KENTUCKY LAW UPDATE

2025

ADVANCING THE PROFESSION THROUGH EDUCATION

Supreme Court Criminal Case Law Review

1 CLE Credit
Sponsor: KBA Criminal Law Section

Compiled and Edited by:
The Kentucky Bar Association
Office of Continuing Legal Education
for
Kentucky Bar Association
2025 Kentucky Law Update

Published and Printed by:
Kentucky Bar Association, August 2025

Editor's Note: The materials included in the following Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered as of the original publication date. No representation or warranty is made concerning the application of legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how a particular judge or jury will interpret or apply such principles. The proper interpretation of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefor. Attorneys using these materials, or information otherwise conveyed during these programs, in dealing with a specific legal matter have a duty to research the original and current sources of authority. In addition, opinions expressed by the authors and program presenters in these materials do not reflect the opinions of the Kentucky Bar Association, its Board of Governors, Sections, Committees, or members.

KENTUCKY SUPREME COURT CRIMINAL LAW UPDATE 2025

B. Scott West*

I. FOURTH AMENDMENT/KENTUCKY CONSTITUTION SECTION 10 SEARCH & SEIZURE ISSUES

A. Search Warrants

Search warrant/legal possession of an item not yet illegal to possess (sex doll):

***Commonwealth v. Master*, 706 S.W.3d 140 (Ky. 2024), Kenton Circuit Court. Opinion by Conley, J., all sitting, Lambert, Nickell and Thompson, JJ., concur; Lambert, J., concurs by separate opinion in which Thompson, J., joins; VanMeter, C.J., concurs in part and dissents in part with separate opinion in which Bisig and Keller, JJ., join.**

Master entered into a conditional plea to 10 years in prison based upon 20 counts of possession of matter portraying a sexual performance by a minor. The search warrant which led to these items was based upon Master's purchase of a child sex doll, an anatomically correct doll with physical proportions of a child. (Although illegal to possess now, at the time of the conviction, sex dolls were not illegal to possess in Kentucky.)

The trial court noted that while ordering and possessing a child sex doll may not be illegal, the facts in the affidavit for a warrant do not have to be illegal in and of themselves; rather, they must establish the probability that contraband will be found. In so doing, the Court relied heavily upon the experience of the officer executing the affidavit, who stated in the affidavit that:

> Chinese web sites that sell the type of child sex doll purchased and received by Defendant also contain child pornography. He also attests that, in his experience, a person who goes through the lengths that Defendant went through to obtain such a prepubescent sex doll from China does so for sexual gratification for a sexual attraction to children and has likely downloaded, viewed, shared, and/or manufactured child pornography.

The Court of Appeals reversed, noting that while the experience of the officer is one factor, it is not the only factor, and what was missing were facts specific to Master; there must be a "nexus" between the suspected illegal activity (child pornography) and the place to be searched (Master's home). There were no facts in the affidavit establishing such a nexus.

* B. Scott West Law Office, PLLC, 200 N. 3rd St., Richmond, KY 40475.

In affirming the Court of Appeals, the Supreme Court rejected the argument of the Commonwealth that it was "common sense" that a person who purchases a child-like sex doll is likely to possess or manufacture child pornography:

> [C]ommon sense is not a bottomless well from which the Commonwealth can draw any inference it desires; nor is it a free-floating concept unmoored from the underlying facts within the four corners of the affidavit. It cannot be. [Citation omitted.] Common sense indeed is a wide-ranging and imprecise standard, but it is a standard – it is not *carte blanche*. There must be something "more than conclusory allegations" in the affidavit to pass constitutional muster. [Citation omitted.] "Mere affirmance of belief or suspicion is not enough." [Citation omitted.]
>
> * * *
>
> It must also be pointed out that a sexual attraction to children is not illegal – to act upon it, generally, is. Pedophilia is indeed a "sick man's appetite [which] desires most that which would increase his evil." Shakespeare, *Coriolanus*, Act. I, Sc. I. The Commonwealth's logic, however, is that a person who purchases a child sex doll (not illegal at the time) to further his sexual attraction to children (not illegal in and of itself) is, by dent of common sense, also furthering that attraction through some other illegal means. While that may be true in some cases, it is a presumption we are not willing to indulge without specific, underlying facts regarding the individual in question.

B. Warrantless Searches & Seizures

1. **Warrantless entry/landlord and tenant/emergency clause.**

***Crite v. Commonwealth*, 706 S.W.3d 74 (Ky. 2024), Daviess Circuit Court. Opinion by Thompson, J., all sitting, all concur.**

Crite was convicted of possession of a firearm by a convicted felon and sentenced to two years, reserving only the issue of whether his Fourth Amendment rights were violated when his landlord entered his apartment (where the firearm in question was found) and allowed the police to also enter, because there was no emergency and because the landlord lacked common authority to grant entry. The Supreme Court disagreed, holding that the landlord and her agent (an electrician) had the right to enter because Crite had consented pursuant to an "emergency entry" clause in his lease.

Crite, a diagnosed schizophrenic, had ripped out the wires in his apartment after he had gone off his medication. Crite's brother informed the landlord that as a result the apartment had no electricity or air conditioning. Crite's brother took Crite to the hospital and requested that repairs be made while Crite was not in his apartment. After an inspection, an electrician was hired;

however, Crite was not admitted to the hospital, and – at the request of the electrician – a police escort was provided because the electrician was concerned for his safety in the event the tenant was present at the time of repairs. This was proven via a recorded phone call to police dispatch from the electrician. Upon entry by the police, they discovered extensive damage done to the electrical system, including the thermostat. Wires had been ripped out of the walls. Also, an AR-15 rifle was in plain view.

In affirming the Court of Appeals, the Supreme Court made the following points:

a. A contractual "emergency clause" in a contract is not held to the same circumstances as the "exigent circumstances" exception to the warrant requirement; housing concerns which relate to health and safety of tenants or neighbors or which could risk serious damage to property are situations which must be addressed promptly; electrical damage which could cause a fire falls within an "emergency" under the lease. The landlord and his agent, the electrician, were allowed to enter under the lease under the circumstances.

b. Under the totality of the circumstances in this case, the police search of Crite's apartment was minimally invasive, not for the purpose of gathering evidence, and was conducted solely for the electrician and landlord to enter safely.

c. Once the police were lawfully inside, they were allowed to seize what they could see in plain view and identify as contraband. Knowing Crite was a convicted felon, he could not possess a rifle, and the police were immediately able to see the rifle sticking out from the side of a couch.

2. **Warrantless entry/plain view/protective sweep.**

***Bitter v. Commonwealth*, 701 S.W.3d 447 (Ky. 2024), Kenton County. All sitting; Opinion by Thompson, J., joined by VanMeter, C.J., Bisig, Keller, and Nickell; Lambert, J., dissents by separate opinion, joined by Conley, J.**

Bitter was found guilty by a jury of two counts of trafficking in a controlled substance and being a persistent felony offender in the first degree and sentenced to 20 years. Bitter was arrested when a police officer entered his residence without a warrant and saw drug paraphernalia in plain view immediately after the door was opened. The officer had arrived at the residence along with backup after receiving a letter from a resident of the multi-family apartment home that Bitter had "pistol-whipped" a man and was selling drugs out of the basement. Knowing that Bitter was a convicted felon and being aware that this was an area where drug users had been arrested

and had identified Bitter as their dealer, the police decided to engage in a "knock and talk." Upon arriving at the house, the officer knocked on the door and was directed to the basement, out of which Bitter was living. The officers knocked, claiming to be looking for "Melissa," and then thereafter saying that "Melissa told them to come talk to him." Bitter's girlfriend, also his roommate, told the police they had the wrong address; however, eventually Bitter's girlfriend opened the door.

