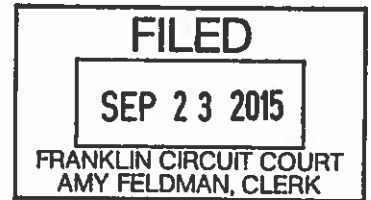


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
INDICTMENT NO. 15-CR-00101-001
DIVISION II



COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

**COMMONWEALTH'S RESPONSE TO
MOTION TO COMPEL DISCOVERY**

GILBERT "TOBY" CURTSINGER

DEFENDANT

COMES THE COMMONWEALTH, represented by Counsel, Zachary M. Becker, Assistant Commonwealth's Attorney for the 48th Judicial Circuit, and hereby responds to the Defendant's Motion to Compel Discovery (hereinafter "Motion"). In support thereof, the Commonwealth states as follows:

**I. DEFENDANT'S REQUEST FOR INFORMATION RELATING TO THE
FRANKLIN COUNTY SHERIFF'S OFFICE TEXT-A-TIP CELLULAR PHONE**

The Defendant's Motion requests certain information related to the Franklin County Sheriff's Office Text-a-Tip program and the cellular phone associated with that program. In review of the Defendant's requests, the Commonwealth has no objection to providing certain information relevant to the Text-a-Tip program that does not otherwise violate the anonymity of private citizens of Franklin County who have provided information of illegal conduct in good-faith reliance that the information provided would remain anonymous and not subject themselves to intimidation or harassment. As such, the following information is provided in response to the Defendant's requests of May 18, 2015:

5)(a)(i): In regards to the phone maintained by the investigative entity: i) the phone number(s) used to receive anonymous phone calls or text messages:

Answer: The phone number of the Text-a-Tip phone is (502) 320-3306.

5)(a) (ii): In regards to the phone maintained by the investigative entity: ii) where said phone(s) is maintained at all times:

Answer: The FCSO Text-a-Tip cellular phone is maintained in the sole possession of Detective Jeff Farmer of the Franklin County Sheriff's Office.

5)(a)(iii) In regards to the phone maintained by the investigative entity: iii) the individual(s) responsible for maintaining, responding to and investigating any and all anonymous phone calls or text messages received:

Answer: Det. Jeff Farmer of the Franklin County Sheriff's Office is responsible for maintaining and responding to the anonymous phone calls and/or text messages and relaying those messages to other individuals in the Franklin County Sheriff's Office for further investigation.

5)(a)(iv) In regards to the phone maintained by the investigative entity: iv) the phone records of the phone(s) used to receive anonymous calls and/or text messages:

Answer: The Commonwealth has already provided to the Defendant in the Commonwealth's Response to Bill of Particulars and Discovery Order the entirety of the anonymous text messages received by the Franklin County Sheriff's Office relevant to the instant matter, with the phone number of the anonymous tipster removed to protect his/her anonymity. The Commonwealth objects to providing any further phone records as being 1) irrelevant to the discovery in this matter, 2) detrimental to additional criminal investigations that are being conducted in other matters by the Franklin County Sheriff's Office and 3) would violate Kentucky Rule of Evidence 508. *See infra*.

5)(a)(v) In regards to the phone maintained by the investigative entity: v) any and all documentation maintained by the investigative entity regarding the protocol for maintaining, responding to and investigating anonymous phone calls or text messages received via the phone maintained for said purpose:

Answer: None.

5)(a)(vi) In regards to the phone maintained by the investigative entity: vi) all individual(s) who have access to said phone(s) at all times:

Answer: The FCSO Text-a-Tip cellular phone is maintained in the sole possession of Detective Jeff Farmer of the Franklin County Sheriff's Office.

- 5(a)(vii) In regards to the phone maintained by the investigative entity: vii) which entity or individual is tasked with paying for the maintenance and service of said phone.:

Answer: The FCSO Text-a-Tip cellular phone is wholly maintained by the Franklin County Sheriff's Office. All payments, maintenance and service is done so by the Franklin County Sheriff's Office.

