probationer cannot be managed in the community before probation may be revoked.").

However, Ullman failed to challenge this alleged error before the circuit court, and it is therefore not preserved for our review. *Accord Lainhart v. Commonwealth*, 534 S.W.3d 234, 237 (Ky. App. 2017). And, nowhere in Ullman's brief to this Court does he request review for palpable error pursuant to RCr 10.26.[29] "Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error

[29] RCr 10.26 provides that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant." *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) (citing *Thomas v. Commonwealth*, 153 S.W.3d 772, 782 (Ky.2004); *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky.2005), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010)).

We do not believe the circumstances presented by this case constitute extreme circumstances amounting to a substantial miscarriage of justice and therefore decline to address Ullman's argument. The Division of Probation and Parole first sought revocation of Ullman's probation in March 2017 for several violations of his probation conditions, namely: evading a drug screen and failing to report to his probation officer as directed the following day; another failure to report to his probation officer thereafter; failing a drug screen which showed the presence of Lortab and methamphetamine; and for being terminated from his SOTP for failing a drug screen.

The circuit court nevertheless gave Ullman a second chance to comply with the conditions of his probation, but by the following March the Division of Probation and Parole was again seeking revocation, this time for even more violations, specifically: being terminated from his outpatient substance use disorder treatment program for excessive absences and missed drug screens; failing to report to his probation officer as directed on six separate occasions; failing a drug screen which showed the presence of Oxycodone; being discharged from his substance use disorder treatment class for excessive

absences; and being terminated from his SOTP for a second time based on six distinct violations of that program's contract.

Based on the foregoing, we cannot conclude that the circumstances of this case warrant *sua sponte* review for palpable error.

D. Ullman's RCr 11.42 claims must be remanded for consideration by a fact-finding court.

Ullman's final argument is that his revocation hearing counsel's representation constituted prejudicial ineffective assistance of counsel pursuant to RCr 11.42. He faults his revocation hearing counsel for failing to challenge the conditions of his probation during his revocation hearing and for failing to object to and/or appeal the circuit court's failure to make the required findings under KRS 439.3106 prior to revoking his probation. He contends that if this Court reverses the Court of Appeals and reinstates the circuit court's revocation order, we should further order that the case be remanded so that a fact-finding court may address his RCr 11.42 arguments in the first instance. As noted, both the circuit court and the Court of Appeals forewent addressing Ullman's RCr 11.42 arguments on the basis that his CR 60.02 relief was dispositive. As we have already ruled in Section II(A) of this Opinion that Ullman's challenge to the conditions of his probation were untimely, that issue need not be considered. Nevertheless, we agree that remanding to allow the circuit court to address his argument regarding his counsel's failure to challenge the circuit court's failure to make the required findings under KRS 439.3106 prior to revocation is warranted.

III. CONCLUSION

Based on the foregoing, we reverse the Court of Appeals and hereby reinstate the circuit court's May 24, 2018, revocation order. We further remand this case to the circuit court for consideration of Ullman's RCr 11.42 arguments.

VanMeter, C.J.; Bisig, Conley, Keller, Lambert and Nickell, JJ., sitting. VanMeter, C.J.; Bisig, Conley, and Nickell, JJ., concur. Keller, J., concurs in result only. Thompson, J., not sitting.

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Supreme Court of Kentucky

2022-SC-0293-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2021-CA-0077
OLDHAM CIRCUIT COURT NO. 13-CR-00124

RICKY D. ULLMAN, JR. — APPELLEE

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing, filed by the Appellee, of the Opinion of the Court, rendered April 18, 2024, is DENIED.

VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. Thompson, J., not sitting.

ENTERED: August 22, 2024.

CHIEF JUSTICE

RENDERED: JUNE 17, 2022; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-0077-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

APPEAL FROM OLDHAM CIRCUIT COURT
v. HONORABLE CHARLES R. HICKMAN, SPECIAL JUDGE
ACTION NO. 13-CR-00124

RICKY D. ULLMAN, JR. — APPELLEE

AND NO. 2021-CA-0112-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, SPECIAL JUDGE
ACTION NO. 13-CR-00124

v.

RICKY D. ULLMAN, JR. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, LAMBERT, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: The Commonwealth of Kentucky appeals from the Oldham Circuit Court's orders vacating the probation revocation, as well as certain conditions of probation, of Ricky D. Ullman, Jr. We affirm.

The procedural history of these appeals began in September 2013, when Ullman was indicted in Oldham Circuit Court in Case No. 13-CR-00124 on seven counts, namely: unlawful transaction with a minor, first degree (Counts I and II); use of a minor in a sexual performance (Count III); rape, third degree (Count IV); prohibited use of electronic communication system to procure minor sex offense (Count V); sexual abuse, first degree (Count VI); and persistent felony offender (PFO), first degree (Count VII). The victim, a friend of Ullman's daughter, was fourteen years old at the time of the offenses.

Ullman negotiated a guilty plea agreement whereby Counts IV, V, and VI were dismissed. Counts I, II, and III were amended to distribution of matter portraying a sexual performance (Kentucky Revised Statute (KRS) 531.340); and Count VII was amended to PFO in the second degree. On June 5, 2015, Ullman was sentenced to a total of twelve years' imprisonment. Per the plea agreement, he received an alternative sentence of serving one year in the county jail with the

balance of the term of imprisonment probated for five years. Ullman agreed to the following conditions of probation (termed post-incarceration supervision per KRS 532.043): submit to a sexual offender risk assessment; submit to testing for HIV; complete a sexual offender treatment program (SOTP); register as a sex offender; and be subject to a five-year post-incarceration supervision program (referred to as conditional discharge in Ullman's plea agreement). Ullman was represented by counsel throughout the indictment, arraignment, plea agreement, and sentencing process. He was registered as a lifetime registrant on the same date as sentencing.