The officer testified that immediately he observed a coffee table five to 10 feet away upon which was a scale, a baggie of pink pills, and a box of sandwich bags with several baggies removed. He announced "I got a scale and everything in plain view." Bitter and his roommate were ordered out of the basement, but Bitter indicated that a third person, Jeremy, was in the back room. After calling out Jeremy's name, he exited, and the police conducted a "protective sweep" since the letter had indicated that a pistol was present. After the sweep, the officer obtained a search warrant based on the scale, the pink pills, and baggies he had seen. A search produced 3.5 grams of fentanyl, over 15 grams of meth, and a gun. The pink pills were vitamins.

Upon being convicted of the charges, Bitter challenged the search on four grounds. Each ground and the Supreme Court's holding on the ground are discussed separately below:

(1) The officer's initial contact with Bitter and his roommate was not consensual and otherwise violated the confines of a permissible "knock and talk." The Court found this argument to be unpreserved as it was not raised at the trial level, and hence not reviewable.

(2) The officer unlawfully crossed the dwelling's threshold. This issue was not raised at the suppression hearing; however, the Court looked at the officer's body camera and a majority determined that it does not conclusively disprove the officer's unrebutted testimony that he viewed the drug paraphernalia immediately upon opening the door.

(3) The unlawful nature of the evidence that the officer saw "in plain view" was not immediately apparent. The Court held that in this instance the only real issue was whether the trial court's determination from the body camera that the items on the table were immediately and apparently drug paraphernalia were clearly erroneous. The Court held they could not find it to be clearly erroneous.

(4) The trial court erred "when it held the warrantless search was predicated on a lawful protective sweep." This was persevered, but was, according to the Court, a "red herring" because the items that gave rise to the search warrant were observed in plain view, and these were sufficient to give rise to a search warrant.

Justice Lambert wrote a scathing dissent, giving a near frame-by-frame accounting of the cop camera video, which she stated showed clearly that the police had moved across the threshold prior to announcing that he had seen drug paraphernalia in plain view. Justice Lambert also had concerns with the legality of the knock and talk, because the officers should not have entered the basement, even had they seen illegal contraband. Instead, they should have ordered the occupants out of the basement, secured the basement, sought a warrant, and then entered.

3. ***Terry*** **stop/articulable reasonable suspicion.**

***Vincent v. Commonwealth*, 706 S.W.3d 94 (Ky. 2024), Metcalfe Circuit Court. Opinion by Thompson, J., all sitting, Conley, Lambert, and Nickell, JJ., concur; Bisig J., concurs in part and dissents in part by separate opinion in which Thompson, J., joins; VanMeter, C.J., concurs in part and dissents in part with separate opinion in which VanMeter, C.J., and Keller, J., join; Keller, J., dissents by separate opinion in which VanMeter, C.J., joins.**

An informant's tip alerted police that some people were at a local gas station acting "high" like they were on meth. The basis for her knowledge was reported to be experience with her husband doing meth. Based on this, a police officer went to observe what was happening. Having identified the vehicle and persons who were the subject of the tip, he followed the car when it left the gas station, pulling it over when he observed that the vehicle's parking lights were red, in violation of a recently passed law making red parking lights illegal, which the officer believed was in effect at the time of the stop. No other traffic violations were observed. Upon pulling over the vehicle, he learned the driver's operating license was suspended and the passenger had an active warrant for arrest. The officer arrested them and, after the driver admitted to having 1.5 Lortab pills in the vehicle, searched the vehicle where he found a pipe with marijuana, a bag of a white crystal substance, and a bag of meth. Vincent was indicted for trafficking in a controlled substance and other misdemeanors.

The defense filed a motion to suppress, arguing there was no articulable reasonable suspicion that criminal activity was afoot sufficient to justify the stop, because the new parking lights law had not yet gone into effect. The trial court denied suppression, holding the officer had a "good faith basis" for believing that the new law was in effect, even though it would not become effective until 11 days later, and that the officer had made an objectively reasonable mistake of law. Additionally, the trial court held the informant's tip, apart from the traffic violation, was sufficient to establish reasonable and articulable suspicion to stop the vehicle. Vincent entered a conditional plea, appealing the suppression issue to the Court of Appeals, which affirmed. In reversing both courts, the Supreme Court held:

> An officer cannot stop a motorist based on speculation about what the law requires. There can be no good faith under such circumstances. An officer is to enforce the law as written by our General Assembly, which is currently in effect, as interpreted by our Appellate Courts. At minimum, this requires an officer to either read the law to be enforced (including its effective date), or to have received formal training about it, before seeking to enforce it. Officers are not justified in stopping drivers based upon their "fuzzy" understanding and "suppositions" about what the law requires. Therefore, we eliminate Officer Robertson's observation of "improper equipment" as justifying the stop of Vincent's vehicle.

As for the informant's tip, the Court held:

> The fact that the informant's husband used "meth," did not make her any kind of an expert on what kinds of behavior people who are under the influence of various kinds of intoxicating substances may generally exhibit. While such history could give her the ability to compare other people's behavior to her husband's when he was intoxicated, her general statement that "I know how they act" was insufficient to communicate how their behavior was the same as her husband's.
>
> Additionally, and more importantly, the information the informant conveyed to Officer Robertson about the couple's behavior to support her inference that individuals could intoxicated was far from definitive. It could not form a particularized and objective basis for concluding that the couple was using drugs, and thus provide reasonable and articulable suspicion to stop their vehicle for public intoxication or drunk driving. Instead, the behavior she reported was just as consistent with innocent behavior as intoxicated behavior.

4. **Warrantless seizure of bodily fluids/DUI/independent blood test.**

***Story v. Commonwealth*, 706 S.W.3d 263 (Ky. 2024), Campbell County. J. Bisig, joined by Lambert, Conley, Thompson, JJ.; Keller, J. concurs by separate opinion in which Conley and Thompson, JJ., concur; VanMeter, C.J., concurs in part and dissents in part in separate opinion, joined by Nickell, J.**

This case started in Campbell District Court, when the district judge deprived the defendant of an opportunity to test his independent blood sample, choosing instead to allow the Commonwealth to conduct a test on the

sample. Both the circuit court and the Court of Appeals affirmed the district court. As for the refusal to allow the defendant to conduct his own test, the Supreme Court found harmless error. However, allowing the Commonwealth to test it pursuant to a statutorily invalid warrant was erroneous, and the Commonwealth lacked the defendant's consent to conduct such a test.