- 5(b)(i) In regards to the phone(s) which anonymously called or sent an anonymous text message(s): i) the phone number(s) used to send the anonymous phone call(s) or text message(s):

Answer: The Commonwealth has already provided to the Defendant in the Commonwealth's Response to Bill of Particulars and Discovery Order the entirety of the anonymous text messages received by the Franklin County Sheriff's Office relevant to the instant matter, with the phone number of the anonymous tipster removed to protect his/her anonymity. The Commonwealth hereby objects to providing any further phone records as being 1) irrelevant to the discovery in this matter, 2) detrimental to additional criminal investigations that are being conducted in other matters by the Franklin County Sheriff's Office and 3) would violate Kentucky Rule of Evidence 508. *See infra.*

- 5(b)(ii) In regards to the phone(s) which anonymously called or sent an anonymous text message(s): ii) the name and address of any and all individual(s) who made anonymous phone call(s) or sent anonymous text message(s):

Answer: The Commonwealth has already provided to the Defendant in the Commonwealth's Response to Bill of Particulars and Discovery Order the entirety of the anonymous text messages received by the Franklin County Sheriff's Office relevant to the instant matter, with the phone number of the anonymous tipster removed to protect his/her anonymity. The Commonwealth hereby objects to providing any further phone records as being 1) irrelevant to the discovery in this matter, 2) detrimental to additional criminal investigations that are being conducted in other matters by the Franklin County Sheriff's Office and 3) would violate Kentucky Rule of Evidence 508. *See infra.*

- 5(b)(iii) In regards to the phone(s) which anonymously called or sent an anonymous text message(s): iii) the phone record(s) of any and all phone(s) used to make or send anonymous phone call(s) and text message(s):

Answer: The Commonwealth has already provided to the Defendant in the Commonwealth's Response to Bill of Particulars and Discovery Order the entirety of the anonymous text messages received by the Franklin County Sheriff's Office relevant to the instant matter, with the phone number of the anonymous tipster removed to protect his/her anonymity. The Commonwealth hereby objects to providing any further phone records as being 1) irrelevant to the discovery in this matter, 2) detrimental to additional criminal investigations that are being conducted in other matters by the Franklin County Sheriff's Office and 3) would violate Kentucky Rule of Evidence 508. *See infra.*

- 5(c)(i) All information regarding any and all phone call and/or text messages received in regards to the above-stated case, including but not limited to: i) the individual sending the anonymous phone call(s) or text message(s) or the number from which anonymous call(s)/tip(s) made:

Answer: The Commonwealth has already provided to the Defendant in the Commonwealth's Response to Bill of Particulars and Discovery Order the entirety of the anonymous text messages received by the Franklin County Sheriff's Office relevant to the instant matter, with the phone number of the anonymous tipster removed to protect his/her anonymity. The Commonwealth hereby objects to providing any further phone records as being 1) irrelevant to the discovery in this matter, 2) detrimental to additional criminal investigations that are being conducted in other matters by the Franklin County Sheriff's Office and 3) would violate Kentucky Rule of Evidence 508. *See infra.*

- 5(c)(ii) All information regarding any and all phone call and/or text messages received in regards to the above-stated case, including but not limited to: ii) when anonymous tip(s) sent:

Answer: Any and all information in possession of the Commonwealth indicating the date/time when the anonymous tip(s) was sent and/or received has already been provided to the Defendant in the Commonwealth's Response to Bill of Particulars and Discovery Order the entirety of the anonymous text messages received by the Franklin County Sheriff's Office relevant to the instant matter.

5(c)(iii) All information regarding any and all phone call and/or text messages received in regards to the above-stated case, including but not limited to: ii) when anonymous tip(s) received:

Answer: Any and all information in possession of the Commonwealth indicating the date/time when the anonymous tip(s) was sent and/or received has already been provided to the Defendant in the Commonwealth's Response to Bill of Particulars and Discovery Order the entirety of the anonymous text messages received by the Franklin County Sheriff's Office relevant to the instant matter.

5(c)(iv) All information regarding any and all phone call and/or text messages received in regards to the above-stated case, including but not limited to: (iv) any and all statements obtained as a result of the anonymous tip(s):

Answer: Any and all statements obtained as a result of the anonymous tip(s) have already been provided to the Defendant in compliance with the requirements of RCr 7.26.