The Commonwealth moved to revoke Ullman's probation/conditional discharge/post-incarceration supervision on two occasions: (1) on March 28, 2017, for three violations, namely, failure to report, failure to complete the SOTP, and use of opiates and methamphetamines; and (2) on April 4, 2018, for similar violations of conditions. In 2017, Ullman was permitted to remain under his conditions of discharge, but on May 24, 2018, he was ordered to serve the remainder of his twelve-year term of imprisonment. He was represented by counsel at both revocation hearings.

In January 2020, Ullman filed a motion to vacate the revocation order pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 and Kentucky Rule of Civil Procedure (CR) 60.02. He argued that he was sentenced illegally because his convictions under KRS 531.340 were not included in the definition of sex

crimes under KRS 17.500(8) (which mandate participation in the SOTP).[1] He also argued that counsel was ineffective at the revocation hearing. Ullman moved for his immediate release from incarceration.

The Commonwealth opposed the motion, arguing that Ullman should have contested his sentence when it was imposed in 2015 and that, because he had agreed to the conditions, they were enforceable against him. The circuit court disagreed with the Commonwealth, and entered an order on December 21, 2020, pursuant to CR 60.02(f), vacating "the portion of the Judgment and Order on Plea of Guilty . . . that required Ulllman to undergo sexual offender risk assessment, submit to HIV testing, complete a SOTP[], and be subject to a five-year period of postincarceration supervision, as those requirements are not authorized by statute." Ullman was ordered immediately released and was "returned to probation for a term of five years subject to all his original conditions of probation, except for those conditions which have been determined herein to not be authorized by statute."

The circuit court subsequently denied the Commonwealth's CR 59.05 motion to alter, amend, or vacate the order but granted the CR 52.02 motion for

[1] Ullman had argued that his lifetime registration as a sexual offender was illegal, but later moved to dismiss this allegation, conceding that, because the victim was a minor, this requirement was not illegally imposed.

more specific findings regarding case law precedents relied upon for its December 2020 order. The Commonwealth appeals, making similar arguments to this Court.

We begin by stating our standard of review, namely:

> Whether to grant relief pursuant to CR 60.02 is a matter left to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996) (quoting *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959)). We also review a trial court's denial of RCr 11.42 relief for an abuse of discretion. *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Foley v. Commonwealth*, 425 S.W.3d 880, 886 (Ky. 2014) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted)). However, also presented to this Court are several issues of law including questions of constitutionality and statutory interpretation. On these issues, we review conclusions of law de novo. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

Phon v. Commonwealth, 545 S.W.3d 284, 290 (Ky. 2018).

The Commonwealth first argues that Ullman's failure to challenge his conditions of postincarceration probation precluded him from later objecting to same. In support of this argument, the Commonwealth cites *Commonwealth v. Jennings*, 613 S.W.3d 14, 17 (Ky. 2020) (citing *Butler v. Commonwealth*, 304 S.W.3d 78, 80 (Ky. App. 2010), and *Weigand v. Commonwealth*, 397 S.W.2d 780,

781 (Ky. 1965)), for the proposition that "[a] probationer is required to challenge the offending provision at the time it is imposed."

We do not agree with the Commonwealth's argument and instead quote the following in support of our decision:

> We hold today that a sentence imposed beyond the limitations of the legislature as statutorily imposed is unlawful and void. This holding is narrow: **only a sentence that is illegal and was illegal at the time it was imposed would fall within this holding. It is because these sentences are void and unlawful that CR 60.02 provides the proper remedy for relief.**

Phon, 545 S.W.3d at 304 (emphasis added). The circuit court did not abuse its discretion in granting Ullman relief under CR 60.02. *Phon*, 545 S.W.3d at 290.

The Commonwealth next argues that Ullman's probation conditions were not part of his sentence and did not render his conviction void. But the conviction itself was not voided, only those conditions which were not permissible by statute. As in *Phon*, this is a narrow holding, and we affirm the circuit court's ruling in this regard. *Id.*

We lastly consider the Commonwealth's argument that it should be given the opportunity to renegotiate the 2015 guilty plea agreement because it relied to its detriment on Ullman's acceptance of the conditions. The record does not support this argument: There is every indication that the Commonwealth based its plea agreement on the victim partially recanting her version of the events which

led to Ullman's indictment, not just Ullman's willingness to accept conditions that were not statutorily authorized. The conviction itself is not void, only the order of revocation based upon violation of the illegally imposed conditions. *Id.* at 309.

Likewise, because we are affirming the circuit court's order granting relief under CR 60.02, we decline Ullman's request to remand this matter to the circuit court for a ruling on that portion of his motion devoted to RCr 11.42 claims of ineffective counsel at the probation revocation hearing.

The December 2020 and January 2021 orders of the Oldham Circuit Court are affirmed.

THOMPSON, K., JUDGE, CONCURS.

JONES, JUDGE, DISSENTS AND DOES NOT FILE SEPARATE OPINION.

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COMMONWEALTH OF KENTUCKY
OLDHAM CIRCUIT COURT
CASE NO.: 13-CR-00124

COMMONWEALTH OF KENTUCKY PLAINTIFF

V.