Story was stopped for speeding and one working headlight. During the stop, the officer noticed Story had slurred speech, red cheeks, and a slow response time. He also smelled alcohol. Story did not satisfy the standard field sobriety testing. Story also admitted to being in two different bars that evening and having consumed multiple beers and two shots of Jagermeister. Finally, Story admitted he was intoxicated and should not have been driving. At the jail, the officer asked Story to submit to a breathalyzer, and Story complied, returning a result of 0.178. Story then invoked his statutory right to an independent blood test under KRS 189A.103(7). The officer took him to a hospital, and the hospital employee drew his blood. However, rather than test it, the employee gave the vial of blood to the police, who took it back to the police department and placed it in the evidence room.

Later in the case, the judge suppressed the breathalyzer results (due to an error in administration of the test), leaving the case without a BAC. When the defendant asked for his vial of blood back, the judge stated it had been "abandoned," and that the Commonwealth could test it if it obtained a warrant. The Commonwealth obtained a warrant, but the defense moved to suppress it because the underlying incident did not involve death or physical injury. The district court denied the motion, concluding that Story had "voluntarily provided it" while seeking his independent blood test. Story then entered a conditional plea, challenging this ruling. The circuit court affirmed, as did the Court of Appeals, the latter finding that Story had voluntarily given the blood sample to the police.

The Supreme Court first found the refusal of the trial court to give the sample back for the specific purpose of testing was in error, but was harmless, as the purpose was to compare the result to the results of the test by the Commonwealth. Since the Commonwealth's test was suppressed, this was harmless error.

The Court then found the testing of the blood sample was a search done in violation of the Fourth Amendment and Section 10 of the Kentucky Constitution, because the law at that time allowed for a warrant for a blood test only in the event of death or serious physical injury. (In 2022, the law was changed to provide that a warrant could be issued in any type of DUI case, but this DUI occurred in 2019). Furthermore, this test was not done pursuant to consent. Voluntarily giving a blood sample for the purpose of an *independent* test does not equal consent for the *Commonwealth* to test it.

The case was remanded with the blood result suppressed. The Supreme Court disagreed with the defendant that, under the circumstances, dismissal of the DUI charge was the only option.

II. FIFTH AMENDMENT/KENTUCKY CONSTITUTION SECTION 11 ISSUES

Miranda:

***Ellis v. Commonwealth*, 694 S.W.3d 294 (Ky. 2024), Simpson County. Opinion by Conley, J., joined by VanMeter, C.J., Lambert and Nickell, JJ. Concur; Keller, J., concurs in part and dissents in part, joined by Bisig, J.; Thompson, J., not sitting.**

Ellis was convicted of rape in the first degree, burglary in the second degree, and kidnapping, and sentenced to 50 years in prison. Part of the evidence against him was a recording of a statement he made to his girlfriend, who at the time of the statement was acting as an agent of the state, and after Ellis had invoked his right to counsel.

Ellis had been missing for two days, and his disappearance coincided with a rape of a person close to the family (called "Ashley" in the opinion, but not her real name). Ellis was the only family member not accounted for. Thus, Officer Johnson believed Ellis to have been involved in the rape of Ashley. Ellis was asked to come to the police station and give a statement ostensibly pertaining to his disappearance. Officer Johnson denied that Ellis was a suspect when he was first interviewed at the police station (and being recorded, unknown to Ellis), and that he became a suspect only two hours later, when he was read his *Miranda* rights and asked to sign a waiver. However, early in the interview Officer Johnson can be heard saying to a colleague that he intended to take a buccal swab of Ellis' DNA soon, an action that was irrelevant to the issue of disappearance and relevant only to the issue of identifying the rapist. Thus, Ellis was brought to the interview under false pretenses. Officer Johnson testified that Ellis was told he was free to leave at any time, but this statement did not appear in the video.

Throughout the interview, the police deceptively told Ellis that he was on camera footage going into the home of the rape victim and that treads found at the scene matched his truck tires. Neither statement was true. At some point, the interview became hostile, and Officer Johnson asked Ellis if he needed to talk to a lawyer, at which point Ellis replied, "I think I do." The officers left the room, telling Ellis they were going to go get "Margaret" (not her real name, Ellis' girlfriend and Ashley's sister), and that they would "get [Ellis] out of here in a second." The police then spoke to Margaret and told her they could not ask him any more questions because he had requested a lawyer, and then falsely told her that his semen had been found on Ashley and that his car had been seen at Ashley's residence. Officer Johnson admitted he had told Margaret these things in hopes she would question Ellis and elicit a response. When her first conversation with Ellis elicited no inculpatory information, Officer Johnson tried again, telling Margaret more lies, sending her back in to talk to Ellis, and ultimately getting inculpatory information from Ellis.

Holding that the statements of Ellis should have been suppressed, the Supreme Court noted the trial court had implicitly found Ellis to be in custody by finding that the right to counsel had been invoked (which only applies in a custodial setting). Thereafter, sending Margaret in

to talk to Ellis in the hopes of getting inculpatory statements that the police could not at that point lawfully get by further interrogation, was the "functional equivalent of interrogation designed to elicit an incriminating response." The Court then applied "harmless error" analysis and found there was insufficient other evidence adduced at trial, and the Commonwealth had relied almost exclusively on Ellis' confession, which in its words "seal[ed] the case."

III. SIXTH AMENDMENT/KENTUCKY CONSTITUTION SECTION 11 ISSUES

A. Fast & Speedy Trial

***Manning v. Commonwealth*, 701 S.W.3d 478 (Ky. 2024), Christian County. All sitting, opinion by Lambert, J., joined by Bisig, Keller, Nickell, and Thompson, JJ.; Conley, J., concurs in result only by separate opinion in which VanMeter, C.J joins.**

Manning was convicted of complicity to murder and complicity to robbery in the first degree and sentenced to life imprisonment. As this case is about fast and speedy trial, the following timeline is of importance, and is fully set out below:

- Arrested, October 21, 2020; remained in jail through trial.
- Indicted December 18, 2020.
- Pretrial conferences, January 27, 2021, and March 31, 2021.
- Third pretrial conference, May 19, 2021, where defense counsel advises court they were considering criminal mediation, and Commonwealth indicated it was amenable to doing so.
- Email to defense from Commonwealth indicating there was "no interest" in mediating the case and should probably set case for trial, July 16, 2021.
- **Manning files motion for speedy trial, July 21, 2021. Trial date set for October 4, 2021.**
- Commonwealth files notice to seek death penalty, July 23, 2021.
- Defense files motion to dismiss indictment or preclude death penalty for prosecutorial vindictiveness, July 24, 2021.
- Pretrial conference, August 4, 2021.
- Commonwealth withdraws death notice but still seeking enhanced penalties, August 4-24, 2021.
- Hearing on motions, August 24, 2021. Defense informed for the first time that DNA testing would not be complete by trial date. Counsel argued that enhanced penalties notice came only after motion for fast and speedy trial was filed, as a punishment. Also, additional "supplemental" discovery was given after motion for speedy trial was filed, but discovery was dated January, March, and April. Court did not rule on vindictiveness motion but agreed with defense's contention that a case involving enhanced penalties could not be tried by October 4, 2021.
- Status conference, September 22, 2021, co-defendant pleads guilty. Trial continued until December 7, 2021.
- Commonwealth moves for continuance, December 6, 2021, the day before trial, claiming ATF lab called that very day and informed him they found testable,

female DNA on the duct tape used to bind the victim. Defense objects. Court grants continuance. ATF says final report to be expected by February 2022. Trial court finds, for first time, that KRS 500.110 does not grant a statutory right to a fast and speedy trial, as Manning was not a state inmate with a lodged detainer.