5(c)(v) All information regarding any and all phone call and/or text messages received in regards to the above-stated case, including but not limited to: v) copies of transcripts of the anonymous phone call(s) or copies of any anonymous text(s):

Answer: The Commonwealth has already provided to the Defendant in the Commonwealth's Response to Bill of Particulars and Discovery Order the entirety of the anonymous text messages received by the Franklin County Sheriff's Office relevant to the instant matter, with the phone number of the anonymous tipster removed to protect his/her anonymity. The Commonwealth hereby objects to providing any further phone records as being 1) irrelevant to the discovery in this matter, 2) detrimental to additional criminal investigations that are being conducted in other matters by the Franklin County Sheriff's Office and 3) would violate Kentucky Rule of Evidence 508. *See infra.*

However, as noted above, the Commonwealth objects to providing any further information related to the Franklin County Sheriff's Office Text-a-Tip phone program and the identifying information related to the source of such.

A. RECORDS ON THE TEXT-A-TIP PHONE RELATING TO OTHER INVESTIGATIONS ARE WHOLLY IRRELEVANT AND NOT SUBJECT TO DISCOVERY IN THIS MATTER

The Commonwealth has already produced in discovery in this matter the entirety of the anonymous tips received relating to the stolen bourbon that was recovered from the property of the Defendant. All information received on those text messages was left unredacted and provided to the Defendant, with the exception of the phone number from which the “tip” was sent to the Franklin County Sheriff’s Office. Instead, that number was anonymized as the “Wild Turkey Tip” to protect the private citizen from retaliation and harassment. The Defendant now requests additional phone records from the Franklin County Sheriff’s Office Text-a-Tip cellular phone that would touch upon other tips—wholly unrelated to the instant Defendant and the allegations contained within the instant indictment—that have been received from residents of Franklin County with the expectation of anonymity and in hope that others may be brought to justice for criminal activity.

Therefore, the Defendant requests information that does not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable” and therefore is not subject to discovery in this matter. See KRE 401 (definition of relevant evidence). Furthermore, the production of such evidence would be related to other ongoing, criminal investigations. Such requests are wholly unreasonable as it would thwart the governmental process, potentially interfere and hamper other investigations and altogether frustrate the entire purpose of effective law enforcement. The understanding and reasoning is

bolstered by the statutes of this Commonwealth as codified at KRS § 17.150(2)(a)-(d)¹ and KRS § 61.878(1)(i)². As such, in this manner the Defendant's Motion must be denied.

B. THE INFORMANT'S PRIVILEGE APPLIES TO ANY FURTHER IDENTIFYING INFORMATION FROM THE ANONYMOUS TIPS THAT HAVE ALREADY BEEN PRODUCED IN DISCOVERY

Turning to the next point, the Commonwealth, pursuant to KRE 508, asserts the informant's privilege, to the extent that the Defendant requests additional information identifying the anonymous tipster who provided the tips that have already been produced in discovery in this matter. The tipster in this case simply reported his/her observation to the Franklin County Sheriff's Office, and therefore, his/her identity or information that otherwise might lead to his/her identity being discovered is not subject to disclosure.

Kentucky Rule of Evidence 508(a) expressly provides that the Commonwealth is privileged from providing the disclosure of the identity of an anonymous caller/tipster or informant:

General rule of privilege. The Commonwealth of Kentucky and its sister states and the United States have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

This rule of privilege has likewise been interpreted and applied by the appellate courts of this Commonwealth. "KRE 508 provides the Commonwealth with a privilege to refuse to disclose the identity of an informant." Taylor v. Commonwealth, 987 S.W.2d 302 (Ky. 1998).

¹ KRS § 17.150(2)(a)-(d) specifically provides that intelligence maintained by a law enforcement agency is not subject to inspection if 1) it would disclose the name or identity of a confidential informant or of information that may lead to their identity being discovered or 2) contains information to be used in prospective law enforcement actions.

² KRS § 61.878(1)(i) specifically provides for the discovery protections in place for correspondence between a governmental agency and private citizens. The text messages received by the Franklin County Sheriff's Office are wholly transmitted by private citizens to the Sheriff's Office and thus fall within these protections.

Additionally, KRE 508(b) specifically provides that the informer's privilege "may be claimed by an appropriate representative of the public entity to which the information was furnished." KRE 508(b). Such as here in the present case, "[o]rdinarily the prosecuting attorney is the proper representative to assert the privilege on behalf of the public entity." Trial Handbook for Ky. Law. § 28:10 (2014-2015 ed.). Thus, the Commonwealth's assertion of the privilege on behalf of the Franklin County Sheriff's Office is appropriate.