ORDER

RICKY D. ULLMAN, JR. DEFENDANT

This matter comes before the Court on Defendant Ricky D. Ullman, Jr.'s (hereinafter "Ullman"), Motion Pursuant to CR 60.02 and RCr11.42, to Vacate the Illegal and Void Orders, Sentences and Conditions in and Arising Out of the June 5, 2015 Judgment and Sentence and the May 24, 2018 Revocation Order and to Vacate the Revocation Order Due to the Ineffective Assistance of Counsel at the 2018 Revocation Hearing. This Court was appointed as Special Judge to hear the current Motion. Ullmann is represented by counsel and has filed substantial briefs, and the Commonwealth has filed a responsive briefs. The Court has reviewed the parties' briefs and the record of this action in rendering its decision herein.

On September 13, 2013, Ullman was indicted in Oldham Circuit Court in Case No.: 13-CR-00124 on seven counts as follows: 1) Unlawful Transaction with a Minor, First Degree, 2) Unlawful Transaction with a Minor, First Degree, 3) Use of a Minor in a Sexual Performance, 4) Rape, Third Degree, 5) Prohibited Use of electronic Communication System to Procure Minor/ Peace Officer Sex Offense, 6) Sexual Abuse, First Degree, and 7) Persistent Felony Offender, First Degree. The victim in these offenses was fourteen years old at the time the offenses are alleged to have occurred.

Ullman, represented by counsel Matthew Pippen, negotiated a plea agreement which was entered on April 15, 2015. The plea agreement dismissed Counts four, five and six of the

Indictment and plead guilty to amended charges on Counts one, two, three and seven. Count 1 Unlawful Transaction with a Minor, First Degree was amended to Distribution of Matter Portraying a Sexual Performance with sentence of 10 years (enhanced by Count 7 PFO), Count 2 Unlawful Transaction with a Minor, First Degree was amended to Distribution of Matter Portraying a Sexual Performance with sentence of 2 years, Count 3 was amended from Use of Minor in a Sexual Performance to Distribution of Matter Portraying a Sexual Performance with a sentence of 2 years, and Count 7 was amended from Persistent Felony Offender, First Degree to Persistent Felony Offender, Second Degree which enhanced Count 1. The plea ran Counts 1 and 2 consecutively for a total of 12 years and it would run consecutive to a prior Oldham Circuit Case No.: 12-CR-00086. Ullman agreed to an alternative sentence to serve one year in the county jail from the date of the plea with the balance of his sentence to be probated for five years. The plea agreement stated that as a condition of probation, Ullman must submit to a sexual offender risk assessment, submit to testing for HIV, complete a sexual offender treatment program, register as a sex offender, and be subject to conditional discharge for a period of five years upon completion of incarceration or parole pursuant to KRS 532.043. (Note: KRS 532.043 refers to this five year period as "postincarceration supervision," rather than the term "conditional discharge" as used in Ullman's plea agreement.)

Ullman was sentenced in conformity with his plea agreement by Judgment and Sentence on Plea of Guilty which was entered on June 5, 2015. A Judgment of Registration Designation was also entered on June 5, 2015, which stated that Ullman was to be a lifetime registrant on the Sexual Offender Registry pursuant to KRS 17.520(4) as a person convicted of: "Two or more felony criminal offenses against a victim who is a minor." Ullman was subsequently released from his one year alternative sentence and probated. Ullman's probation was revoked by a Revocation

Order entered on May 24, 2018. The grounds for revocation according to the Revocation Order are that he stipulated to "failure to complete SOTP and others" according to the handwritten notation on the order. SOTP of course stands for Sexual Offender Treatment Program. Ullman was represented by attorney Elizabeth Curtin during his revocation proceedings. The Revocation Order remanded Ullman into the custody of the Department of Corrections to serve out his sentence, and Ullman remains through the current date in their custody.

Ullman filed the current Motion on January 13, 2020 before the Oldham Circuit Court seeking to vacate the Judgment and Order on Plea of Guilty entered almost five years prior on June 5, 2015 and to vacate the Revocation Order entered twenty months prior on May 24, 2018. This Court was assigned as Special Judge in this matter by Order entered on July 28, 2020. Ullman contends that his Judgment should be vacated as it imposes illegal and void sentences contrary to statutory law by requiring him to: undergo a sexual offender risk assessment, submit to HIV testing, complete a SOTP (Sexual Offender Treatment Program), and be subject to a five-year period of postincarceration supervision. Ullman argues that similarly, the Revocation Order is also illegal and void as the grounds for his revocation was his failure to complete a SOTP, which provides an illegitimate basis for his revocation as it was illegal to set that condition on Ullman's probation. Ullman also argues that he does not meet the criteria of KRS 17.520 for a lifetime sexual offender registrant, rather he should be classified as a 20 year sexual offender registrant.

Ullman was convicted of three counts of Distribution of Matter Portraying a Sexual Performance by a Minor, an offense found at KRS 531.340. It is notable that this offense pursuant to Kentucky law is not considered a "sex crime", and therefore he is not considered a "sexual offender" under Kentucky law. See KRS 17.500(8) and KRS 17.500(9). Only those individuals who stand convicted of a "sex crime" and are "sexual offenders" are required under the law to

submit to a sexual offender risk assessment, submit to HIV testing, and complete a sexual offender treatment program (SOTP). Similarly, KRS 532.043 sets out offenses that qualify an individual for the additional five year "postincarceration supervision" period, and that statute does not include the offenses Ullman was convicted of under KRS 531.340. Based on the applicable statutes, Ullman's conviction for three counts of Distribution of Matter Portraying a Sexual Performance by a Minor pursuant to KRS 531.340 does **NOT** require him to submit to a sexual offender risk assessment, submit to HIV testing, complete a sexual offender treatment program (SOTP), and have a five-year postincarceration supervision period imposed. Ullman was sentenced to all of the foregoing requirements in conformity with his plea agreement, but legally these requirements are not authorized by statute given the offenses to which he plead guilty.

