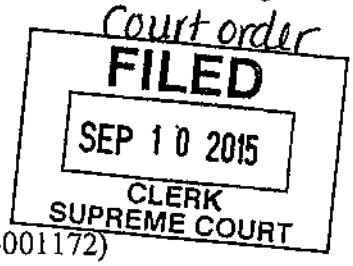
pursuant to Court order



COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NUMBER: 2014-SC-000243-DG

(On Appeal from Ky. Court of Appeals, Case No. 2012-CA-001172)

JOHN C. MARTIN *APPELLANT*

VS.

Appeal from Anderson Circuit Court
Hon. Charles R. Hickman, Judge
Case No: 09-CR-00042

COMMONWEALTH OF KENTUCKY *APPELLEE*

REPLY BRIEF FOR APPELLANT

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2015, the foregoing "Brief for Appellant" was served by first-class mail upon Hon. Charles R. Hickman, Vice-Chief Regional Circuit Judge, Chief Circuit Judge, 401 Main Street, Suite 401, Shelbyville, KY 40065-1133; Hon. Laura Donnell, 544 Main Street, Shelbyville, KY 40065; Hon. Christian K. R. Miller, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601; and Mr. John C. Martin, #244453, Kentucky State Reformatory, 3001 W. Hwy 146, LaGrange, KY 40032. The record on appeal was not checked out from the Kentucky Supreme Court for review.

COUNSEL FOR APPELLANT

PURPOSE OF REPLY

The purpose of this Reply Brief is to address the Commonwealth's argument that this appeal should be dismissed as moot and its contention that the Court of Appeals did not recharacterize Appellant's claim (Brief for Commonwealth (BC), p. 8, 11-12, 13-24).

ARGUMENT

At the outset, it should be noted that the Appellee does not oppose a summary opinion of this Court vacating the Court of Appeals opinion and affirming the trial court's order, as it would resolve Martin's only concern with the Court of Appeals opinion, that it improperly characterized the pleading as an RCr 11.42 Motion. (BC, p. 8).

A. *Pro Se* Litigants are Entitled to Leniency.

This is an appeal from a *pro se* motion filed by Appellant, a prisoner, untrained in the field of law. His pleading is being construed contrary to his intent in a forum in which he is without the opportunity to either amend or withdraw it, because such characterization was not made until it was before the appellate court. His ineptness as a *pro se* litigant, the failure to cite a procedural rule consistent with his intent, is being held against him. In this Commonwealth, *pro se* pleadings are not required to meet the standards of those applied to legal counsel. Beecham v. Commonwealth, 657 S.W.2d 234, 236 (Ky. 1983). Courts are to treat the *pro se* litigant's filings with leniency and **liberally construe procedural rules in the litigant's favor.** Moore v. Commonwealth, 199 S.W.3d 132, 146 (Ky. 2006) (citing Miller v. Commonwealth, 458 S.W.2d 453, 454 (Ky. 1970); Million v. Raymer, 139 S.W.3d 914, 920 (Ky. 2004); and Moore v. Commonwealth, 394 S.W.2d 931, 932–33 (Ky. 1965)). The Commonwealth asks this Court to do is deny Martin the leniency his pleadings are entitled to and not construe his pleading liberally in his favor. This is the essence of form over function. Prisoners have but one opportunity to seek relief from their conviction through RCr 11.42 proceedings. Butler v. Commonwealth, 473 S.W.2d 108, 109 (Ky. App. 1971);

RCr 11.42(3). The Commonwealth is asking this Court to take that one opportunity away from him, despite his intent to the contrary, because he did not plead the claim as a trained legal practitioner.

B. Martin's Pleading was Recharacterized By the Court of Appeals.

Martin's pleading, although it did not cite a procedural rule for invoking the court's jurisdiction, was captioned as a "Motion to Amend." Nowhere in the Motion to Amend does Martin reference RCr 11.42 or make any attempt to comply with the procedural requirements of RCr 11.42.[1] In denying his motion, the circuit court did not cite RCr 11.42 or any other procedural rule either but stated therein that "Martin's Motion to Amend his Sentence is hereby Overruled." The circuit court characterized Martin's *pro se* pleading as a "Motion to Amend," not as an RCr 11.42 Motion. Thus, any characterization of the pleading as anything more than a generic "Motion to Amend" is a recharacterization and a change in the treatment of the pleading.

C. Characterization or Recharacterization Should Be Done By the Circuit Court.

The Commonwealth contends that People v. Shellstrom, 833 N.E.2d 45 (Ill. 2005), and Castro v. U.S., 540 U.S. 375 (2003), are not applicable to Martin's case, because the Court of Appeals in this case did not "recharacterize" Martin's pleading and, instead, characterized his pleading for the first time. (BC, p. 20-24). While Appellant argues that the Court of Appeals' opinion constituted a recharacterization of his pleading as an RCr 11.42 Motion, *see supra Argument A,* such a label is merely a labor in semantics, because the point of the matter is that the Court of Appeals made a determination that the circuit court did not. The significance of Castro, in relation to the present case, is in that case the characterization or recharacterization was done by the district court, not the appellate court. At the heart of what has occurred in this case, is the *appellate* court labeling Appellant's motion in a way that

[1] RCr 11.42(1) requires there be a claim of a right to be released, which was not done here. RCr 11.42(2) requires that the motion be verified, which Martin did not do.

is contrary to the way it was treated by all parties when the case was before the *trial* court. The Commonwealth repeatedly contends that titling the pleading "Motion to Amend" and the circuit court's treating the motion as a "Motion to Amend" constitutes a failure to characterize the pleading or that the pleading was "un-labeled," requiring the Court of Appeals to do so on his behalf. (BC, p. 17).

