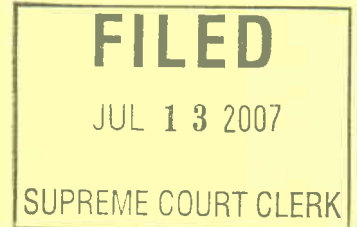


**Commonwealth of Kentucky  
Supreme Court**

Nos. 2006-SC-0330-DG and 2006-SC-0690



**COMMONWEALTH OF KENTUCKY**

**APPELLANT/CROSS-RESPONDENT**

v.

Appeal from Fayette Circuit Court  
Hon. Gary Payne, Judge  
Indictment No. 02-CR-01088

**JAMES OSCAR MERRIMAN**

**APPELLEE/CROSS-MOVANT**

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**Reply/Cross-Appellee Brief for Commonwealth**

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Submitted by,

**GREGORY D. STUMBO**

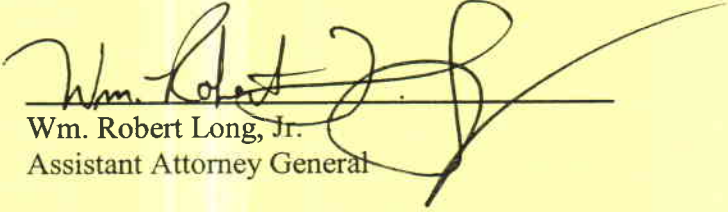
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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 13th day of July, 2007, to Honorable Gary Payne, Judge, Fayette Circuit Court, Second Division, 120 N. Limestone Street, Lexington, KY, 40507; Honorable Lou Ann Red Cord, Asst. Commonwealth's Attorney, 116 North Upper Street, Suite 300, Lexington, KY 40507; and Honorable Braxton Crenshaw, counsel for appellee/cross-movant, 121 Constitution Street, Lexington, Ky 40509.

  
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## **INTRODUCTION**

Since the issues in both the Commonwealth's motion for discretionary review and Mr. Merriman's cross-motion for discretionary review are essentially the same, undersigned counsel has chosen to limit the content of this Reply/Cross-Appellee brief to address the argument's made by Mr. Merriman in his Brief for Appellee/Cross Movant. However, to insure that no argument is waived undersigned counsel adopts and incorporates herein the arguments made in his Brief for Commonwealth.

## **STATEMENT OF ORAL ARGUMENT**

The Commonwealth continues to believe that oral argument is not warranted in this case; however, the Commonwealth would nonetheless welcome the opportunity to appear and present its position before the Court.

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## ARGUMENT

A.

**THE PROHIBITIONS ON PROBATION  
CONTAINED IN THE VIOLENT OFFENDER  
STATUTE (KRS 439.3401(3)) APPLIES TO  
YOUTHFUL OFFENDERS AND THAT  
PROHIBITION DOES NOT THWART THE  
REHABILITATIVE GOALS OF THE JUVENILE  
CODE.**

Essentially Mr. Merriman argues that if any specific sections of the Penal Code, such as KRS 439.3401(3), do not effectuate the supposed rehabilitative thrust of the Unified Juvenile Code, it must be forced into conformity by judicial interpretation. This argument ignores the express language of the statutes in question and ignores the multi-pronged goals expressed by the General Assembly. Thus, the trial court and Court of Appeals properly found that youthful offenders are subject to the provisions of the Violent Offender Act and if the legislature had intended to create an exception, it would have included it in the relevant portion of the Unified Juvenile Code.

Contrary to Mr. Merriman's desire, *The Rhetoric of Juvenile Justice Reform*, Law Review Association of Quinnipiac College School of Law, 18 QLR 661 (1999) (as quoted on pages 10 and 11 of his Brief), does not dictate the intent of Kentucky's Unified Juvenile Code, rather the language of intent expressly contained in the Unified Juvenile Code and the plain language of the other relevant statutes perform that function. KRS 600.010(f) provides that,

**KRS Chapter 640 [the youthful offender section] shall be interpreted to promote public safety and the concept that every child be held accountable for his or her conduct**

**through the use of restitution, reparation, and sanctions, in an effort to rehabilitate delinquent youth.**

(emphasis added). Thus, the expressly stated intent provided by the General Assembly makes it clear that Unified Juvenile Code is to have two purposes with regard to youthful offenders, both to sanction/punish and to rehabilitate them, or perhaps use punishment as a means of effectuating the goal of rehabilitation. The fact that Mr. Merriman views the application of KRS 439.3401(3) to his case as punishment, as opposed to rehabilitation, is not violative of some ethereal, overarching rehabilitative intent of the Unified Juvenile Code. Moreover, the Mr. Merriman has not shown how following the express dictates of KRS § 439.3401(3) and rendering the appellant into the custody of the Department of Corrections will undermine the legislature's rehabilitative goals.