- Pretrial conference, February 2, 2022. Lab says it is behind schedule, would be end of the month. Commonwealth and trial court say that speedy trial has no application in the matter, since defendant was not a state inmate. No acknowledgment of a constitutional right to a speedy trial. Trial set for August 8, 2022.
- Pretrial conference, April 6, 2022. Still no final report from ATF lab.
- Pretrial conference, July 6, 2022. Still no final report. Defense counsel prepared a draft order containing an exhaustive list of items and said that if items were supplied, they could still be ready by August 8 even without a final report. Commonwealth did not object. Lab ordered to produce items by July 15, 2022.
- Defense moved to suppress all forensic evidence, July 19, 2022, as the items were not produced by July 15. Court denied suppression, and defense agreed that continuance was only the option. Set trial for January 9, 2023.
- Client is convicted, and ultimately appeals, alleging fast and speedy trial violation.

Applying the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), the Court analyzed the merits as follows:

1. Length of delay.

   The Court found a delay between arrest and trial of two years, two months, and 20 days to be presumptively prejudicial.

2. Reason for delay.

   There were four periods of delay. The first delay of nine months was to give defense counsel time to review discovery and give parties time to submit the case for felony mediation (valid reasons). Second delay of three months can be attributed to the Commonwealth's intentionally filing an untimely motion. Third delay of 2.5 months was partially due to defense counsel having COVID (although he would be released from quarantine before trial), and because the court believed that failing to continue the trial would be unfair to both parties (valid reasons). Fourth delay, 13 months, was due to the delay in the ATF lab in completing DNA testing and submitting a final report. Although the Supreme Court said that this delay was "entirely unsatisfactory," the Court could not fault the judge for continuing the case because of the importance of DNA evidence and thus found this to also be a valid reason. The balance of this factor weighed in favor of the Commonwealth.

3. Defendant's assertion of right.

Defense counsel filed on July 21, 2021, and thereafter "continually and staunchly" asserted the right. This factor was "strongly" in favor of defendant.

4. Prejudice to the defendant caused by the delay.

According to the Court, the only prejudice alleged was that her mother was left to take care of her quadriplegic brother and two grandchildren, and—knowing that her mother was left alone to shoulder this burden—this caused the defendant to suffer an "unusual anxiety which extends beyond that which is inevitable in a criminal case." Though not disputed by the Court, the Court cited to a lack of an "affirmative showing" of these circumstances.

Adding it all up, the Supreme Court held:

> On balance, while the length of delay in this case was extensive, the majority of the delay can be attributed to valid reasons. And, while Manning consistently asserted her right to a speedy trial, we hold her assertion of prejudice was insufficient. We accordingly hold that her constitutional right to a speedy trial was not violated.

B. Right to be Present/Heard by Himself and Counsel

1. **Right to be present.**

***Sloss v. Commonwealth*, 709 S.W.3d 102 (Ky. 2024), Jefferson County. All sitting, opinion by Lambert, J., joined by Bisig, Conley and Thompson, JJ.; Nickell, J., dissents by separate opinion in which VanMeter, C.J., and Keller, J., join.**

Sloss was convicted of murdering his girlfriend, abusing her corpse, and being a persistent felony offender in the first degree. He was sentenced to 50 years imprisonment. During his representation, the defendant exhibited behavior which the Supreme Court characterized as "disruptive" and displayed an "unwillingness to participate" in his own trial. Prior to trial, he filed a motion to remove counsel which contained threats against his counsel. The court appointed new counsel for trial. Sloss' behavior continued, and he filed a "motion to waive all my rights voluntarily to a trial." The court convened a status conference, in anticipation of Sloss' trial, but Sloss remained in holdover and the court noted on the record that he had "opted not to join them." Trial started the following week, and again, Sloss refused to come out of holdover. Counsel reported that Sloss made it clear he was not going to participate in the trial. Despite several opportunities to come join the trial, Sloss persisted in refusing.

Finally, Sloss's attorney stated that it was his opinion that Sloss, under RCr 8.28(1), had waived his due process rights to attend. The trial court

responded that he was aware of the rule and that it called for a hearing, but that "it's a hearing for which he's not going to be present and our choices are limited. It's accede to his wishes or drag him up here." In light of what the judge anticipated would be the jury's reaction to seeing him strapped to a chair, the judge proceeded with the trial without him. [Space limitations prevent a full recitation here of all the lengths to which both counsel and the trial court went in an effort to get Sloss to trial; suffice it to say that attempts were repeated, and Sloss remained dogged in his determination not to participate in trial.]

On appeal, however, Sloss asserted as error that the trial court failed to hold a hearing pursuant to RCr 8.28(1) and the trial court was precluded from finding he waived his right to be present because it never obtained a personal, verbal waiver of his right to be present. In finding that Sloss nevertheless waived his right to be present at trial, the Supreme Court held:

> We hold that the conversations that the trial court had with counsel on the record about Sloss' refusal to attend trial, coupled with the court's personal knowledge of Sloss' behavior throughout the proceedings, constituted sufficient "hearings" under RCr 8.28(1). We further hold that, based on these hearings, the trial court made the requisite finding that Sloss refused to attend his trial, short of being forced, and therefore waived his constitutional right to be present.

The dissent opined that the majority had basically concluded the trial court made an implied finding of waiver following an implied hearing based on nothing more than hearsay and double hearsay, and that as such, this was insufficient to support a holding that Sloss had positively and intentionally waived a fundamental constitutional right.

2. **BONUS COVERAGE! UNPUBLISHED CASE! Right to counsel.**

***Wischer v. Commonwealth*, 2023-SC-0158-MR, 2025 WL 1197950 (Ky. April 24, 2025), Campbell County. All sitting, memorandum opinion, Lambert, C.J., Bisig, Conley, Goodwine, Nickell, Thompson, JJ., concur, Keller, J., concurs in result only.**

This is an unpublished case. It is included here for the following reasons:

a. There is no Kentucky published case that squarely addresses the merits. The Court cited to federal cases and a Connecticut case, but the only Kentucky case discussed was distinguished by the Court. Thus, this is essentially a case of first impression.

b. The case was unanimous, at least as to result, with six justices joining in the reasoning and Justice Keller concurring as to result only.

c. This was a "palpable error" case which reversed a conviction. Thus, the error made in this case will likely apply to all future cases where the same thing happens, whether objected to or not.

d. Finally, this case is something that judges, prosecutors and defense counsel alike should all be aware of. From the prosecution side, an otherwise airtight conviction may be reversed; from the defense side, a timely objection based on the merits of this case may result in a mistrial or be grounds for reversal on appeal. If counsel does his or her own appeals, missing it at trial may be missing it as a ground on appeal.