The Commonwealth concedes in their brief that Ullman cannot be subject to the five-year period of postincarceration supervision pursuant to KRS 532.043. As to the other requirements discussed above, the Commonwealth contends that Ullman agreed to comply with those requirements in his plea agreement, and his agreement trumps the fact that under the applicable statutes he is not subject to such requirements. The Commonwealth also stated the importance of those requirements to the Commonwealth in negotiating its plea agreement with Ullman, given the nature of what Ullman was alleged to have done. In Ullman's plea agreement he did not plead guilty to any of the original charges set forth in the Indictment, and all charges were amended to new offenses or dismissed. The Commonwealth Attorney as a prosecutor has broad discretion in determining whether to prosecute a matter, what charges a defendant should be indicted on, and whether and how to amend charges in a plea agreement. If it was important or significant to the Commonwealth that Ullman be required to submit to a sexual offender risk assessment, submit to HIV testing, complete a sexual offender treatment program (SOTP), and be given a five-year term

of postincarceration supervision, then it was well within their authority and discretion to amend his charges to an offense which is classified as a "sex crime" under Kentucky law which would legally impose such requirements. Instead, in this instance the statutory framework was circumvented by having Ullman agree to requirements not authorized by statute given the offenses to which he plead guilty. The Court concludes that such circumvention is a poor practice, and not one to be encouraged or upheld. The Commonwealth should not be able to secure by a plea agreement a sentence which could never exist under the proper application of the law. The Court is persuaded by Ullman's argument that similar to the decision in Ladriere v. Commonwealth, 329 S.w.3d 278, 283 (Ky. 2010), a sentence not authorized by statute should be vacated. That Ullman agreed to these requirements in his plea agreement, does not alter the fact that such requirements are not authorized by statute given the offenses for which he stands convicted, and those requirements should be vacated.

Ullman's probation was revoked on the basis that he did not complete a sexual offender treatment program (SOTP). Ullman should never have been subject to such a requirement, and that portion of his Judgment will be vacated by this Order. This determination requires that the Revocation Order entered on May 24, 2018 also be vacated since it was premised on a illegitimate basis, i.e. that Ullman was required to complete a SOTP and that failure to do so was grounds for revocation.

Ullman's guilty plea did qualify him as an individual who is a "registrant" as that term is defined in KRS 17.500(5), because his offense meets the definition of the term "a criminal offense against a victim who is a minor" as set forth in KRS 17.500(3)(a)(11), since the victim of his offenses was 14 years old at the time of the offense. As a "registrant", Ullman must register as a sexual offender. The Oldham Circuit Court entered a Judgment of Registration Designation on

June 5, 2015, which stated that Ullman was to be a lifetime registrant on the Sexual Offender Registry pursuant to KRS 17.520(4) as a person convicted of: "Two or more felony criminal offenses against a victim who is a minor." Ullman objects to his designation as a lifetime registrant, and contends that he is does not meet the criteria of KRS 17.520(4). Ullman contends that the criteria of "two or more felony criminal offenses against a victim who is a minor" refers to two or more separate felony judgments. Ullman also argues that the three offenses he stands convicted of are part of a continuing course of conduct and cannot meet the criteria of two or more criminal offenses for KRS 17.520(4). This argument relies on an unpublished decision of the Kentucky Court of Appeals in Commonwealth v. Daughtery, 2019 WL 1579601 (Ky. App. 2019). In Daughtery, supra, they found that KRS 17.520(4) did not apply "to a continuing course of conduct in downloading videos in a single day to a single device."

The Oldham Circuit Court found in the current case that Ullman was convicted of three offenses against a victim who is a minor, and that he met the requirements of KRS 17.520(4) to be a lifetime registrant on the Sexual Offender Registry. The Commonwealth argues that Daughtery, besides being unpublished, is factually distinct to the circumstances presented in this case, as Ullman's offenses under Counts 1 and 2 occurred on June 23, 2013 and Count 3 occurred on June 18-23, 2013 and involved multiple photos of a partially unclothed fourteen year old girl. (Dates taken from the Indictment.) The Court agrees with the Commonwealth that multiple photos over a course of days is not a continuous course of conduct. The Court also notes that Daughtery is unpublished and not precedent which this Court must follow. The Court also finds that the plain language of KRS 17.520(4), i.e. "two or more felony criminal offenses against a victim who is a minor" directs the Court to look at the number of criminal "offenses", as opposed to criminal convictions or prior criminal offenses. Since the Court is to look to the number of criminal offenses

against a victim who is a minor, the Court may count criminal offenses against a victim who is a minor that were contained in the same judgment. This interpretation of the statute can also be seen in Embry v. Commonwealth, 476 S.W.3d 264, 272 (Ky. App. 2015), overruled on other grounds; Crabtree v. Commonwealth, 2017 WL 2211375, *2-3 (Ky. App. 2017); and Lewis v. Commonwealth, 2017 WL 129081, *2 (Ky. App. 2017). The Court finds no error by the Oldham Circuit Court's determination that Ullman had two or more felony criminal offenses against a victim who was a minor based on the amended offenses he plead guilty to in Counts 1, 2 and 3 of the current action, and that he qualified as a lifetime registrant of the Sexual Offender Registry. KRS 17.520(4).