The purpose and intent of the informer's privilege is clear. It is the goal of effective government to encourage its citizenry to actively provide information to local law enforcement agencies so that those that violate the law are appropriately brought to justice by those that are sworn to enforce the law and protect our citizenry. As such, it is necessary that those good citizens who report wrongdoing, and their families, be protected from retaliation and violence from those that are clearly otherwise inclined to criminal wrongdoing. The United States Supreme Court, in recognizing the informer's privilege as a matter of long-standing common law, has echoed this sentiment:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. Scher v. United States, 305 U.S. 251, 254 (1938); In re Quarles and Butler, 158 U.S. 532 (1895); Vogel v. Gruaz, 110 U.S. 311, 316 (1884). The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Roviaro v. United States, 353 U.S. 53, 59 (1957).

It is with such a solid foundation that the informer's privilege has been successfully applied repeatedly by the state appellate courts in Kentucky. This understanding is perhaps most succinctly laid forth in the unanimous Kentucky Supreme Court opinion of Schooley v. Commonwealth, 627 S.W.2d 576, 578 (Ky. 1982) in which the Court reviewed the historical importance and impact on

society as a whole that the appropriate application of the informer's privilege provides to the citizens of this Commonwealth.

As such, the underlying facts present in Schooley are quite instructive. In Schooley, a police officer happened to be at a county jail when he received a phone call from the sheriff's wife relaying that she had just received an anonymous phone call reporting a burglary that had just occurred at a local store. The anonymous caller had further given a description of the assailants and their getaway vehicle. Shortly after receiving this phone call, Schooley was traffic stopped, subsequently charged and convicted of burglary. At the trial court level and on appeal, Schooley similarly argued that he was entitled to the name of the anonymous caller/informant. In reaching its holding denying the disclosure of the informant, Justice Stephenson, writing on behalf of the unanimous Court, relied heavily upon the reasoning of the United States Supreme Court in Roviaro and stressed the important role anonymous citizen tipsters play in the administration of justice in this Commonwealth:

The informant here did not wish to be identified. We feel this is the usual situation. Public policy has long recognized the privilege for informers. This public policy seeks to protect the public interest in effective law enforcement. It recognizes the obligations of citizens to communicate their knowledge of the commission of crimes to law enforcement officer, and by preserving their anonymity, encourages them to perform that obligation. The privilege is designed to protect the public interest, and not to protect the informer.

Schooley, 627 S.W.2d at 578.

The Schooley Court, in interpreting the statutory privilege of KRS 218A.260 that was present in Kentucky at the time, held the tipster's identity was not required "where the informer gives the police a 'tip' or a 'lead' which provides information enabling police to identify and charge a defendant. . . ." Id. Stated in another manner, the "courts [in interpreting the informant's privilege of KRS 218A.260] uniformly held that where the evidence shows that an informant was merely a

tipster who leads to subsequent independent police investigation which uncovers evidence of the crime, disclosure of the identity of the informant is not required.” Taylor v. Commonwealth, 987 S.W.2d 302, 304 (Ky. 1998) (citing Hargrave v. Commonwealth, 724 S.W.2d 202 (Ky. 1986); Schooley, 627 S.W.2d 576).

Thereafter, in 1992, the informant’s privilege was adopted as Kentucky Rule of Evidence 508, as cited supra. As noted by the Taylor Court, “[t]he Kentucky rule in KRE 508 reflects the decision of the United States Supreme Court in Roviaro v. United States, 353 U.S. 53 (1957). . . .” Taylor, 987 S.W.2d at 304.

In the presence of the appropriate application and invocation of the informer’s privilege, disclose of the identity of the informant is not permitted unless one of the delineated exceptions laid forth in KRE 508(c) is found to apply. “Our case law provides that a defendant who requests disclosure of the identity of an informant must first make a proper showing that an exception applies.” Heard v. Commonwealth, 172 S.W.3d 372, 374 (Ky. 2005) (citing Schooley v. Commonwealth, 627 S.W.2d 576 (Ky. 1982)). As interpreted by the Taylor court, “[e]xceptions to the privilege occur when the disclosure is voluntary, when the informant is a witness and when the testimony of the informant is relevant to an issue.” Taylor, 987 S.W.2d at 304.