Had the *trial court* construed Martin's pleading as an RCr 11.42 pleading he would have had the opportunity to obtain re-dress by a motion to reconsider, motion to amend, or motion to withdraw. However, characterization or recharacterization, that occurs in the appellate court occurs without such an opportunity and thus, provides no notice or opportunity to a *pro se* litigant that they have not plead their pleading sufficiently, consistent with their intent. The crux of the holdings in Castro and Shellstrom is that a *pro se* litigant is entitled to notice prior to any attempt to "construe" or "characterize" their pleading as a post-conviction pleading to which the rights of the defendant to bring another such action would be substantially impaired. See Castro, 540 U.S. at 383 ("In such circumstances the district court must **notify the *pro se* litigant** that it intends to recharacterize the pleading, **warn the litigant** that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions ..., and **provide the litigant an opportunity** to withdraw the motion or to amend it... ."); Shellstrom, 833 N.E.2d at 870 ("... a *pro se* litigant such as defendant, ... **ought to be given notice** before his pleading is recharacterized as a first postconviction petition."). Here the trial court did not construe Martin's *pro se* pleading as an RCr 11.42 Motion, it perpetuated the motion as a "Motion to Amend" and thus, Martin was never provided notice and opportunity to controvert the determination of his pleading as one made pursuant to RCr 11.42, when such was done by the appellate court for the first time.

D. Characterization or Recharacterization Must Be Consistent with the Litigant's Intent.

The Commonwealth contends that appellate courts can properly make determinations as to the procedural rule by which the pleading is being brought. (BC, p. 12-13). In so doing, however, the Commonwealth cites cases in which the courts adopted a form of the pleading consistent with the litigant's intent, liberally construing the procedural rules in the litigant's favor. The cases cited by the Commonwealth are nearly all cases that were filed in the last 1950's or early 1960's when the Writ of Coram Nobis was abolished and replaced with CR 60.02. Jackson v. Commonwealth, 344 S.W.2d 381, 382 (Ky. 1961); Sherrill v. Commonwealth, 323 S.W.2d 586 (Ky. 1959); Hamm v. Mansfield, 317 S.W.2d 172 (Ky. 1958). Further, the cases cited by the Commonwealth did not include cases where the characterization of the pleadings substantially impaired the rights of the litigants. See Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005) and CR 60.03 (the court treated the independent action as a CR 60.03 Motion and there is no statutory provisions restricting the number of motions to be filed pursuant to that rule); see also, Jackson, supra, Sherill, supra, and Hamm, supra, and CR 60.02 (the court treated the Writs of Coram Nobis as CR 60.02 Motions and there is no statutory limit on the number of CR 60.02 motions that can be filed by a petitioner). As noted *supra*, at p. 3-4, the U.S. Supreme Court noted in Castro that the reason why the district court needed to provide notice, warning, and opportunity to respond before recharacterizing the pleading was the fact that doing so substantially impaired the litigant's ability to obtain relief at a later time.

E. If Martin's Appeal is Moot, the Public Interest Exception Applies.

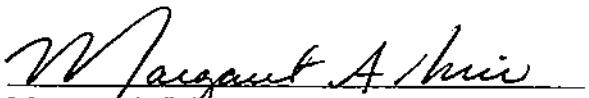
The Commonwealth argues that because Martin does not argue in his Brief for Appellant the claim relating to the underlying motion, that imposition of KRS 532.043 violates the Due Process Clause, this appeal is rendered moot. (BC, p. 8, 11-12). In Morgan

v. Getter, 441 S.W.3d 94, 102 (Ky. 2014), this Court formally adopted the public interest exception to the mootness doctrine. "The public interest exception allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question." Id. (quoting In re Alfred H.H., 910 N.E.2d 74, 80 (Ill. 2009)). The question of how a court should treat *pro se* pleadings filed improperly with the circuit court is an issue that affects all fifty-seven circuits on a daily basis. This is an issue affecting all of the court systems statewide and an area in which the courts and prosecutors are often left in a quandary as to how to proceed. The issue of a court characterizing or recharacterizing pleadings will continue to occur on a routine basis. Further, the appellate courts are often left grappling with interpreting the *pro se* pleading, which the circuit may or may not have recharacterized and how to review such a pleading. Clarity as to the handling and litigating of the treatment of improperly-filed *pro se* pleadings serves the interest of justice and efficiency in resolving claims in the judicial system.

CONCLUSION

For the reasons stated herein, and those asserted in the Brief for Appellant, John Martin respectfully requests that this Court summarily vacate the Court of Appeals Opinion and remand the case to the circuit court to affirm its order or find that his pleading was not properly recharacterized by the Court of Appeals as an RCr 11.42 Motion.

Respectfully submitted,



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