

Trends in KY Youthful Offender Case Law from 2000-2013

Transfers—In Fuller (2009), it was held that deposition proceedings held in the district court before the transfer hearing do not violate double jeopardy. In Fuller (2009) and Pardue (2010), it was held that juvenile defendants transferred to circuit court as youthful offenders and indicted on different crimes at the circuit court level are not entitled to a rehearing on their transfer when the new indictments would still make them transferrable as youthful offenders. In Jackson (2012), it was held that district courts could transfer juvenile defendants as youthful offenders in the absence of a written motion by the Commonwealth so long as the courts make the requisite findings.

KRS 635.020(4)—In Ruark (2007), the court held that KRS 635.020(4) transfers are constitutional, because the elements of a case must still be proved to the jury beyond a reasonable doubt. Chipman (2010), KR (2012), and Brown (2012) all address what constitutes use of a firearm by a minor under KRS 635.020(4). In Chipman, KRS 635.020(4) was held inapplicable because the juvenile did not actually fire the gun, and the juvenile did not initially know an adult co-defendant had brought the gun to the crime. In KR, a juvenile who was charged as an accomplice to a felony in which a firearm was used, and who knew the firearm was going to be used in commission of the offense, fell within KRS 635.020(4). In Brown, a juvenile who had a gun in his pants, which discharged during a struggle with police, fell within KRS 635.020(4).

Probation Denial—The cases establish that denial of probation is difficult to overturn on appeal due to the level of deference given to the trial court; and while Merriman held that youthful offenders could not automatically be denied probation under the violent offender statute, courts are still free to deny probation after applying KRS 340.030(2) and 533.010(2).

Violent Offender Statute—After Merriman (2008), the violent offender statute cannot be read to apply to youthful offenders in regards to probation restrictions. This is still controlling law, and in Friar (2012) the court held that KRS 640.030 is consistent with Merriman, because youthful offenders are still subject to serving their full sentence regardless of the possibility of parole or probation. Edwards (2013) declined to extend the Merriman ruling to include parole restrictions because the legislature has not clearly addressed the issue in the statutes.

Sentencing—In Carneal (2008), the court held that the original sentencing of a youthful offender constitutes the final judgment rather than the 18-year-old sentencing hearing. In Masengale (2009), the court held that minors originally tried as youthful offenders but later convicted of a crime that exempts them from youthful offender status are to be sentenced as juveniles.

Life Sentences—The court in Shepherd (2008) held that youthful offenders sentenced to life without the possibility of parole for 25 years cannot attack their sentences on the ground that life without parole was mistakenly presented as a possible sentence. Shepherd and Spencer (2009) both established that life without parole is not an available sentence for youthful offenders. Miller (2012) holds that mandatory life without parole for youthful offenders violates the Eighth Amendment's prohibition of cruel and unusual punishment. While the possibility of life without

parole is not foreclosed, the sentence must take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Post-Roper Cases—Sims (2007), McMillen (2007), and Campbell (2011) demonstrate the Kentucky courts' unwillingness to extend any of the reasoning of Roper to non-death penalty cases. Court has yet to analyze cases based on Miller or Graham which may yield different result.

A Review of Significant KY Youthful Offender Cases from 2000-2013

Transfer Issues

1. Jackson v. Commonwealth, 363 S.W.3d 11 (Ky. 2012)
 - a. **Issues:** (1) Does a plea of guilty to a charge in circuit court by a minor charged as a youthful offender waive a claim that on its face the charge is one which the State may not constitutionally prosecute? (2) Whether the decision to transfer a charge against a minor from juvenile court to circuit court is a matter of subject-matter jurisdiction. (3) Whether subject-matter jurisdiction can be determined by agreement of parties, waiver or estoppel. (4) Whether a convicted youthful offender can raise challenges to the factual adequacy of a transfer decision that are not clear on the face of the judicial order for transfer through collateral litigation such as an RCR 11.42 motion or a CR 60.02 motion. (5) Upon collateral review, was the district court's order transferring defendant to circuit court as a youthful offender deficient, given that the Commonwealth never entered a written motion for transfer?
 - b. **Holding:** A transfer order may be reviewed on appeal on the grounds that it is facially invalid, even though the petitioner failed to preserve an objection at the time of entry of the plea because the ability of the state to charge a minor in circuit court as a youthful offender is a matter of subject matter jurisdiction that cannot be waived. In a collateral review of such an order, the appellate court should examine both the written order and any of record oral statements the court made in conjunction with the court's determination. Where the transfer decision requires both statutorily required and discretionary findings, the statutorily mandated findings must be first determined before the judge exercises her discretion. The transfer order was not facially deficient, as the district court made the requisite findings to transfer defendant, including that there was probable cause that an offense was committed, that the child committed the offense, and that the child was of sufficient age and had the requisite number of prior convictions necessary to transfer. The decision to seek transfer belongs with the Commonwealth as the prosecuting authority.
 - c. **Further Considerations or Implications:** A petitioner cannot bargain away the obligation of the state to have subject matter jurisdiction in its prosecution of a minor in circuit court. This decision should lead to an examination of the constitutionality of sentences imposed on many convicted youthful offenders who are in Kentucky prisons.