So, what is the case about? First degree rape of a child. In a nutshell, the prosecutor used the fact the defendant had consulted with counsel as evidence of guilt. The prosecutor's theme was "actions speak louder than words," and to that end elicited testimony from a police detective that Wischer had called two different criminal defense attorneys five different times. During cross-examination, the prosecutor inquired of the defendant whether the defendant had met with his attorneys many times. During closing, the prosecutor stated:

> And you can see the panic, right? Call to Dad. Call to Dad. Defense Attorney. Dad. Defense Attorney. Dad. Defense Attorney. Dad. That's not the activity of an innocent person. **That's the activity of someone starting to build a defense. ... He's telling you he's guilty without telling you he's guilty.** [Bold lettering supplied by Supreme Court.]

The Supreme Court stopped short of whether this was a Fourteenth Amendment due process violation, as some courts have held, or a violation of the Fifth Amendment right against self-incrimination, or a violation of the Sixth Amendment right to counsel. The Commonwealth relied solely on a case that the Supreme Court quickly distinguished. In this case, unlike the case relied upon by the prosecutor: "[T]he prosecutor directly invited the jury to accept the evidence of Wischer's consultations with a defense attorney as probative evidence of guilty."

C. Right to Jury Trial/Right to Confront Witnesses

1. **Right to a fair and impartial jury.**

***Woodside v. Commonwealth*, 706 S.W.3d 166 (Ky. 2024), Casey County. All sitting; Opinion by Justice Keller, J., joined by VanMeter, C.J., Bisig, Nickell, and Thompson, JJ; Lambert, J., concurs in result only by separate opinion, joined by Conley, J.**

This case involves a claim that a confrontation right was denied where the witness took the stand, but the court precluded a certain area of inquiry of

the witness (as opposed to the typical confrontation clause claim, where a witness is absent but something the witness said comes into trial).

Defendant was convicted of burglary and being a persistent felony offender, both in the first degree, and was sentenced to 20 years in prison. During the trial, the defendant wanted to cross-examine the victim, an undocumented immigrant, about his knowledge and efforts to obtain a "U visa," in the hopes the defense could establish the victim's bias and lack of credibility. To get a U visa, one must meet four criteria: the victim (1) has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity; (2) possesses information concerning the criminal activity; (3) has been helpful to federal, state, or local law enforcement who is investigating or prosecuting the criminal activity; and (4) the criminal activity violated the laws of, or occurred in, the United States. If approved, the U visa provides the crime victim with up to four years of temporary immigration status.

The Commonwealth moved to preclude the defense from inquiring into the immigration status of the victim, and the defense argued that it went to bias. The Commonwealth claimed to have no evidence that the victim had sought a U visa, but defense counsel wanted to hear under oath if the victim had applied, tried to apply, or would try to apply after the case was over, and whether or not anyone from the state had mentioned a U visa to him. Moreover, the defense simply wanted to inquire about his illegal immigration status because that in and of itself might expose some history of untruthfulness.

The trial court ruled in part for each party. The defense was not allowed to ask about immigration status but could ask whether the victim was receiving any benefit for his testimony. If the answer was "yes," the defense could delve into the benefit and its implications for his immigration status, but if the answer was "no," the defense had to move on.

The Supreme Court found no abuse of discretion. First, it was not clear that this charged burglary was a qualifying crime contemplated by the U visa application. Burglary is not listed as a qualifying crime. Inflicting "serious physical harm" to the victim qualifies, and an uncharged assault occurred in this case, but the defense did not "dissect the assault" comparison and determine whether it would have been a Class B or Class C felony, meaning the seriousness of the physical harm was not established. Second, it was apparent that neither the Hardin County Commonwealth's Attorney nor the judge completed the U Nonimmigrant Status Certification, and the record did not reflect that another qualifying law enforcement authority, such as a federal agency, was involved or would have certified the application.

2. **Confrontation Clause/cross-examination.**

***Sims v. Commonwealth*, 701 S.W.3d 313 (Ky. 2024), Hardin County. Opinion by Justice Lambert, J., all sitting, all concur.**

Sims was convicted in a jury trial of two counts of sexual abuse in the first degree and sentenced to 20 years' imprisonment. Sims complained of two points of error that will be discussed here. First, that the venire panel was not sworn in under oath prior to being asked questions during *voir dire*. Second, he argues he was denied his right to confront witnesses when the two child witnesses against him were allowed to testify in chambers via closed-circuit television outside of his presence, where his attorney was separated from him during this examination.

As to the unsworn jury, the Supreme Court held that while it was a tradition for judges to swear in a panel, it was not required by the Sixth Amendment right to an impartial jury, nor by Section 11 of Kentucky's Constitution, and the failure to administer an oath is not error. Nevertheless, the Court claimed that "[w]e do, however, recognize the value in the *voir dire* oath, and suggest that the continued administration of such an oath or affirmation is the best practice in the courts of this Commonwealth."

As to the alleged violation of the confrontation clause, the Court found it was not an abuse of discretion of the trial court to allow this given the court's finding of a "compelling need" as there was a "substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence." The facts which supported this finding were as follows:

> Here, the trial court heard sufficient testimony from D.C.'s and Z.C.'s mother, Sara, regarding the girls' inability to testify in Sims's presence. Sara testified that the girls would not be able to testify near Sims because "they don't want to say anything that will get him in trouble." Sara elaborated with testimony indicating that the girls would not be able to effectively communicate in Sims's presence: "D.C. will just sit there and cry, and Z.C. will mumble and stick her hands in her mouth. They're also embarrassed by it, so they don't want to say it out loud." Sara also testified that D.C. had told her that she could not testify against Sims. Sara testified that D.C. is "already hurt by it, so having to talk about it . . . it's going to hurt her even more."

3. **Confrontation Clause.**

***Faughn v. Commonwealth*, 694 S.W.3d 339 (Ky. 2024), Todd County. Opinion by Justice VanMeter, C.J., all sitting, all concur.**

Faughn was sentenced to life in prison following a wanton murder trial after driving his vehicle while high on methamphetamine, resulting in his vehicle leaving the roadway, entering a yard, and crashing into a home owner, killing her. At trial, two of the witnesses called to testify against him testified remotely via the Zoom software platform. One of these witnesses was an employee of a Pennsylvania Crime Lab, which had facilities that the Kentucky State Police Lab did not, who testified about the amount of drugs in Faughn's blood sample. The other witness was a toxicologist at the University of Kentucky. On appeal, Faughn argued that permitting them to testify remotely violated his constitutional right to confront witnesses.

The Supreme Court found the Commonwealth's justification – that testifying remotely would save the Commonwealth $10,000-$15,000 – insufficient, and thus a violation of the Confrontation Clause. However, this error was harmless, and thus not reversible, because "quantification of the amount of methamphetamine in Faughn's blood was cumulative of other properly admitted testimony." The Court pointed to the defendant's high rate of speed, erratic driving, his slurred speech, his droopy eyes, his failure to perform the standard field sobriety tests, and the fact that the Kentucky labs were able to detect the presence of methamphetamine in his blood, even thought they could not quantify the amount.