Based on the foregoing and pursuant to pursuant to CR 60.02(f) "for any reason of an extraordinary nature justifying relief", the Court **HEREBY VACATES** the portion of the Judgment and Order on Plea of Guilty entered on June 5, 2015 that required Ullman to undergo a sexual offender risk assessment, submit to HIV testing, complete a SOTP (Sexual Offender Treatment Program), and be subject to a five-year period of postincarceration supervision, as those requirements are not authorized by statute. The Revocation Order entered on May 24, 2018 is **HEREBY VACATED, Ullman shall be immediately released from the custody of the Department of Corrections**, and **Ullman is hereby returned to probation for a term of five years subject to all his original conditions of probation, except for those conditions which have been determined herein to not be authorized by statute.**

The Court finds that the Oldham Circuit Court correctly determined that Ullman was a lifetime registrant for the Sexual Offender Registry, and makes no alteration on that matter.

Ullman's Motion is hereby **GRANTED** to the extent set out above, and **OVERRULED** as he it was properly determined that he is a lifetime registrant of the Sexual Offender Registry.

It is **SO ORDERED** this 17 day of December, 2020.

This Order is final and appealable, there being no cause for delay.

Chas R Hickman

CHARLES R. HICKMAN, Special Judge
Oldham Circuit Court

COMMONWEALTH OF KENTUCKY
OLDHAM CIRCUIT COURT
DIVISION ONE (1)
CASE NO. 13-CR-124

Electronically Filed

COMMONWEALTH OF KENTUCKY PLAINTIFF/RESPONDENT

V. **ORDER**

RICKY D. ULLMAN, JR. DEFENDANT/MOVANT

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

This matter having come before this Court on the Commonwealth's motions, pursuant to CR 52.02, for this Court to make specific findings and, pursuant to CR 59.05, to alter, amend or vacate this Court's December 21, 2020 Order, and this Court being sufficiently advised,

IT IS HEREBY ORDERED that the Commonwealth's motion, made pursuant to CR 59.05, to alter, amend or vacate this Court's December 21, 2020 Order, is DENIED and

IT IS FURTHER ORDERED that the Commonwealth's motion, pursuant to CR 52.02, for this Court to make specific findings is GRANTED to the EXTENT that this Court makes the following FINDING:

> As to the Commonwealth's contention that "the law outlined in *Butler v. Com.*, 304 S.W.3d 78, (Ky. Ct. App. 2010) and *Weigand v. Com.*, 397 S.W2d 780 (Ky. 1965)," "preclude[s] a defendant from challenging a condition of probation after revocation," this Court FINDS that those particular cases do not involve illegal and void sentences imposed in violation of the separation of powers doctrine and are, therefore, irrelevant to Mr. Ullman's claims, and, instead, controlling precedents, such as *Phon v. Commonwealth*, *545 S.W.3d 284 (Ky. 2018)*, *McClanahan v.*

Commonwealth, 308 S.W.3d 694 (Ky. 2010), and *Ladriere v. Commonwealth*, 329 S.W.3d 278 (Ky. 2010), hold that a sentence imposed beyond the limitations of the legislature as statutorily imposed is unlawful, void, a legal nullity, an abuse of discretion, void, *correctable at any time*, and *a defendant's consent to an unlawful sentence is irrelevant.* As a result, defendant Ullman's illegal sentences, as addressed in this Court's December 21, 2020 Order, were required to be vacated without regard to the lack of any previous challenge to those sentences.

It is SO ORDERED this 15 day of Jan, 2021.

This Order if final and appealable, there being no cause for delay.

Chas R Hickman

CHARLES R. HICKMAN, Special Judge
Oldham Circuit Court

Oldham CIRCUIT COURT
ACTION NO: 13-CR-124
DIVISION I

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS **REVOCATION ORDER**

Ricky Ullman Jr. DEFENDANT

This matter was before the Court on May 24, 2018 on Commonwealth's Motion to Revoke. The Defendant, Ricky Ullman, was present represented by Honorable Elizabeth Cotton. The Commonwealth was also present.

One of the following occurred on this date:

☒ The Defendant stipulated to violations of probation failure to complete SOTP, + others
Please take note: if box not checked, Defendant did not stipulate

☒ A brief hearing was held with regard to violations (Sanctions/Revocation)

As such, the Court finds probable cause to revoke and it be and is hereby Ordered that probation of the Defendant is fully revoked effective May 24, 2018. He/she shall be remanded to custody with the Department of Corrections for service of his/her sentence. The Court requests that Probation and Parole calculate jail custody credit and submit Order for same.

ENTERED
MAY 24 2018
OLDHAM CIRC./DIST. COURT
BY _____ D.C.

DATE: 5-24-018.

Karen A. Conrad
KAREN A. CONRAD
CIRCUIT COURT JUDGE, DIVISION I

AOC-445 Doc. Code: JSPG
Rev. 2-10

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

JUDGMENT AND SENTENCE ON PLEA OF GUILTY

Case No. 13-CR-00124
Court Circuit
County Oldham

COMMONWEALTH OF KENTUCKY — PLAINTIFF

V.