2. Pardue v. Commonwealth, 2010 WL 1253166 (Ky. App. 2010)
 - a. **Issue:** When a minor is charged with first-degree robbery and transferred to circuit court as a youthful offender, and is later also indicted in circuit court for wanton murder, does the circuit court have jurisdiction over the greater offense when it is one that allegedly occurred during the same course of conduct that resulted in the robbery charge even though the district court neither found probable cause nor made a decision to transfer the murder charge.
 - b. **Holding:** The circuit court has jurisdiction where the transfer was valid and the subsequent charges arose from the same conduct. The Court of Appeals states that the jurisdiction is over the offender, not the offense yet recognizes a two-part test: first, the original case must have been properly transferred and secondly, the additional charge(s) must arise from the same course of conduct.
 - c. **Further Considerations or Implications:** Conditional guilty pleas permit for more refinement of the law, which enhances our understanding of the law, and thus such pleas serve the common good. Additionally, this case reaffirms the broad sweep of the automatic transfer provisions on gun offenses. In this case there was no direct evidence that Pardue knew his cohort intended to use a gun to commit the robbery.
3. Fuller v. Commonwealth, 2009 WL 1452648 (Ky. 2009)
 - a. **Issues:** (1) When a juvenile defendant has a transfer hearing scheduled, but before the hearing the juvenile court judge takes the sworn testimony of the victim and a witness without the defendant present for purposes of trial, and the defendant is then transferred to circuit court as a youthful offender, where he receives a full trial on all issues, has double jeopardy been violated? (2) When a minor charged with ten counts of first-degree sodomy and ten counts of first-degree sexual abuse is transferred to circuit court as a youthful offender, where he is indicted on only one count of first-degree sodomy, is he entitled to a rehearing on the transfer decision? (3) Whether a fourteenth month delay between the close of the investigation and the decision to seek prosecution of a minor as a youthful offender violated the minor's rights to a speedy trial and an expeditious resolution of his charges.
 - b. **Holding:** (1) Double jeopardy does not attach until a defendant is "*put to trial*" before the trier of fact. Being "*put to trial*," does not occur until the trier of fact is authorized to decide the issue of the defendant's guilt, thus, even though there is no such animal as a deposition in a juvenile or criminal proceeding, the appellate court found that the trial had not begun when the Commonwealth was permitted to take depositions of the child witnesses allegedly for use at the trial of the case. (2) When the offense for which the defendant is indicted in circuit court would still qualify the defendant for transfer as a youthful offender, there does not need to be a rehearing on the transfer decision in circumstances where the defendant is indicted on fewer charges than those contained in the transfer order. (3) Because a minor is *not arrested* when he is detained, pursuant to KRS 610.190, a minor's speedy trial right will not begin to toll until the minor has been indicted. As trial counsel did not object to the delay in proceeding to trial, the defendant can only prevail on appeal on the claim of a violation of his right to an expeditious resolution of his charges if there was a probability of a different result at trial or

the error was so prejudicial that it violated a fundamental right. For the defendant to establish pre-indictment delay he must establish that the delay caused substantial prejudice and was an intentional tactic by the Commonwealth, which he did not do in this case.

- c. **Further Considerations or Implications:** Fuller appears to permit juvenile court judges to hold depositions prior to a decision by the Commonwealth to seek transfer, without violating double jeopardy, because a trial has not yet begun and the judge is not sitting as a trier of fact at a deposition. What is good for the goose is good for the gander; it would now appear that an accused minor is entitled to conduct depositions while her case is still in the juvenile court even though a transfer to circuit court may be likely. This case raises the question: what other matters may be conducted by a juvenile court judge in their authority over a case in controversy, where the minor may be transferred on charges as a youthful offender to circuit court. Further, the interpretation that KRS 610.190 prohibits defining the detention of a minor as an arrest would appear to raise significant constitutional questions given that the minor is detained in what for all purposes appears to be a jail for people who are under 18 years of age.
4. Hooten v. Commonwealth, 2006 WL 2578297 (Ky. App. 2006)
 - a. **Issues:** Did the district court abuse its discretion transferring a juvenile's case to adult court based solely on three of the eight factors relevant to transfer found in the transfer statute? Does the statute that provides a discretionary scheme for the district court to waive jurisdiction over a juvenile offender, violate due process?
 - b. **Holding:** The district court did not abuse its discretion when it waived jurisdiction over a juvenile's case and the discretionary scheme does not violate due process.
 - c. **Further Considerations and Implications:** The youthful offender transfer statute lists eight requirements that courts must consider at transfer hearings but only two of the requirements must be found for transfer to be proper. The statute, however, does not make transfer mandatory when two or more factors have been found; it just allows for transfer at the judge's discretion.
 5. Humphrey v. Commonwealth, 153 S.W.3d 854 (Ky. App. 2004), (discretionary review denied Feb. 9, 2005)
 - a. **Issue:** Can a juvenile voluntarily waive their right to a transfer hearing? Is a waiver form adequate evidence that the waiver is knowing and voluntary?
 - b. **Holding:** A voluntary waiver of juvenile transfer hearing must be knowing, voluntary and intelligent. Where the only evidence of voluntariness of waiver is a waiver form, and the record is ambiguous about whether the juvenile was properly advised by counsel, then a hearing must be held to determine whether the waiver was knowing, voluntary and intelligent.
 - c. **Further Considerations and Implications:** Whether a waiver of transfer hearing is voluntary and knowing is imperative because of the loss of juvenile code protections. Nothing in the juvenile code prevents this waiver but the court must inform the child of their right to a hearing to ensure the waiver was voluntary and knowing. During the hearing, the consequences of the waiver must be fully explained to the juvenile.