**B & C.**

**THE PROHIBITIONS ON PROBATION  
CONTAINED IN THE VIOLENT OFFENDER  
STATUTE (KRS 439.3401(3)) APPLIES TO  
YOUTHFUL OFFENDERS.**

Contrary Mr. Merriman's assertions, neither the Commonwealth nor the Court of Appeals ignored the "plain meaning" of any portion of the relevant statutes. Rather, when interpreting the relevant statutes, the Court of Appeals focused on the whole law, not merely a single provision. See Cabinet for Families and Children v. Cummings, 163 S.W.3d 425 (Ky. 2005). In so doing the Court of Appeals successfully fulfilled its duty to ascertain and give effect to the intent of the General Assembly without adding or taking away from the legislative enactment. Beckham v. Board of Education, 873 S.W.2d 575 (Ky.1994). Thus, the Court of Appeals properly interpreted and applied

the provisions of KRS 439.3401(3) to Mr. Merriman.

When youthful offenders come before the Circuit Court for sentencing, the procedure is governed generally by KRS 640.030. That statute directs that such juveniles are to be sentenced to the same type of sentencing procedures, including probation and parole, as would be used in the case of an adult felon. Several *specific exceptions* to the standard adult procedure are delineated including the confinement in juvenile facilities instead of prison and return for re-sentencing upon reaching eighteen (18) years old. Upon the eighteen (18) year old re-sentencing, the trial court has three (3) options: 1) probation or conditional discharge, 2) return the youthful offender to treatment for another six (6) months of treatment, or 3) order incarceration with the Department of Corrections.<sup>1</sup> KRS 640.030(2)(a-c).

KRS 640.040 is entitled "Capital punishment and other prohibited dispositions." In addition to establishing the guidelines for sentencing a youthful offender to death, the statute provides that youthful offenders are not subject to persistent felony offender status based on crimes occurring before their eighteenth (18) birthday. KRS 604.040(1-2). Further, and of great relevance in the instant case, KRS 640.040(3) states:

No youthful offender shall be subject to the limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

Thus, it can be said that KRS 640.040 is, on the whole, a *limiting statute* for the

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<sup>1</sup> Since incarceration remains an option on re-sentencing, it is obvious that the General Assembly did not necessarily believe incarceration was incompatible with the goal of rehabilitation.

sentencing of youthful offenders. It seeks to remove from the realm of sentencing possibilities those dispositions that would be out of line with the ameliorative goal of our juvenile justice system. It stands to reason that in such a statute the legislature would list *all* the exceptions to regular sentencing that they desired to have effect on youthful offenders. KRS 640.040 is plain in its meaning and effect should be given to its words as they stand. Wheeler & Cleavenger Oil Co., 127 S.W.3d 609 (Ky. 2004).

KRS 640.040(3) clearly indicates the legislature's intent to exempt youthful offenders from *the delineated* statutory provisions that would serve to prevent probation or parole for adults as a matter of law based on the circumstances of the crime committed. To that end, an examination of the restrictions set forth in KRS 533.060 is beneficial to our analysis. KRS 533.060(1) provides that someone convicted of a crime (Class A, B, or C felony) involving a firearm shall not be eligible for probation, shock probation, or conditional discharge unless they demonstrate that they are the victim of domestic violence at the hands of the victim. KRS 533.060(2) prohibits probation or parole and requires consecutive sentences for crimes committed while the defendant is already released on probation, parole, or conditional discharge. Finally, KRS 533.060(3) demands consecutive sentences for one who commits a crime while awaiting trial for another crime. KRS 533.060 *does not contain* the Violent Offender provisions at issue in this case. KRS 439.3401 demands that a person defined as a "violent offender" serve 85% of his sentence before becoming eligible for probation or parole. KRS 439.3401(3).