RICKY ULLMAN — DEFENDANT

Date of Birth	SSN	For Youthful Offender: Provide school name and address.
06/06/1981	307-98-2743	

Defendant appeared in open court on APRIL 2 , 2015 , ☐ without counsel ☑ with counsel, Honorable RICKY ULLMAN JR . By agreement with the attorney for the Commonwealth, Defendant **withdrew his/her plea of not guilty and entered a plea of GUILTY to the following ☑ charges contained in the Indictment(s) AND/OR ☑ Amended Charges:**

(1) COUNT I, II, & III (AS AMENDED): DISTRIBUTION OF MATTER PORTRAYING A SEXUAL PERFORMANCE BY A MINOR, which offenses were committed on or about , when Defendant was years old;

(2) COUNT VII (AS AMENDED): PFO 2ND, which offenses were committed on or about when Defendant was years old;

(3) , which offenses were committed on or about when Defendant was years old;

☐ **ADDITIONAL CHARGES CONTAINED IN THE INDICTMENT LOCATED ON PAGE 4 OF 4.**

Finding Defendant understands the nature of the charges against him/her including potential penalties, the Court finds: Defendant knowingly and voluntarily waives his/her right to plead not guilty, to be tried by a jury, to compel attendance of witnesses in his/her behalf, to confront and cross-examine witnesses and to appeal his/her case to a higher court. The Court further finds Defendant understands and voluntarily waives his/her right not to incriminate himself/herself, the right to be represented by an attorney at each stage of the proceedings against him/her (if appearing without counsel) and, if necessary, to have an attorney appointed to represent him/her. Finding the guilty plea is made voluntarily, knowingly and intelligently, the **Court accepts Defendant's guilty plea** to the charges to which Defendant entered a guilty plea.

6/4/2015

For the purpose of sentencing, Defendant appeared in open court on
☐ without counsel ☑ with counsel, Honorable M. Pippin
The Court inquired of Defendant (and counsel, if any) whether there was any legal cause why judgment should not be pronounced, and afforded Defendant (and counsel, if any) the opportunity to make statements in Defendant's behalf and to present any information in mitigation of punishment. The Court informed Defendant (and counsel, if any) of the factual contents and conclusions contained in the written Presentence Investigation Report (PSI) prepared by the Division of Probation and Parole and provided Defendant's attorney (if any) with a copy of the PSI although not the sources of confidential information. Defendant ☑ agreed with the factual contents of the PSI ☐ was granted a hearing to controvert factual contents of the PSI. Having given due consideration to the PSI prepared by the Division of Probation and Parole, and to the nature and circumstances of the crime, as well as the history, character and condition of Defendant, and any matters presented to the Court by the Defendant (or counsel, if any), **the Court finds:**

☐ the Victim suffered death or serious physical injury;
☐ imprisonment is necessary for protection of the public because:
☐ there is a likelihood that during a period of probation with an alternative sentencing plan or conditional discharge, Defendant will commit a Class D or Class C felony or a substantial risk that Defendant will commit a Class B or Class A felony;

ENTERED
JUN 05 2015
OLDHAM CIRC. DIST. COURT
BY D.C.

☑ Defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution;

☐ probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the Defendant's crime;

☐ Defendant is ineligible for probation, probation with an alternative sentencing plan, or conditional discharge because of the applicability of KRS 532.080, KRS 439.3401, or KRS 533.060;

☑ Defendant is eligible for probation, probation with an alternative sentencing plan, or conditional discharge as hereinafter ordered on AOC-455.

Insufficient cause having been shown why judgment should not be pronounced, it is ADJUDGED BY THE COURT that Defendant is **GUILTY** of the following charge(s)(include applicable UOR Code):

COUNT I, II, & III (AS AMENDED): DISTRIBUTION OF MATTER PORTRAYING A SEXUAL PERFORMANCE BY A MINOR
COUNT VII (AS AMENDED): PFO 2ND
COUNTS IV, V, AND VI ARE DISMISSED
10 YRS ON COUNT I, 2 YEARS ON COUNT II, 2 YEARS ON COUNT III. COUNTS I AND II TO RUN CONSECUTIVE W/ EACH OTHER AND CONCURRENT W/ COUNT III (12 YR TOTAL) AND CONSECUTIVE W/ OC 12-CR-86
Count I to enhanced by Count 7.

A. Defendant is sentenced to:

1. Courts Costs, Restitution, Fees and Fines

Defendant is ORDERED to pay:

☐ Court Costs of $_____.
☐ Fees in the amount of $
☐ Restitution in the amount of $ _____.
☐ Fine(s) in the amount of $

2. Method of Payment

☑ Court Costs are **WAIVED** due to Defendant having been found to be a "poor person" under KRS 453.190(2).
☐ **At time of SENTENCING**, all Court Costs, Restitution, Fees and Fines shall be paid in full.
☐ **Payment is DEFERRED.** All amounts shall be PAID IN FULL by _____.
☐ An **INSTALLMENT SCHEDULE IS ESTABLISHED.** Beginning _____.
Defendant is **ORDERED** to pay $ _____ ☐ weekly ☐ every other week ☐ monthly
☐ other _____ until paid in full.

3. Directions for Payment of Restitution

As specified in KRS 532.032 and KRS 532.033, Defendant shall pay restitution pursuant to these conditions:
Restitution shall be paid through the
☐ Circuit Court Clerk with a 5% service fee;
☐ County Attorney; **OR**
☐ Commonwealth's Attorney;
for the benefit of (name of specific person or organization and address) _____

4. Imprisonment

In addition to any monetary amount specified above, Defendant is sentenced to:

☑ imprisonment for a maximum term of 12 years ☐ probated ☑ probated with an alternative sentence as stated in the attached Order of Probation. (No fine imposed on KRS Chapter 31 indigent defendant).
Consecutive to 12-CR-086 (Old Ham KY)
☐ imprisonment for a maximum term of _____ conditionally discharged as stated in the attached Order of Conditional Discharge. (No fine imposed on KRS Chapter 31 indigent defendant).