IV. EVIDENCE

A. Domestic Violence

1. **Domestic violence/coercive control.**

***Commonwealth v. Moore*, 709 S.W.3d 241 (Ky. 2025), Laurel Circuit Court. Opinion by Thompson, J., Lambert, C.J.; Bisig, Conley, Keller, Nickell and Thompson, JJ., SITTING. Lambert, C.J.; and Keller, J., concur. Conley, J., concurs by separate opinion. Nickell, J., concurs in result only. Bisig, J., concurs in part, dissents in part by separate opinion. Goodwine, J., not sitting.**

Melzena Moore pled guilty to manslaughter, first degree, under extreme emotional disturbance (EED), for an 18-year sentence pursuant to a plea agreement. The trial court did not apply the domestic violence exception in KRS 439.3401(6), which exempts from the "violent offense" statute someone who has been determined by a court to have been a victim of domestic violence or abuse with regard to the offenses involving the death of the victim or serious physical injury to the victim. Thus, Moore would have to complete 85 percent of her sentence before becoming eligible for parole, as opposed

to 20 percent had the exemption been applied. In denying the exemption, the trial court found she was a victim of domestic violence, but that her shooting of the victim did not occur "with regard to" such domestic violence. The Court of Appeals disagreed, and reversed the trial court's decision on this issue. The Supreme Court took up the issue on a discretionary grant.

The Court upheld the decision of the Court of Appeals and vacated the trial court's order with instructions to make factual findings on the issue of whether, under the totality of the circumstances, there was "some connection" between all the alleged acts of domestic violence and the manslaughter. In considering the totality of the circumstances, the Supreme Court specifically pointed to various instances of alleged abuse upon the defendant by the victim (regardless of whether the abuse resulted in a conviction or filing of an EPO/DVO), as well as the testimony of an expert on domestic violence, who testified that less than 2 percent of survivors call the police after abuse. Focusing on the "with regard to the offenses" language in the statute, the Supreme Court noted that the "some connection" standard was a low bar. More significantly for this update's purposes, the Supreme Court quoted from an article by Epstein & Goodman, "Discounting Women: Doubting Domestic Violence Survivor's Credibility and Dismissing Their Experiences," 167 *U. Ps. L. Rev.* 399, 414 (2019), and noted that the reason that many persons do not leave an abusive relationship is because of "coercive control."

> [Victims feel they cannot leave because they are stuck in a relationship] characterized by coercive control, a pattern of domination that includes tactics to isolate, degrade, exploit and control the survivor... Once a perpetrator of abuse has appropriated the power to verbally restrict his partner's day-to-day choices, physical violence then serves as both the abuser's means of enforcing that control and the punishment for attempting to resist it.

With that, the Supreme Court ushered in the concept of "coercive control," a concept that victim's groups and advocates have, for a long while, attempted to have recognized by the courts.

2. **Bonus coverage! Coercive control, Court of Appeals CASE!**

The Supreme Court's opinion could not have been more timely. The very next day, the Kentucky Court of Appeals issued an opinion which recognized the substance of coercive control in upholding the entry of a domestic violence order (DVO) by the Kenton Family Court. In ***Hogle v. Hogle*, 710 S.W.3d 482 (Ky. App. 2025)**, the family court judge found "coercive control" to have occurred in relationship to text messages sent by the husband to his spouse inquiring as to her whereabouts, as well as the employment of a private investigator to surveil her. Giving credence to the family court's findings, the Court held:

> While we agree that the words "coercive control" do not appear in the statute, the United States Supreme Court has recognized that… "DOMESTIC Violence" is not merely a type of "violence"; it is a term of art encompassing acts that one might not characterize as "violent" in a nondomestic context… Minor uses of force may not constitute "violence" in the generic sense… But an act of this nature is easy to describe as "domestic violence," when the accumulation of such acts over time can subject one intimate partner to the other's control.

Between the two to-be-published cases, trial courts seemingly have the "green light" to consider patterns of behavior that—in the domestic context—can be abusive and controlling of a spouse (or another person subject to an EPO/DVO).

B. KRE 404(b) "Other Crimes"

Witness retaliation/KRE 404(b) evidence:

***Williams v. Commonwealth*, 706 S.W.3d 177 (Ky. 2024), Graves Circ. Court. All sitting, opinion by Bisig, J., joined by VanMeter, C.J., Conley, Keller, and Lambert, and Nickell, JJ.; Thompson, J., concurs in result only.**

Defendant was convicted of retaliating against a participant in the legal process and being a persistent felony offender in the first degree. He was sentenced to 20 years. In an earlier case, Williams had been convicted of sexual abuse of a victim under 12. The child was the daughter of a girlfriend of Williams, "Leslie," who was a witness against Williams in the sexual abuse trial. Around four days after being convicted in that case, Leslie received a postcard from Williams that said:

> Leslie, hi how are you doing? Things going alright? I'm doing alright considering you have to watch for all of the snakes, they are everywhere. Wish me luck in the Appeals Court, we might get to do it all over again.
>
> By the way, I found this and thought you might want to have it, [Leslie's date of birth and social security number]. Several other people wanted it. Good luck in the future. In the end, we all get what we deserve.
>
> Lots of love always & forever.
> John
> P.S. Give the kids a big kiss and hug for me.

Lelie considered this postcard threatening and was disgusted with the comment to "give the kids a big kiss and a hug" after having been convicted of sexually abusing one of them. Thus, Leslie contacted the police, and Williams was charged with

intimidating a participant in a legal process. During the trial, the jury was informed about Williams' prior conviction for sexually abusing the child. The Commonwealth filed a KRE 404(b) notice, alleging that it would provide context to demonstrate that his comment asking Leslie to give a kiss and a hug to her children for him was threatening.

The Supreme Court found no abuse of discretion in admitting the KRE 404(b) evidence for the same reasons the Commonwealth argued it should come in; the sexual abuse conviction provided context for why the postscript on the postcard was so threatening.

As for the merits of the intimidation of a participant, the defense contended on appeal that, in order to prevail, the Commonwealth had to prove intent to cause damage to tangible property, and the threat that others had her social security number and address was not a threat to tangible property. The Supreme Court disagreed, finding that "fraudulent accessing of one's electronic accounts plainly can result in physical damage to one's property," *e.g.,* stealing funds from a bank account which results in the loss of a home in foreclosure proceedings. Moreover, the Supreme Court did not believe the General Assembly intended such a strict interpretation of the term "tangible property" such that it would not include bank accounts.

C. Self-Protection

Self-protection/initial aggressor instruction:

***Dunkleberger v. Commonwealth*, 2023-SC-0385-MR, 2025 WL 890870 (Ky. Mar. 20, 2025), Wolfe Circ. Court. Opinion by Conley, J., joined by Lambert, C.J., Goodwine, Nickell and Thompson, JJ; Keller, J., Bisig, J., dissents by separate opinion.**

Defendant was convicted of first degree manslaughter and sentenced to 20 years in prison after a jury rejected his self-protection claim by finding him to be the "initial aggressor" of the incident that resulted in the victim's death. Under KRS 503.060, the use of physical force upon another is not justifiable when the accused is the initial aggressor and uses unlawful physical force. In this case, the defendant screamed at the victim, and raised up his shirt to reveal a holstered, lawfully possessed, firearm. Thereafter, the victim, according to some testimony, responded "what are you going to do, pull a Glock on me?" The victim, carrying a knife and having a bulge in his pocket which the defendant to believe to be a weapon, said that he would "gut" the defendant "like a fish," and then moved his hand toward his pocket. At that point, the Defendant drew his gun and fired.