6. Caldwell v. Commonwealth, 133 S.W.3d 445 (Ky. 2004)
 - a. **Issue:** Does KRS 635.020 violate a juvenile's constitutional right to due process and equal protection? Do factors related to a juvenile's transfer to adult court need to be submitted to the grand jury and found true beyond a reasonable doubt?
 - b. **Holding:** KRS 635.020 does not violate a juvenile's constitutional rights because is not an automatic transfer. Factors related to transfer to adult court do not have to be found true beyond a reasonable doubt because the transfer decision only involves the determination of which system is appropriate for the juvenile, not the determination of guilt or innocence.
 - c. **Further Considerations and Implications:** The Court failed to find an equal protection violation in the transfer statute because the transfer was not automatic and it furthered the state's interest in curtailing juvenile crime. However, no evidence was provided to show how transfers to adult court actually curtail juvenile crime. Furthermore, the statute states that juveniles that meet the three conditions listed "shall" be transferred to adult court, which essentially makes certain cases mandatory for transfer.
7. Commonwealth v. Davis, 80 S.W.3d 759 (Ky. 2002)
 - a. **Issues:** Does a juvenile waive their right to challenge their transfer to adult court if they fail to raise objections to the transfer during the transfer hearing?
 - b. **Holding:** By raising for first time on appeal issue of whether his prior juvenile adjudication for possession of marijuana while in possession of a firearm amounted to a prior "felony offense" within the meaning of statute governing a 16-year-old juvenile's eligibility for transfer from district court to circuit court, juvenile waived issue of validity of transfer order.
 - c. **Further Considerations and Implications:** The Court admitted that the juvenile's transfer to adult court was improper because prior juvenile adjudications were considered to be prior convictions of felony offenses. However, they still determined that the juvenile waived his right to challenge the validity of the transfer by not raising the issue in district or circuit court. The Court recognized that Commonwealth v. Thompson, 697 S.W.2d 143 (Ky. 1985) indicated that a facially invalid transfer order can be challenged for the first time on appeal but refused to consider this because that argument was not made in this case.
8. Barth v. Commonwealth, 80 S.W.3d 390 (Ky. 2001)
 - a. **Issues:** Do the rules of evidence apply in a transfer hearing to bar the use of a co-defendant's statement if that statement is inadmissible at trial?
 - b. **Holding:** Rules of evidence do not apply in a transfer hearing therefore, the inadmissible at trial statement was admissible at a juvenile's transfer hearing for the purpose of establishing probable cause.
 - c. **Further Considerations and Implications:** Transfer hearings are not trials and less stringent evidentiary standards are applied, therefore, determination of probable cause can be based on hearsay evidence, pursuant to rules of criminal procedure, and rules of evidence do not apply to preliminary hearings in criminal cases.

9. Osborne v. Commonwealth, 43 S.W.3d 234 (Ky. 2001)
 - a. **Issues:** Does a circuit court still have jurisdiction over a youthful offender's burglary count when that charge was omitted from the transfer order, and the juvenile was still eligible for transfer on the indicted offenses?
 - b. **Holding:** The failure to charge the defendant with burglary in juvenile proceedings does not preclude district judge from transferring that offense to circuit court and circuit court still has jurisdiction to adjudicate the charges.
 - c. **Further Considerations and Implications:** The reasoning used by the Court is that, under the statutory scheme for youthful offenders, transfers to adult court should be based on the offender, not the charge. In addition, the indictments can vary from the transfer order as long as the child would still have been eligible for transfer on the indicted offenses.
10. Stout v. Commonwealth, 44 S.W.3d 781 (Ky. App. 2001)
 - a. **Issues:** Must decisions about juvenile transfers to adult court be supported by substantial evidence?
 - b. **Holding:** Yes, decisions about juvenile transfers to adult court must be supported by substantial evidence but no higher standard needs to be followed.
 - c. **Further Considerations and Implications:** The Court stresses the legislative intent for the courts to have wide discretion but they must still be sure to consider the juvenile's needs and balance them with those of society.

Automatic Transfer – Use of Firearm - KRS 635.020(4)

1. Brown v. Commonwealth, 2012 WL 876748 (Ky. App. 2012)
 - a. **Issue:** When a minor, possessing a loaded gun attempts to run from the police, and the gun discharges during the struggle, do his actions constitute “a felony in which a firearm, whether functional or not, was used in commission of the offense” under KRS 635.020(4), requiring his transfer to circuit court as a youthful offender?
 - b. **Holding:** Where a defendant admits possession of a loaded gun and the gun discharges during a struggle with police, that defendant's offense includes use of a firearm pursuant to KRS 635.020(4), requiring that the minor be subject to automatic transfer to circuit court for prosecution as a youthful offender.
 - c. **Further Considerations or Implication:** Unlike Chipman, in which an adult possessed the firearm and the Commonwealth did not present evidence of the minor's “use” of the firearm, this case deals with a minor who possessed and discharged a firearm during the commission of a felony.
2. KR a/k/a J.W v. Commonwealth, 360 S.W.3d 179 (Ky. 2012)
 - a. **Issues:** (1) Can a juvenile defendant charged with complicity to a felony in which a firearm is used be transferred as a youthful offender under KRS 635.020(4) when the defendant did not herself fire the gun during commission of the felony?
(2) Is a writ of mandamus an appropriate remedy where a district court has refused to transfer a juvenile offender where such transfer would be mandatory?
 - b. **Holding:** (1) Probable cause was established that the accused knew that her companion had a gun and that she reasonably could have assumed he would use it, because he had already pulled the gun out and used it just prior to the alleged criminal acts. When a gun is used in the commission of a felony, the district

court's first inquiry must be whether that use was by the juvenile directly or whether the use can be attributed to the juvenile. A juvenile charged as an accomplice to an offense in which a firearm is used falls under the mandatory transfer provision of KRS 635.020(4) because of the definition of *complicity* under Kentucky law. "In Kentucky one who is found guilty of complicity to a crime occupies the same status as one being [found] guilty of the principal offense." Wilson v. Commonwealth, 601 S.W.2d 280, 286 (Ky. 1980). Such a defendant is "actually tried and [can be] found guilty of the principal offense." Liability for the principal offense is imputed to the accomplice. *Id.* (2) A writ is appropriate where there is no adequate remedy by appeal, because a subsequent trial in the circuit court following a final judgment in the district court would violate double jeopardy and interfere with the administration of justice.