☐ imprisonment for a maximum term of _____ in _____ (Institution) to run

☐ concurrently ☐ consecutively with a sentence previously imposed on _____.

B. It is ORDERED that Defendant's bond:

☐ be **released.** If bond was posted by Defendant, bond ☐ shall be ☐ shall not be applied to payment of remaining fines and costs; ☐ other _____.

☐ is not released until ☐ further order of the Court ☐ payment of all fines and costs

☐ other

C. It is further ORDERED that:

☑ upon release from incarceration or parole, Defendant, being found guilty of a felony under KRS Chapter 510, 529.100 involving sexual activity, 530.020, 530.064(1)(a), 531.310 or 531.320, is sentenced to a five (5) year period of **conditional discharge.**

☑ pursuant to KRS 17.510(2) Defendant has been convicted of a sex crime or a crime against a minor, or has been committed as a sexually violent predator, and has been informed of the **duty to register** with the appropriate local Probation and Parole Office. (See JC-4).

☐ Defendant shall not be released from probation supervision until **restitution** has been paid in full and all other aspects of probation have been successfully completed.

☐ by a preponderance of evidence, the Court finds **hate was a primary factor** in the commission of the crime by the Defendant. KRS 532.031(2).

☐ being sentenced to a term of incarceration for a nonstatus juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony, Defendant is ordered to pay **costs of incarceration** in the amount of $ _____ as allowed by KRS 532.352. Said costs shall be reimbursed to (*specify state or local government*) _____.

☑ Defendant shall be delivered to the custody of the Department of Corrections at such location within this Commonwealth as Corrections shall designate.

☑ pursuant to KRS 17.170, Defendant having been convicted of a felony offense under KRS Chapter 510 (Sexual Offense) or KRS 530.020 (Incest), shall have a **sample of blood** taken by the Department of Corrections for DNA law enforcement identification purposes and inclusion in law enforcement identification databases.

☑ Defendant is hereby **credited with time spent in custody prior to sentencing,** namely to be calc'd days as certified by the jailer of _____ towards service of the maximum term of imprisonment (or toward payment of a fine at the rate of $5.00 per day). RCr 4.58

Date: 6/4, 2015

Kimberly Bunnell
Judge's Signature

Copies to: Defendant / Attorney; Prosecutor: Probation & Parole; Sheriff (2 certified copies if Defendant sentenced to death or confinement); Principal, _____ School (If Defendant is youthful offender).

SHERIFF'S RETURN

[ ] Served on Defendant named herein on _____, 2____.

[ ] Not served because: _____

Date: _____, 2____ Officer: _____

AOC- 455 Doc. Code: OPR & OCD
Rev. 5-13
Page 1 of 3
Commonwealth of Kentucky
Court of Justice www.courts.ky.gov
KRS 439.553; 533.010; 533.020; 533.030, 533.070 501 KAR 6:250

ORDER OF PROBATION/

Case No. 13-CR-00124
Court CIRCUIT
County Oldham

NOTE: This form is designed for attachment to Judgment and Sentence Forms 445 and 450.

COMMONWEALTH OF KENTUCKY

V.

RICKY (First) ULLMAN (Last), Defendant

I. The Court having found the above-named Defendant eligible for probation, probation with an alternative sentence, or conditional discharge, and pursuant to the Judgment and Sentence of the above-named Defendant, **DOES HEREBY ORDER** the Defendant sentenced to:

ENTERED
JUN 05 2015
OLDHAM CIRC./DIST. COURT
BY _____ D.C.

☐ Probation, under the supervision of
- ☐ the Division of Probation and Parole,
- ☐ the State of _____, or
- ☐ _____; or

☑ Probation with an alternative sentence, as specified herein, under the supervision of
- ☑ the Division of Probation and Parole,
- ☑ the State of Ky, or
- ☑ 5 years; or

☐ Conditional Discharge for a period of _____ from the date of the Judgment,

ON THE CONDITION THAT THE DEFENDANT SHALL NOT COMMIT ANOTHER OFFENSE DURING THE PERIOD FOR WHICH THE SENTENCE REMAINS SUBJECT TO REVOCATION.

II. As **ADDITIONAL CONDITIONS,** the Court **FURTHER ORDERS** that the Defendant SHALL:

☐ Be subject to graduated sanctions imposed by Probation and Parole in accordance with 501 KAR 6:250;
☐ Avoid injurious or vicious habits;
☑ Avoid persons or places of disreputable or harmful character;
☑ Work faithfully at suitable employment as far as possible;
☑ Undergo available medical, substance abuse or psychiatric treatment as follows: S.O.T.P. offered by State (approved) in Community based txt program. Must complete successfully. no changing providers w/o Court Order
☐ Post a bond in the sum of $_____ without surety conditioned upon the defendant's compliance with the terms of this order;
☐ Support dependents and meet other family responsibilities;
☐ Pay the cost of the proceeding herein as set by the Court;
☐ Remain within the area of _____

ENTERED
JUN 05 2015
OLDHAM CIRC. DIST. COURT
BY _____ D.C.