In reversing the conviction, the Supreme Court held that "the question is not whether yelling a name or displaying a holstered firearm is physical force and therefore unlawful, but whether it is unlawful physical force." Since the firearm was legally possessed and remained holstered, and since the yelling of the victim's name does

not constitute physical force inflicted upon another, the actions of the defendant did not meet the standard necessary for being an "initial aggressor."

The Court noted that the yelling of the victim's name, and the act of displaying his holstered weapon, were minutes apart and not to be considered as part of one course of aggressive conduct. Moreover, even if this was sufficient initial aggression, the fact that the two parted ways for several minutes after this initial aggression terminated the initial encounter.

D. Demonstrative Evidence

Demonstrative evidence/dramatization:

***Lampkins v. Commonwealth*, 701 S.W.3d 99 (Ky. 2024). All sitting, all concur. Opinion affirming by Nickell, J.**

Defendant was convicted of two counts of murder and other crimes and sentenced to life in prison without possibility of parole. On appeal, Lampkins argued several points of error, only one of which is focused on here: Improper demonstrative evidence in the form of a dramatization. To demonstrate how one of the murder victims could have been shot, a model door was brought into the courtroom. An assistant prosecutor played the part of the victim, and the Commonwealth's expert, Medical Examiner Dr. Springer, played the part of the defendant, showing how the shooting was believed to have occurred. A prop gun, instead of a real gun, was used in the demonstration, although the trial court and defense did not know at the time that it was a prop. It is unknown whether the gun was of the same kind as the one used. The defense objected to the demonstration as witness speculation.

The Supreme Court noted the proponent of demonstrative evidence bears the burden of establishing sufficient similarity:

> If the experiment is offered as a simulation of actual events, then there must be a substantial similarity between the experimental conditions and those which are the subject of the litigation. If, on the other hand, the experiment is not meant to simulate what happened, but rather to demonstrate some general principle bearing on what could or what was likely to have happened, then the similarity between the experimental and the actual conditions need not be as strong. (*Quoting U.S. v. Wanoskia*, 800 F.2d 235, 237-238 (10th Cir. 1986)).

The Supreme Court could not conclude the Commonwealth met the requisite foundational showing of a fair comparison, especially because the prop gun was chosen at random without any comparison to the type of weapon actually used. Thus, the Court could not conclude the demonstrative evidence was properly admitted. However, the Court found the admission of the evidence to be harmless error, due to "particularly compelling" circumstantial evidence of Lampkin's motive, intent and identity.

V. SENTENCING AND POST-CONVICTION ISSUES

A. Hammer Clause

***Poore v. Commonwealth*, 709 S.W.3d 166 (Ky. 2024), Whitley County. All sitting; Opinion affirming and vacating in part by Keller, J., joined by VanMeter, C.J., Bisig and Nickell, JJ.; Lambert, J., dissents by separate opinion in which Conely and Thompson, JJ., join.**

Defendant pled guilty to receiving a stolen firearm, possession of a handgun by a convicted felon, and one count of being a persistent felony offender in the first degree. Under the original plea bargain, Defendant was supposed to be sentenced to 10 years; however, the plea bargain contained a "hammer" clause, whereby he was released on his own recognizance prior to sentencing, with language in the plea bargain that stated if he "failed to appear at sentencing without just cause," he would be sentenced up to "the maximum aggregate sentenced allowed by law." After entry of the plea, but before sentencing, the defendant's counsel withdrew after the defendant wished to withdraw his guilty plea. Defendant checked into a rehabilitation facility but thereafter exited treatment. The motion to withdraw the plea and the motion for counsel to withdraw were both set for the same day as sentencing.

Defendant did not show up. Rather, he was arrested in Pike County for shoplifting and as a result, failed to appear at his sentencing, whereupon the trial court granted the motion of the attorney to withdraw, denied the motion to withdraw his guilty plea, and sentenced him to the maximum lawful sentence of 20 years.

Upholding the hammer clause, the Supreme Court majority found no abuse of discretion and declined to comment on whether an absence at sentencing due to an arrest on a new charge was "just cause" not to appear at sentencing.

Justice Lambert dissented, arguing the sentencing court abused its discretion by enforcing a hammer clause without considering whether there was just cause for the defendant's failure to appear. The Court could have had the power to order the defendant's transport, and the defendant had no ability to appear without the court order.

B. Revocation of Diversion/Probation

1. **Revocation of pretrial diversion.**

***Commonwealth v. Raider*, 706 S.W.3d 62 (Ky. 2024), Estill County. Opinion by Thompson, J., reversing, all sitting, all concur.**

Defendant was granted a pretrial diversion on the condition that he attends and completes drug court. He did not; rather, he absconded. The issue was whether the trial court, on its own initiative and without the Commonwealth filing a motion to revoke, could conduct a revocation hearing. The Court of

Appeals held the trial court could not; however, the Supreme Court agreed instead with the trial court:

> Revocations of diversions are to be determined by the same criteria as probation revocation, and the defendant is entitled to the same rights as if probation revocation were at issue. KRS 533.256(2). Therefore, the standard for reviewing a trial court's decision to void a diversion agreement is the same abuse of discretion standard which is used to review probation revocation decisions. The test for abuse of discretion is whether the trial judge's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The implications of this holding are interesting. It is one thing to decide that a revocation of diversion agreements is to be treated in the same way as revocation of probation orders, once a hearing has been commenced, but it sidesteps completely the issue of separation of powers. A probation occurs solely by order of the court. No one may reasonably dispute that the court has control over policing its own orders, and revoking the probation on its own initiative when the court has knowledge that the order has been violated. However, a diversion agreement is an agreement between the Commonwealth and the defendant whereby the Commonwealth is agreeing to dismiss the charges. In *Flynt v. Commonwealth*, 105 S.W.3d 415 (Ky. 2003), the Supreme Court held that—since completion of a diversion results in a dismissed case—the executive branch would have to agree to the diversion before it could exercise its power to grant a diversion:

> To interpret KRS 533.250(2) as permitting a trial court to approve pretrial diversion applications over the Commonwealth's objection—and thus conferring upon circuit courts the discretionary authority that we have previously held to be within the exclusive province of the executive branch—would construe it in a manner inconsistent with Kentucky's constitutional separation of powers provisions. In accordance with the rule of statutory construction referenced above, we therefore hold that KRS 533.250(2) gives a circuit court the discretion to approve or disapprove an application for pretrial diversion only when the Commonwealth has recommended that the court approve the application.