- c. **Further Considerations or Implications:** Unlike Chipman, examination of KRS 635.020(4) took place in the transfer phase (rather than the sentencing phase in circuit court); in the transfer phase, the question is whether there is probable cause to believe the offense was committed. "When the juvenile does not directly use the firearm, but is charged with a complicity offense, the record must reflect sufficient evidence to show probable cause that complicity has occurred. Since this review occurs at the charging stage, rather than at a trial of guilt or innocence, this means that there must be allegations which, if true, would support a probable cause finding that the juvenile 'act[ed] with the kind of culpability with respect to the result that is sufficient for the commission of the offense.'" 187. Additionally, in Chipman, the only information of record considered by the appellate court was the defendant's plea colloquy, where she denied any knowledge that her accomplice had a gun or intended to use a gun. The Court in K.R. notes that a writ would most likely be unavailable to the prosecution if the case were one of discretionary transfer due to the large latitude given to a decision on appropriateness of transfer by a juvenile court judge.
3. Chipman v. Commonwealth, 313 S.W.3d 95 (Ky. 2010)
 - a. **Issues:** (1) When a minor transferred to circuit court on charges of Robbery First Degree, Burglary First Degree and Assault Second Degree, pleads guilty only to Robbery Second Degree (where use of a firearm is not an element of the offense) where the minor would not have qualified for transfer under Robbery Second Degree and where the only evidence presented at sentencing is her plea colloquy which denies knowledge of her accomplice's possession of a firearm or intended use of a firearm in the commission of the crime, should the juvenile defendant be sentenced as a youthful offender or a juvenile, given the meaning of 'use of a firearm' under KRS 635.020(4)? (2) What sources should the sentencing court rely upon in making her decision?
 - b. **Holding:** As this case was a matter of interpretation of law, the review by the appellate court was *de novo*. The minor defendant should be sentenced as a juvenile rather than as a youthful offender because the minor would not have qualified for transfer on a charge of Robbery Second Degree. The Commonwealth could have presented other evidence or included a stipulation that the minor had used a gun or knew of the gun's use but did not do so in this case.

classifications of offenses, s/he is entitled to have a jury decide if the Commonwealth has proven those elements beyond a reasonable doubt.

5. Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001)
 - a. **Issues:** Can a juvenile be transferred to adult court based on the “Use of a firearm” provision in KRS 635.020(4), when the firearm was merely possessed, and not used.
 - b. **Holding:** No, a juvenile cannot be transferred to adult court under KRS 635.020(4) for possession of a firearm that was not used.
 - c. **Further Considerations or Implications:** Possession of a firearm does not equal use. Statutory terms “possession of a weapon” and “use of a weapon” were two entirely different concepts, and interpreting them as identical would be counter to legislative intent and would result in extremely harsh and disproportionate results in trying juvenile cases.

Probation Denial-In General

1. Cox v. Commonwealth, 2011 WL 5008305 (Ky. App. 2011)
 - a. **Issue:** Petitioner minor argued that the trial court abused its discretion at the 18-year-old sentencing hearing by only considering the severity of the youthful offender’s crimes when it denied probation.
 - b. **Holding:** The appellate court reviewed the record and held that the trial court considered more than the seriousness of the offenses in denying the youthful offender probation. The court correctly applied KRS 340.030(2) and 533.010(2) in considering the seriousness of the juvenile defendant’s crimes, the need to protect the public from the defendant while he obtained correctional treatment, and the resulting depreciation of the seriousness of the defendant’s dangerous crimes if he were released on probation.
 - c. **Further Considerations or Implications:** Despite significant efforts taken by a youthful offender to demonstrate rehabilitation, such as obtaining a GED, scoring highly on the ACT, exhibiting respect and leadership, and earning the endorsement of top administrators in the DJJ Youth Development Center responsible for his rehabilitation, if the court determines the offender ought to be placed in the adult prison system after making findings on the record, there will likely be found no abuse of discretion.
2. Dyer v. Commonwealth, 2010 WL 4025912 (Ky. App. 2010)
 - a. **Issue:** Was it error for the circuit court to deny the youthful offender’s request for probation at his 18-year-old resentencing hearing because of an order that relied upon KRS 439.3401 and the standard adult sentencing provisions in denying the request for probation?
 - b. **Holding:** The circuit court properly denied probation to a youthful offender, because it considered probation as a sentencing option but decided against it based on its application of the standard adult sentencing considerations. The trial court’s reference to KRS 439.3401 did not prejudice the judge’s exercise of discretion such as to merit relief on collateral review.
 - c. **Further Considerations or Implications:** While Merriman establishes that the violent offender statute cannot be applied to youthful offenders, youthful offenders can still have probation denied at their 18-year-old resentencing hearing

if the court finds that the offender should be incarcerated in the adult prison system. Courts are simply barred from applying KRS 439.3401 to automatically deny probation. This case leaves open whether a conditional guilty plea, examined on direct appeal may yield a different result.

3. London v. Commonwealth, 2009 WL 3047644 (Ky. App. 2009)
 - a. **Issue:** Did the court abuse its discretion in refusing probation to a youthful offender at his 18-year-old resentencing hearing when the court specifically found that the defendant presented a serious risk of committing another offense, committed a dangerous offense, needed correctional treatment, and would have the seriousness of his crime depreciated if allowed probation?
 - b. **Holding:** The court did not apply a “de facto policy” of refusing probation. Instead, it made the findings required at an 18-year-old sentencing hearing.
 - c. **Further Considerations or Implications:** Given the deferential scope of appellate review (abuse of discretion), where a court makes specific findings which parrot the discretionary sentencing provisions, in denying probation to a youthful offender at his 18-year-old sentencing hearing, there will most likely be found no abuse of discretion.