Doc Code: OPR & OCD

- [x] Report to the probation officer as directed;
- [x] Permit the probation officer to visit the defendant at home or elsewhere;
- [x] Answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment;
- [x] Obey all rules and regulations imposed by Probation and Parole;
- [x] Have no contact with the victim(s) of the Defendant's crime; & victim's family
- [ ] Submit to periodic drug and/or alcohol testing because Defendant's record indicates a drug and/or alcohol problem; and
  - [ ] Pay $_____ as a reasonable fee, not to exceed the actual cost of the test and analysis, to: _____; or
  - [ ] Testing fee is waived for good cause shown.

  NOTE: Testing fees SHALL NOT be paid through the Circuit Court Clerk.
- [ ] During all or part of the period of probation or conditional discharge, participate in a global positioning monitoring system program operated by _____ County pursuant to KRS 67.732 and 67.374 under the same terms and conditions as provided in KRS 431.517.
- [ ] Community service work as follows:

  agency: _____

  address: _____

  term/conditions: _____
- [x] Other: (1) 25 Sup. Fee (2) no new off. prob. viol's, mental refund positive diluted drug screen (3) all conditions applicable unreported (4) all conditions listed in SORA are incorporated herein, see attached. (5) Def. allowed contact with his children.

III. The Court, having found it to be in the best interest of the public and the Defendant that the Defendant be sentenced to **probation with an alternative sentence, DOES HEREBY ORDER** the Defendant to serve one (1) of the following alternative sentences (with the specified conditions):

- [ ] To a halfway house for no more than twelve (12) months;

  Additional Conditions:
  - [ ] Be working or pursuing his or her education; or
  - [ ] Be enrolled in a full-time treatment program
  - [ ] Other:

- [ ] To home incarceration with or without work release for no more than twelve (12) months;

  Additional Conditions:
  - [ ] Be employed by another person or self-employed at the time of sentencing to home incarceration and continue the employment throughout the period of home incarceration, unless the court determines that there is a compelling reason to allow home incarceration while the defendant is unemployed;
  - [ ] Pay all or some portion of the cost of home incarceration as determined by the court;
  - [ ] Other:

Doc Code: OPR & OCD

☑ To jail for a period not to exceed twelve (12) months with or without work release, community service and other programs as required by the court;

Additional Conditions:

☑ Jail: With credit for time served since April 2, 2015

☐ Work Release: _____

☐ Community Service: _____

☐ Other: _____

☐ To a residential treatment program for the abuse of alcohol or controlled substances;

Additional Conditions:

☐ Undergo mandatory drug and / or alcohol screening during term of probation;

☐ Be subject to active, supervised probation for a term of _____ years;

☐ Undergo aftercare as required by the treatment program;

☐ Other: _____

☐ To any other specified counseling program, rehabilitation or treatment program, or facility.

Additional Conditions:

IV. The Court having found that the victim of Defendant's crime has suffered monetary damage or actual medical expenses as a result of Defendant's crime, pursuant to KRS 533.030 (3), the Court **FURTHER ORDERS** that the Defendant shall pay

RESTITUTION to _____

in the amount of $_____ for damages or loss caused by the Defendant and sum shall be payable

☐ to Circuit Court Clerk plus 5% service fee added to each payment; or

☐ Other:

V. **IT IS FURTHER ORDERED** unless the Defendant is a violent felon as defined in KRS 439.3401, upon the completion of the period for which the sentence of probation, probation with an alternative sentence, or conditional discharge remains subject to revocation, the defendant shall be deemed fully discharged, provided no warrant issued by the court is pending against him or her and defendant's probation, probation with an alternative sentence or conditional discharge has not been revoked.

Copy received and terms understood:

6-4-15
Date

Defendant

Judge

Distribution: Defendant
Court File
Probation and Parole
Other: _____

see attached conditions

OLDHAM CIRCUIT COURT
ACTION NO: 13-CR-00124
DIVISION I

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS **ORDER**

RICKY ULLMAN JR. **DEFENDANT**

This Court is in receipt of a letter filed September 24, 2018 from Ricky D. Ullman, Jr. asking that his case be re-docketed, that he be appointed a public defender, that he has "new evidence" from the "actual victim" who has "reached out to his daughter, has made comments to his daughter, and these comments have been brought to Mr. Ullman's wife's attention". He then stated that his original lawyer was consulted who informed his wife that there was definitely a case with the new evidence. He is requesting that a public defender be appointed for him since he is locked up in the Oldham County Jail.

The Court is not sure what the new evidence is since Mr. Ullman has not given the Court details. The Court is aware however that the victim in this case recanted certain statements and as a result of her recantation, the Commonwealth agreed to dismiss Count IV, V, and VI of the Indictment. See Order entered June 12, 2015.

Those particular Counts, that is IV, V, and VI, are as follows: Count IV, Rape in the Third Degree; Count V, Prohibited Use of Electronic Communication System to Procure Minor/Peace Officer Sex Offense; Counts VI, Sexual Abuse in the First Degree. The Defendant entered a straight plea of guilty to amended Counts of I, II, III and VII as follows: Counts I, II, and III, Distribution of Matter Portraying a Sexual Performance by a Minor, Class D Felonies; and Count VII, Persistent Felony Offender, Second Degree.

Defendant took a sentence of ten years and was given an alternative sentence to serve one year with the balance probated. Since then Defendant violated terms of his probation by failing to complete community-based sex offender treatment program. He stipulated to violation of probation, that is the failure to so complete, and the Court revoked him effective May 24, 2018.

The Court requests that the Commonwealth review the letter sent by the Defendant, and provide any further comment within thirty days.

DATE: September 26, 2018.

KAREN A. CONRAD
CIRCUIT COURT JUDGE, DIVISION I