Indeed, the trial court is *required* to consider probation for all offenders, be they adult felons or youthful offenders, *unless* some other statute specifically prohibits

probation or conditional discharge. KRS 533.010(2). Thus, in the statute that defines the *exemptions* from normal adult sentencing guidelines, KRS 640.040, *there is no provision excluding the strictures of KRS 439.3401(3)*. Often what the General Assembly does not say can be as important as what it does say.

Another general rule of statutory construction, *expressio unius est exclusio alterius*, supports this proposition. As explained in Palmer v. Commonwealth, 3 S.W.3d 763 (Ky. App. 1999):

As a general rule of statutory construction, *expressio unius est exclusio alterius*, provides that an enumeration of a particular thing demonstrates that the omission of another thing is an intentional exclusion. Louisville Water Co. V. Wells, Ky. App., 664 S.W.2d 525 (1984); Wade v. Commonwealth, Ky., 303 S.W.2d 905 (1957).

The General Assembly could have, if it so wished, included a subsection of KRS 640.040 stating: No youthful offender shall be subject to the limitations on probation, parole or conditional discharge as provided for in KRS 533.060 and 439.3401. The General Assembly did not, and this omission was intentional and for a reason. The reason is that the General Assembly intended for KRS 439.3401 to apply to youthful offenders.

Neither KRS 439.3401 nor 640.040 are ambiguous or worded in a confusing fashion. Thus, the statutes are to be interpreted as they stand. Terhune v. Commonwealth, 907 S.W.2d 779 (Ky. App. 1995). If the legislature had intended for youthful offenders to exempt from the Violent Offender statute, it would have clearly said so when all the other exceptions to the adult provisions were carved out. Having not so provided, there are no grounds to believe that the violent offender statute does not apply

to youthful offenders. Such a conclusion is easily reached based *solely* on the plain meaning of KRS 640.040, 533.060, and 439.3401(3). KRS 439.3401(3) would serve to require 85% service only on those youthful offenders who are “violent offenders” *and* convicted of capital offense, a Class A, or a Class B felony. That is indeed a very narrow class of the total youthful offenders. That result is not absurd, but rather calculated to obtain a specific goal and the clear intent of the legislature: a tougher criminal justice experience for the most dangerous offenders, those convicted of high crimes of violence. There is no need for extraneous sources for interpretation as urged by Mr. Merriman. The law, as enacted by the General Assembly is clear, and this court need not add or take away from that enactment. Beckham, *supra*. Pure logic dictates that since only a small portion of youthful offenders would fall under KRS 439.3401(3) that statute is more specific than KRS 640.030, which applies to all youthful offenders including those convicted of Class D felonies. This Court when interpreting these two (2) statutes in tandem must find that the most specific statute controls. Commonwealth v. Phon, 17 S.W.3d 106 (Ky. 2000). Mr. Merriman’s crime fell within the confines of KRS 439.3401(3), and that very specific statute applied here, serving to deny the Respondent the privilege of probation as a matter of law. In this case the Court of Appeals followed this rule of statutory construction holding that,

Further, we do not view KRS 640.030 and KRS 439.3401 as being inconsistent with one another, as the former deals generally with youthful offenders who have been convicted of a felony offense, while the latter deals specifically with the narrowly defined category of youthful offenders.

(Merriman, Slip Opinion at 15).

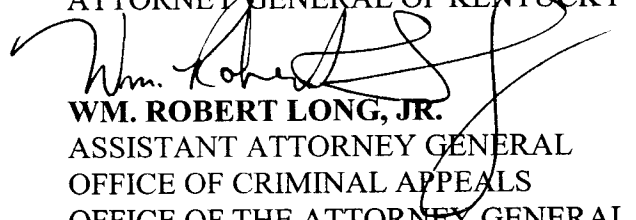
Given that Merriman, as a youthful offender, is “subject to the same type of sentencing procedures and duration of sentence including probation and conditional discharge, as adult,” the probation and parole rules as contained in KRS chapter 439 apply to Merriman. Id. Further, since Merriman is a “violent offender” under KRS 439.3401(1), he therefore comes within the purview of subsection three of that rule which dictates that “[a] violent offender who has been convicted of a . . . Class B felony . . . shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.” KRS § 439.3401(3). Thus, the trial court and the Court of Appeals correctly determine that KRS 439.3401(3) serves to remove the ability to probate Mr. Merriman from the discretion of the Court and that Mr. Merriman was properly sentenced to serve his time in the penitentiary.

### **CONCLUSION**

For the above stated reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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