Violent Offender Statute, KRS 439.3401

1. Edwards v. Harrod, 391 S.W.3d 755 (Ky. 2013)
 - a. **Issues:** Does the Violent Offender Statute apply to youthful offenders for the purposes of parole eligibility?
 - b. **Holding:** Youthful offenders convicted of and sentenced in adult court for a capital offense or a Class A or Class B felony offense can be classified as violent offenders subject to the parole eligibility restrictions because the legislature did not expressly address the issue in the statute.
 - c. **Further Considerations and Implications:** The Court did not consider the Roper and Graham lines of cases in the course of its reasoning. These cases clearly require the differences of children to be considered when determining sentencing. The mandatory parole restrictions of the Violent Offender Statute do not allow for these considerations that the Supreme Court has determined are constitutionally required to ensure punishment is proportionate. This case illustrates the need for the Legislature to amend KRS 439 and KRS 600 to 645 to expressly state the exception of youthful offenders to the Violent Offender Statute's parole eligibility restrictions. Without this express language, the Court says that it cannot extend its Merriman holding, which declared probation eligibility limitations of the Violent Offender Statute could not be applied to youthful offenders, to include parole eligibility.
2. Rees v. Ottman, 2008 WL 3551151 (Ky. App. 2008)
 - a. **Issue:** When a court grants a youthful offender shock probation at his 18-year-old resentencing hearing, but the Department of Corrections refuses to release the offender on the ground that he is a violent offender ineligible for probation, can the Commissioner of the Department of Corrections be found in contempt of court, or is the court order void?
 - b. **Holding:** The youthful offender was eligible for probation at his 18-year-old sentencing hearing; therefore, the court's order was valid and the Commissioner of the Department of Corrections may be found in contempt.

- c. **Further Considerations or Implications:** Although this case predated the decision in Merriman, the court’s reading of KRS 640.030 as barring violent offender status for youthful offenders is consistent with the Merriman decision. Therefore, even if a youthful offender would be considered a violent offender if he were an adult, the youthful offender is still eligible for probation at his sentencing hearing.
3. Commonwealth v. Merriman, 265 S.W.3d 196 (Ky. 2008)
 - a. **Issue:** Is a youthful offender subject to the provisions of KRS 439.3401, the violent offender statute?
 - b. **Holding:** The violent offender statute cannot be read to apply to youthful offenders because the legislature expressly set forth its intention that the rehabilitative purposes of KRS 600.010 permeate the entire Juvenile Code. The Juvenile Code and the Violent Offender Statute were both passed during the same legislative session. Yet, neither references the other. The decision of the legislature to omit reference to KRS 439.3401 given the mandatory nature of KRS 640.030 (requiring a trial court to consider probation at a youthful offender’s 18-year-old sentencing hearing) reflects an intent to require the sentencing court to evaluate the efficacy of probation for every youthful offender. Otherwise, the 18-year-old sentencing would be a sham and the efforts at rehabilitation of the child before sentencing would be an exercise in futility.
 - c. **Implications:** Applying the violent offender statute to youthful offenders would undercut the purposes of the Juvenile Code by wasting the state’s rehabilitative efforts, spending state resources for rehabilitation and then mandating imprisonment even when the rehabilitation was successful. The reasoning underlying Merriman supports the considerable bulk of evidence that pushing minors more deeply into the criminal justice system increases recidivism and conversely that the most effective and thereby economic treatment occurs at diversion. See The Truth About Consequences: Studies Point Toward Sparing Use of Formal Juvenile Justice System Processing and Incarceration, info@njjn.org, www.njjn.org (National Juvenile Justice Network, January 23, 2012). Merriman will not lead to automatic grants of probation, it will stop automatic denials of probation; in other words, courts must at least consider whether a youthful offender should be granted probation rather than deny reaching the issue on the ground that the youthful offender is a violent offender.
4. Department of Corrections v. Friar, 2012 WL 751963 (Ky. App. 2012)
 - a. **Issue:** Can a minor, having been originally convicted as a youthful offender for first-degree rape and resisting arrest, be classified as a violent offender for purposes of parole upon entering the adult prison system?
 - b. **Holding:** Neither the restriction on probation nor the mandate that a prisoner serve 85% of his sentence before being eligible for parole can be applied to youthful offenders under Merriman, *infra*.
5. Georgetown v. Commonwealth, 2009 WL 1705672 (Ky. App. 2009)
 - a. **Issue:** Did the trial court err in refusing to consider probation as a possible disposition upon resentencing, because it determined the youthful offender to be a violent offender?

- b. **Holding:** The trial court must consider probation as the violent offender statute does not apply to youthful offenders.
- 6. Frame v. Commonwealth, 2009 WL 416181 (Ky. 2009)
 - a. **Issue:** Is a youthful offender entitled to a resentencing hearing on the availability of probation in light of the Supreme Court's decision in Merriman that the violent offender statute does not apply to youthful offenders?
 - b. **Holding:** The youthful offender was initially denied an opportunity to present a motion for probation on the ground that he was a violent offender; now, the youthful offender's case must be remanded for a hearing under KRS 640.030(2).
- 7. Wilbanks v. Commonwealth, 2008 WL 5264276 (Ky. App. 2008)
 - a. **Issue:** Is a youthful offender transferred under KRS 635.020(4) and labeled a violent offender entitled to a resentencing hearing on the availability of probation in light of the Supreme Court's decision in Merriman that the violent offender statute does not apply to youthful offenders?
 - b. **Holding:** Yes.
- 8. Buckner v. Commonwealth, 2008 WL 5051578 (Ky. App. 2008)
 - a. **Issue:** Is a youthful offender convicted of wanton murder and kidnapping entitled to a resentencing hearing on the availability of probation in light of the Supreme Court's decision in Merriman that the violent offender statute does not apply to youthful offenders?
 - b. **Holding:** Yes.
- 9. Dunn v. Commonwealth, 2008 WL 5051575 (Ky. 2008)
 - a. **Issue:** Is a youthful offender convicted of robbery, assault, and receiving stolen property entitled to a resentencing hearing on the availability of probation in light of the Supreme Court's decision in Merriman that the violent offender statute does not apply to youthful offenders?
 - b. **Holding:** Yes.
- 10. Webb v. Commonwealth, 2008 WL 898931 (Ky. App. 2008)
 - a. **Issue:** When a youthful offender convicted of first-degree manslaughter presents evidence of domestic abuse, by way of witness testimony and personal testimony, in order to nullify the probation and parole restrictions of the violent offender statute, may the court **not** consider that evidence and deny probation?
 - b. **Holding:** Where the evidence of domestic abuse is contradictory, and where there are factors suggesting probation should be denied, the court is not required to consider evidence of domestic abuse.
 - c. **Implications:** This case predates Merriman; now, the domestic abuse exception to the violent offender statute would not need to be considered, because the entire violent offender statute is inapplicable to youthful offenders.