Turning to the instant facts, the Defendant has in fact failed to even mention KRE 508 in his Motion, much less the applicability of one of the exceptions to the general rule of privilege. Instead, there is simply speculation as to the necessity of this information in the preparation of his defense, which has been uniformly held to be insufficient to carry the Defendant’s burden. See Taylor v. Commonwealth, 987 S.W.2d 302, 304 (Ky. 1998) (citing Schooley, 627 S.W.2d 576 (1982)). “This Court held in Schooley that ‘mere speculation that identity of an informant is necessary to a defense is not enough.’” Taylor, 987 S.W.2d at 304 (quoting Schooley 627 S.W.2d

at 578). However, even assuming *arguendo* that such an invocation is appropriately made, the Defendant's request would still necessarily fail. The Kentucky appellate courts have routinely held that the informant's identity is not appropriate to be disclosed in situations such as the one presented in the instant case where the information provided by the informant is simply a "tip" of observed illegal conduct that does not place the informant actively in the midst of illegality at issue in the indictment. See Thompson v. Commonwealth, 648 S.W.2d 538 (Ky. 1983); Taylor v. Commonwealth, 987 S.W.2d 302, 304 (Ky. 1998); Robbins v. Commonwealth, 336 S.W.3d 60, 66 (Ky. 2011); Byrd v. Commonwealth, 2008 WL 5051586 at * 8 (Ky. Nov. 26, 2008) (charges arising from execution of search warrant based on information personally observed by informant do not require informant's identity to be revealed).

In Thompson, a confidential witness had provided information to a police officer that the informant had observed Thompson in possession of unlawful drugs and that Thompson sold drugs. That information was utilized to obtain a search warrant, which was thereafter executed and resulted in the recovery of controlled substances. Thompson sought at trial and on appeal for the identity of the informant to be revealed as the informant personally observed the unlawful drugs and thus the informant presented as a material witness to his defense. The Thompson Court unanimously dismissed Thompson's argument and ruled that the identity of the informant was not required as the informant "did not participate in any way in the offense for which [Thompson] was charged and convicted." Thompson, 648 S.W.2d at 539.

Similarly in Taylor, an informant provided information to police officers that two described individuals were involved in drug trafficking, which led to an investigative stop, search and seizure of cocaine. Taylor was thereafter convicted of possession of cocaine and tampering with physical evidence. At the trial court and appellate level, Taylor argued that the identity of the confidential

informant was required in order to test the informant's credibility and because he was a material witness to the crime charged. The Kentucky Supreme Court once again disagreed and held that "[t]he informant in this case was not a material witness to the crimes charged and the informant provided only a tip, as in Schooley." Taylor, 987 S.W.2d at 304. A similar conclusion is required in the instant matter.

In Robbins, an identifiable confidential informant contacted police officers to advise of Robbins' whereabouts. Robbins had an active warrant for his arrest from a drug trafficking case in Jefferson Circuit Court. Acting on the information of the confidential informant, Robbins was located and an arrest was effectuated, which led to additional cocaine being discovered. Robbins moved to compel the disclosure of the identity of the confidential informant. Justice Cunningham, writing on behalf of the Kentucky Supreme Court, found Robbins' arguments unavailing and found the informant's privilege to have been appropriately applied by the trial court. "None of the exceptions [of KRE 508(c)] apply in this case. Moreover, the identity of the informant is immaterial to the officers' execution of the bench warrant against Robbins or his possession of cocaine at the time of arrest." Robbins, 336 S.W.3d at 66. Similarly, the identity of the anonymous source in the instant case is immaterial to the Franklin County Sheriff's Office execution of the search warrant and the Defendant's illegal possession of steroids and the stolen barrels of bourbon.