Sentencing

- 1. Fuqua v. Commonwealth, 2009 WL 3486782 (Ky. App. 2009)
 - a. **Issue:** Under KRS 640.030(1), is it reversible error when raised for the first time in a second round of collateral review that the trial court violated the ruling of Gourley v. Commonwealth, 37 S.W.3d 792 (Ky. 2001) by having the Department

of Corrections, Office of Probation and Parole prepare the Presentencing Investigation Report for a youthful offender?

- b. **Holding:** The failure to follow a statutory sentencing procedure is not a jurisdictional question and, thus, can be waived. No palpable error was found where the trial court considered probation at sentencing.
 - c. **Implications:** It is critical to object at sentencing or as soon thereafter as possible to any error in the sentencing procedures. If the error is waived at sentencing, the petitioner should try to set forth any prejudice suffered. Here, no prejudice was identified by the appellate court.
2. Masengale v. Commonwealth, 2009 WL 2971788 (Ky. App. 2009)
- a. **Issue:** When a minor is transferred to circuit court as a youthful offender, pursuant to KRS 635.020(4), but is convicted only of misdemeanors, which exempt him from youthful offender status, is the minor to be sentenced as a juvenile or a youthful offender?
 - b. **Holding:** When a minor is originally tried as a youthful offender but is convicted of a crime falling within KRS 640.040(4), juvenile sentencing is required.
 - c. **Implications:** While KRS 635.020 determines which court a minor is to be tried in based on the charges, the defendant's sentence as either a youthful offender or a juvenile is determined by the conviction, not the trial court.
3. Commonwealth v. Carneal, 274 S.W.3d 420 (Ky. 2008)
- a. **Issues:** (1) Does the limitations period for a postconviction motion to vacate sentence begin at the time of the youthful offender's original sentencing or his 18-year-old resentencing hearing? (2) Does equitable tolling apply to a minor so that he may challenge the illegality of his sentence after the statute of limitations has passed? (3) Do the facts of this case establish a right to equitable tolling based on the youthful offender's mental incompetence? (2) Can a youthful offender who pleads guilty but mentally ill later argue that he was incompetent to plead guilty?
 - b. **Holding:** (1) A youthful offender's original sentence is the final judgment even though he may still be a minor because the trial court's options are limited to probation, remanding to DJJ for six months or sending the youthful offender to prison. Thus, the sentencing court cannot alter any other terms of the original sentence. (2) The appellate court refused to consider whether Carneal's claim qualified for equitable tolling because of his age since that issue was not raised before the trial court in the original RCR 11.42 motions. (3) A claim of mental incompetence, standing alone does not justify tolling the statute of limitations for bringing a claim of ineffectiveness unless it can be established that Carneal was rendered so incompetent by his mental illness that his inability to raise the claims in a timely manner was beyond his control and could not be remedied despite due diligence. The record reflected that there were times when Carneal may have been competent to raise his objections to a trial court. Carneal would have had to establish that there were no times of mental competence during the 6 years from the plea to the filing of his RCR 11.42. As the record established otherwise, no evidentiary hearing was necessary. (4) When a youthful offender is aware of his mental deficiency at the time of his guilty plea, he is not deemed incompetent to plead guilty.

- c. **Implications:** The appellate court makes note that Carneal's entire family supported his guilty plea to the maximum penalty possible had Carneal gone to trial. The opinion contains no discussion about any conflict of interest between the interests of the family and the interest of the youthful offender. Likewise, the opinion does not discuss the interplay between mental illness and youth. Given that Carneal's mental health treatment up to the time he was in state's custody were under the control of his parents and not the minor, the manner in which the appellate court puts sole responsibility upon the minor simply because he was the accused, is surprising. This case is also surprising in its refusal to toll the statute of limitations until the minor reaches the age of majority. Does this case recognize then that all minors, convicted as youthful offenders have by their status as youthful offenders attained the age of majority? The issue may never arise as most youthful offenders are subject to conditions of probation and parole and cannot make many decisions on their own.
 - d. **Re Merriman:** The 18-year-old sentencing hearing can be purposeless for a youthful offender who has been sentenced to life without the possibility of parole for 25 years, because the bar on considering probation is not related to the violent offender statute.
4. Kozak v. Commonwealth of Kentucky, 279 S.W.3d 129 (Ky. 2008).
- a. **Facts:** The youthful offender, a 15-year-old male, was indicted for six counts of first-degree sexual abuse and two counts of first-degree rape involving two victims. When the youthful offender was 17 years old, he entered into a plea agreement where the rape charges were amended to sexual abuse and a prison sentence of twenty years was recommended. The trial court denied the youthful offender's motion for more lenient sentencing, but placed him with the DJJ until his eighteenth birthday, at which time he would return to court for sentencing. The youthful offender had not been informed, nor was he aware of the ramifications of his guilty plea. Given the amended charges, he was no longer eligible to face adult incarceration but could only be subject to the penalties outlined in the juvenile code for juvenile sex offenders.
 - b. **Issue:** Whether a youthful offender can waive the right to more lenient sentencing dispositions by entering into a plea agreement when that individual was not informed of the rights being waived.
 - c. **Holding:** The judgment of the trial court, sentencing the youthful offender for twenty years of imprisonment, is vacated and remanded for further proceedings because waiver of more lenient sentencing options must be express.
 - d. **Implications:** It would seem that the Court's recent determination and discussion of subject matter jurisdiction in Jackson v. Commonwealth, 363 S.W.3d 11 (Ky. 2012) (discussion *supra*) prohibits any waiver, regardless of how explicitly or how knowingly made once a youthful offender enters into a plea agreement that reduces the charged offenses down to those that would not be transferrable in the first instance.
5. Phelps v. Commonwealth, 125 S.W.3d 237 (Ky. 2004)
- a. **Issues:** Can a juvenile's early adjudications be used to enhance later criminal charges?

- b. **Holding:** A juvenile court adjudication is not a “conviction for the purposes of any offense under the penal code.
 - c. **Further Considerations and Implications:** A youthful offender cannot be charged with being a “second or subsequent offender” or a “felon in possession of a firearm” based on the offender’s prior juvenile court record. Once a juvenile has been transferred to circuit court and ultimately is convicted in that court, those convictions can be used in any subsequent proceedings against the juvenile to charge him or her as a second offender. In addition, substantial defects in the degree of the offenses for which the child was indicted warrants dismissal of the indictment, and remand to juvenile court for a new transfer hearing.
6. Commonwealth v. Jeffries, 95 S.W.3d 60 (Ky. 2002)
- a. **Issues:** Does a youthful offender have the right to be heard at his 18-year-old resentencing hearing?
 - b. **Holding:** A trial court, when conducting a sentencing hearing for a youthful offender who has reached majority, must allow the youthful offender a meaningful opportunity to controvert the evidence against him and to present evidence in mitigation of punishment.
 - c. **Further Considerations and Implications:** The Court stated that Jeffries’s due process rights were violated by the lower Court’s refusal to allow him to controvert the Commonwealth’s evidence or to present evidence to mitigate punishment.
7. Commonwealth v. Townsend, 87 S.W.3d 12 (Ky. 2002)
- a. **Issues:** Can a youthful offender waive the “finally discharged” provision in the Youthful Offender Statute?
 - b. **Holding:** A youthful offender may waive their right to the “finally discharged” provision of the Youthful Offender Statute if that waiver is made in open court without objection and is a quid pro quo for trial court’s agreement to allow him to complete a treatment program at DJJ before imposing final sentence.
 - c. **Further Considerations and Implications:** The defense counsel stated on the record that Appellee “agrees to the court’s retaining jurisdiction after the conclusion of six months”. The Court rested its decision on the basis that rights could be voluntarily waived and because this waiver was done in open court and recorded, there were no grounds for objection to the resentencing. The Court only addressed the possibility of waiver when it was clearly and specifically addressed in open court.
8. Manns v. Commonwealth, 80 S.W.3d 439 (Ky. 2002)
- a. **Issues:** Is the statute permitting juvenile records to be used at sentencing or for impeachment unconstitutional to the extent that it applies to the use of the records as impeachment?
 - b. **Holding:** A juvenile court’s adjudication is not a “conviction” for the purpose of the rule of evidence permitting impeachment by prior “convictions.” The statute permitting the use of juvenile records for impeachment is unconstitutional in regards to use of those records as impeachment. Juvenile court adjudications can be used at sentencing provided they meet the minimum qualifications provided by statute.

- c. **Further Considerations and Implications:** The use of prior juvenile adjudications for impeachment violates FRE 609, therefore, the Court held that such use under KRE 609 would violate the Separation of Powers doctrine.
9. Gourley v. Commonwealth, 37 S.W.3d 792 (Ky. 2001)
- a. **Issues:** Was it improper for the trial court to order Probation and Parole to do the PSI in a youthful offender's 18-yr-old hearing, instead of the Department of Juvenile Justice, improper?
 - b. **Holding:** PSI for a youthful offender must be done by the Department of Juvenile Justice, according to KRS 640.050.
 - c. **Further Considerations and Implications:** The Court was concerned that, aside from the order being statutorily improper, the comments that the YO was no longer in the services of the DJJ suggested that the trial court may not have been considering the defendant to be a YO. This suggests the possibility that the trial court did not consider the alternative sentences available to youthful offenders.

Life Sentences

1. Miller v. Alabama, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)
- a. **Issues:** Do mandatory life without parole sentences for defendants who were under the age of 18 at the time of their crimes violate the Eighth Amendment's prohibition of cruel and unusual punishment because they do not allow consideration of youthful characteristics and their accompanying prospects of rehabilitation, during the sentencing process?
 - b. **Holding:** Mandatory sentencing of life without parole for youthful offenders violates the Eighth Amendment's prohibition on cruel and unusual punishment. It violates the basic premise of justice that punishment should be proportionate to both the offender and the offense. Courts must consider the differences between children and adults during sentencing. The Court stressed the importance of scientific evidence of differences in brain development and emotional development. Children are constitutionally different from adults and less deserving of the harshest punishments due to their diminished culpability and greater prospects for rehabilitation.
 - c. **Further Considerations or Implications:** The Court places an emphasis on the scientifically proven differences between children and adults and its effect on behavior, judgment and rehabilitation prospects. The opinion states that it is unconstitutional to sentence youthful offenders without taking into consideration their youth and circumstances. This opinion could be very useful in challenging any mandatory sentencing requirements as applied to juveniles or youthful offenders. After this ruling, many states that previously treated LWOP as a mandatory sentencing for certain crimes must now allow the differences between children and adults to be considered during sentencing.
1. Spencer v. Commonwealth, 2009 WL 485001 (Ky. 2009)
- a. **Issues:** (1) Is life without parole an available sentence for a youthful offender? (2) Can a youthful offender whose attorney encourages him to accept a sentence of life without parole be granted a motion for ineffective assistance of counsel?