Furthermore, it is curious that the Defendant attacks the manner in which the anonymous tips are sent to the Franklin County Sheriff's Office via the Text-a-Tip program as it is the same manner in which 911 phone calls have been made by citizens for decades with expectations that their privacy rights are maintained when they seek to maintain their anonymity. When an individual calls 911 to report criminal wrongdoing, they very well may indicate that they wish to remain anonymous. There are various legitimate reasons that can be imagined for a citizen to wish

to remain anonymous in such a situation. However, even though such privacy expectations are voiced by the caller, the name, phone number, registered address and geographic location of the caller is provided to law enforcement, as is required by the Federal Communications Commission. See Navarette v. California, 134 S.Ct. 1683, 1691 (2014) (citing 47 CFR § 20.18(d)(1)(2013); 47 CFR §§ 20.18(d)-(h); 47 CFR §64.1601(b) & 47 CFR §64.1601(d)(4)(ii)) (holding that caller's use of telephone system that enables caller to be identified is relevant in determining reliability of tip). The caller is therefore not truly "anonymous" and can be contacted for follow-up phone call in emergency, life-threatening situations or prosecution if the individual instead made a false report. However, the information that is provided to law enforcement in such manners, even if utilized in the course of a criminal investigation and prosecution, is not provided in future court proceedings upon the application of the informer's privilege.

The recognition of the reliability of such tipsters who are anonymous, but whose identity may be traced, has likewise been opined by Justice Kennedy to be a distinction worth noting, and has been considered by the Kentucky Supreme Court in Commonwealth v. Kelly, 180 S.W.3d 474, 477 (Ky. 2005). "[T]he ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips." Florida v. J.L., 529 U.S. 266, 276 (2000) (Kennedy, J., concurring). As applied to the instant facts, the information provided by the anonymous tipster included the phone number by which he/she was providing information to the Franklin County Sheriff's Office, which in fact provided the opportunity for the Sheriff's Office to conduct follow-up questioning from the anonymous tipster.

In conclusion, the Defendant asks the court to act in direct violation of both the common law informant's privilege, as well as informer's privilege as adopted in KRS 508. Of course, the

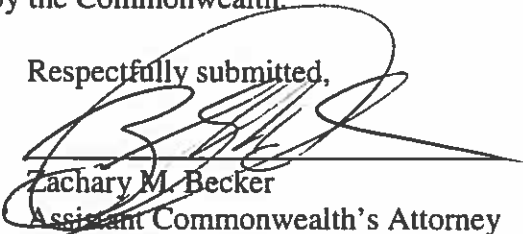
ruling of this court will not be applied solely to the facts of this case, but will necessarily impact all other criminal cases and investigations arising from its jurisdiction. If the Court were to follow the logic of the Defendant, the result would be law-abiding citizens of Franklin County being left with two equally unpalatable choices, either to do their civic duty as law-abiding citizens and thereby place themselves and their families directly in harm's way, or simply learn to ignore and embrace criminal activity in their community. Such a conclusion, as argued by the Defendant, simply cannot be fathomed. Therefore, the Defendant's Motion, to the extent it seeks additional information identifying the anonymous tipster, must be denied.

II. DEFENDANT'S REQUEST FOR RECORDED/WRITTEN STATEMENTS OF TODD BRYANT

Secondly, the Defendant requests that the Commonwealth provide to the Defendant the recorded and/or written statements of Todd Bryant (hereinafter "Bryant") as well as a non-prosecution agreement relating to Mr. Bryant. In support of these requests, the Defendant relies upon the discovery requirements of RCr 7.26, of which the Commonwealth is well versed. However, the Defendant's argument is misplaced as the Commonwealth cannot be compelled to produce information that does not exist. As such, the Defendant's Motion relating to these items must be necessarily denied.

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully requests that the Defendant's Motion to Compel be overruled to the extent that such requests extend beyond that which has already been voluntarily provided by the Commonwealth.

Respectfully submitted,



Zachary M. Becker
Assistant Commonwealth's Attorney
222 St. Clair Street
Frankfort, Kentucky 40601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served, by mailing the same, first-class postage prepaid, on this 23rd day of September, 2015, to the following:

Hon. Whitney True Lawson
124 West Clinton Street
Frankfort, Kentucky 40601

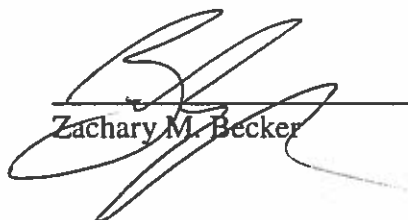
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Zachary M. Becker