- b. **Holding:** (1) Pursuant to KRS 640.040(1), life without parole is not an available sentence for youthful offenders. (2) When counsel encourages a youthful offender to accept an impermissible sentence, the defendant is entitled to a hearing on ineffective assistance of counsel claims.
 - c. **Implications:** Given Shepherd and the available sentences in KRS 640.040(1), a youthful offender convicted of a capital offense cannot be sentenced to life without parole.
2. Shepherd v. Commonwealth, 251 S.W.3d 309 (Ky. 2008)
- a. **Issues:** (1) When a juvenile is held by police for more than two hours without a request for extension, in violation of KRS 610.220(2), must the evidence obtained through the police interview be suppressed? (2) Is a youthful offender prejudiced by a court instruction that life without parole is an available sentence even though the offender is sentenced to life without the possibility of parole for 25 years?
 - b. **Holding:** (1) A technical violation of KRS 610.220(2) does not itself make evidence obtained through police interviews inadmissible. (2) Petitioner was not prejudiced by the trial court having given an impermissible sentencing option in its instructions because the youthful offender was sentenced to life without the possibility of parole for 25 years.
 - c. **Implications:** Courts will not treat a violation of KRS 610.220 as dispositive of the admissibility of evidence; instead, they will treat it as “an important factor in the overall determination of whether a juvenile defendant gave his statement voluntarily.” 320. When a youthful offender cannot show that he was prejudiced by a mistaken instruction, as where a sentence was proposed but not entered against him, he cannot use the instruction to attack his sentence. This case leaves open the ability to prove prejudice where evidence is of record revealing that the jury’s ultimate sentencing determination was influenced by consideration of an impermissible sentencing option.

Post-Roper Cases

1. Campbell v. Commonwealth, 2011 WL 1642028 (Ky. 2011)
- a. **Issues:** (1) Was the waiver of the petitioner’s right to a transfer hearing invalid where the accused was a 23-year-old adult, rendering the transfer to circuit court without a hearing invalid? (2) In light of the United States Supreme Court’s decisions in Roper and Graham, may a youthful offender convicted of intentional murder, wanton murder, first-degree wanton endangerment, first-degree robbery, and first-degree burglary be sentenced to life in prison without the possibility of parole for 25 years?
 - b. **Holding:** (1) The youthful offender, as an adult explicitly acknowledged his right to a transfer hearing and knowingly, intelligently, and voluntarily waived that right, making the need for further procedural safeguards in this case less compelling, and rendering the waiver of the transfer hearing valid. (2) Life without the possibility of parole for 25 years for murder is not inconsistent with Roper or Graham.

- c. **Implications:** In Roper, the question was whether a juvenile could be sentenced to death, and in Graham the question was whether a juvenile could be sentenced to life without the possibility of parole for a non-murder conviction. Given the precedent offered by the United States Supreme Court in those cases, a sentence of life without the possibility of parole for 25 years for murder is constitutional.
2. McMillen v. Commonwealth, 2007 WL 3406851 (Ky. 2007)
 - a. **Issue:** Does the United States Supreme Court’s decision in Roper apply to cases involving minors who are not sentenced to death, because Roper stands for the proposition that juveniles have different mental maturity and therefore less culpability?
 - b. **Holding:** Analyzing whether the decision of the trial court was arbitrary, unfair, unreasonable or unsupported by sound legal principles pursuant to an abuse of discretion standard, the appellate court affirmed the trial court’s decision to refuse to extend Roper beyond the application of it as a bright-line rule that the death penalty cannot be applied to offenders who were under the age of 18 when their crimes were committed.
 - c. **Implications:** A different decision may be rendered if this issue is raised as a matter of first impression at the time of sentencing in a timely manner for trial court review.
 3. Sims v. Commonwealth, 233 S.W.3d 731 (Ky. 2007)
 - a. **Issue:** Does the United States Supreme Court’s decision in Roper apply to cases involving juveniles who are not sentenced to death, because Roper stands for the proposition that juveniles have different mental maturity and therefore less culpability?
 - b. **Holding:** No.
 - c. **Implication:** Taken with McMillen and Campbell, these post-Roper cases demonstrate the Kentucky courts’ unwillingness to extend any of the reasoning of Roper to non-death penalty cases. Instead, Roper is treated as creating only a single bright-line rule: offenders cannot be sentenced to death for crimes they committed as minors.

Miranda Rights

1. N.C. v. Commonwealth, 396 S.W.3d 852 (Ky. 2013)
 - a. **Issues:** Are police are required to give *Miranda* rights when working in conjunction with school officials when a juvenile is subject to criminal charges or adult felonies?
 - b. **Holding:** The confession was suppressed under the Fifth Amendment and Unified Juvenile Code. When working in concert with a school official, police are required to read *Miranda* rights before subjecting a juvenile to custodial interrogation; the boy here was found to have been in custody under J.D.B.’s “all relevant factors test.”
 - c. **Further Considerations and Implications:** Any statement made to school officials working in concert with police can be used for school discipline purposes but not for criminal charges, unless *Miranda* rights are read beforehand. Questioning by school officials is relevant and necessary to student discipline and safety, so *Miranda* readings are not required when only the school is involved. To balance the public interest of keeping schools and students safe, the purpose of questioning must be to avoid potential harm to that student, other students, or school personnel.

Confessions

1. Dye v. Commonwealth, 2013 WL 3122823 (Ky. 2013) (Not Final, To Be Published)
 - a. **Issues:** Was a youthful offender's murder confession voluntary after the police incorrectly told him that he would receive the death penalty and subjected to repeated prison violence?
 - b. **Holding:** No, The confession was coerced because the motivating factor was the threat of the death penalty and prison violence. The three criteria used to assess voluntariness are 1) whether the police activity was 'objectively coercive;' 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession.
 - c. **Further Considerations and Implications:** The Court held in Roper that an offender that was under 18 at the time of the offense could not be sentenced to death but the police incorrectly and repeatedly told the offender in this case that that the only way he could avoid the death penalty was to confess. This was clearly a motivating factor in his confession. Even though the officers stated that they did believe he was death-eligible, the Court held that they should have known that he was not death-eligible. They were aware that he was only seventeen. Furthermore, the Court found that the threat of repeated prison violence and rape was also a form of coercion, citing Henson v. Commonwealth, 20 S.W.3d 466, 469 (Ky. 1999).