If the Supreme Court lacks the constitutional authority to grant diversion agreements without the consent of the Commonwealth, how does it possess the authority to undo the diversion agreement without the agreement (as evidenced by a motion to revoke) of the Commonwealth?

2. **Revocation of probation/fugitive tolling doctrine.**

***Commonwealth v. Ellery*, 713 S.W.3d 114 (Ky. 2025), Jefferson County. Opinion by Goodwine, J., joined by Bisig, Keller, and Nickell, JJ.; Conly, J., dissents by separate opinion in which Lambert, C.J., and Thompson, J., join.**

Defendant, probated in June 2016 for five years on a five year sentence, absconded. A warrant was issued for his arrest, and he was arrested in October 2021, over five years after being probated. At his revocation hearing in November 2021, his first appearance after being re-arrested, the court granted a continuance to the parties. However, the court did not at that first appearance extend his probationary period. When he appeared for his revocation hearing a week later, defense counsel moved to dismiss the revocation for lack of jurisdiction, since his probation was not extended and had expired in June 2021. The trial court denied the motion, but the Court of Appeals reversed, citing a lack of jurisdiction. On appeal to the Supreme Court, the Commonwealth argued that his arrest warrant had tolled the running of his expiration of probation, and asked the Supreme Court to adopt the "fugitive tolling doctrine," which would have tolled his five years for the entirety of the time between his absconding and being re-arrested. In denying the Commonwealth relief, the Supreme Court held:

> Adopting the fugitive tolling doctrine at the Commonwealth's request would be in direct contravention of KRS 533.020(4) and our standing interpretation of that statute because it requires extending the probationary period indefinitely without a "duly entered court order" as required by KRS 533.020(4).
>
> This Court also lacks the authority to adopt the fugitive tolling doctrine under the separation of powers doctrine, which "precludes each of the three branches of government from encroaching upon the domain of the other two branches." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 91 (Ky. App. 2004).

C. Fines & Fees

1. **Jail fee reimbursement.**

***Ford v. Commonwealth*, 709 S.W.3d 203 (Ky. 2025), Carlisle Circuit Court. Opinion by Conley, J., all sitting, all concur.**

KRS 441.265(2)(a) allows a county jailer to adopt, with approval of the county's governing body, a jail reimbursement policy whereby a defendant can be taxed at sentencing with the costs of reimbursement for his stay in the jail. However, as held in *Capstraw v. Commonwealth*, 641 S.W.3d 148 (Ky. 2022), evidence of the existence of a jail reimbursement policy must be

adduced at time of sentencing. In this case, the only evidence that was introduced was that there was an agreement between Carlisle and McCracken Counties whereby Carlisle County would pay $26 a day for housing inmates on its behalf. The Supreme Court held that evidence of an inmate reimbursement agreement between jails was insufficient to prove the existence of a jail reimbursement required by *Capstraw*. Thus, Ford did not have to pay for his jail stay.

2. **Human trafficking fees.**

***Jeffreys v. Commonwealth*, 706 S.W.3d 51 (Ky. 2024), Jefferson Circuit Court. Opinion by Conley, J., all sitting, VanMeter, C.J., Bisig, Lambert, Keller and Nickell, JJ. concur; Thompson, J., dissents by separate opinion.**

Blake Jeffreys called what he thought was an escort service and arranged to meet an escort at a hotel to have sex in exchange for $120. As it turns out, this was a police sting operation, and the "escort" was actually an undercover police officer. He was arrested upon arrival and charged with one count of human trafficking to which he pled and was sentenced to one year probated for five years. Pursuant to KRS 529.130, he was ordered to pay a "fee" of $10,000. Jeffreys requested waiver of the fee under KRS 534.030(4), arguing that the "fee" was actually a "fine," and thus could not be imposed due to Jeffreys' indigency. Jeffreys appealed, arguing the fee was an unconstitutional excessive fine. The Court of Appeals rejected these arguments, and the Supreme Court granted discretionary review.

Sidestepping the issue of whether the $10,000 was a fine or a fee, the Supreme Court stressed that in any event *it was not imposed by KRS 534.030* and thus subsection (4) which would have prohibited the fine from being imposed upon an indigent was inapplicable. However, Jeffreys was not without an avenue toward relief. The Supreme Court stated he could petition the trial court to waive, reduce or otherwise modify the payment plan upon proof of facts supported by substantial evidence that he has an inability to pay, whereupon he may have the amount of his payments reduced, the period of time to pay expanded, and/or the manner of payment modified in another way.

Justice Thompson filed a strong dissent, saying the $10,000 fee was grossly disproportionate as applied to Jeffreys' actions, which he likened to prosecuting a prostitute's "John" for human trafficking. "It makes no sense to recriminalize soliciting prostitution, which was never more than a misdemeanor, into a Class C or D felony of promoting human trafficking." It also made no sense that there is a one-size, fits-all very sizeable human trafficking victims service fee, which was payable by Jeffreys in spite of its "ill-fit" to the facts into the discretionary fund of the Attorney General. "This has the appearance of 'cash register justice' with all its concomitant injustice."

D. Retroactivity

Sentencing/retroactivity of a law:

***Commonwealth v. McKinney*, 709 S.W.3d 191 (Ky. 2025), Warren Circuit Court. Opinion by Bisig, J., all but Thompson, J., sitting, all concur.**

McKinney was convicted of murder and robbery in a capital case and sentenced to life and 35 years, consecutively. At the time of his sentencing, *Rackley v. Commonwealth*, 674 S.W.2d 512 (Ky. 1984) interpreted KRS 532.110(1)(c) to allow a life sentence in a capital case to run consecutively to sentences imposed upon other convictions at the same trial. However, after he was sentenced, *Rackley* was overruled by *Bedell v. Commonwealth*, 870 S.W.2d 779 (Ky. 1993), which reinterpreted the same statute to mean that a life sentence, whether in a capital or non-capital case, cannot run consecutively to another sentence given in the same trial. The issue before the court was whether *Bedell* was retroactive and thus applicable to McKinney's case.

The Supreme Court held that *Bedell* had announced a new rule of law, not a mere clarification of an existing rule of law, and therefore was not retroactive, even though the wording in the statute had not changed between the *Rackley* and *Bedell* interpretations:

> [W]hen a new non-constitutional rule of state criminal procedure is announced in the Commonwealth, it does not apply retroactively to any other criminal judgment already final on direct appeal at the time the rule is announced. [Citation omitted.] On the other hand, the announcement of a mere clarification of the law, rather than a new rule, may be applied retroactively in other criminal cases even on collateral attack, *i.e.* even in proceedings following finality on direct appeal.

FOR YOUR INFORMATION ...

The Kentucky Law Update: Continuing Legal Education for All Kentucky Lawyers

The Supreme Court of Kentucky established the Kentucky Law Update Program as an element of the minimum continuing legal education system adopted by Kentucky attorneys in 1984. The KLU program is now offered in a hybrid format. The 2025 Kentucky Law Update is presented as a one-day, in-person program at nine different locations across the state. The 2025 On-Demand Kentucky Law Update is available virtually on the Kentucky Bar Association website from September 1st until December 31st. These two programs combined offer every Kentucky attorney the opportunity to meet the 12 credit CLE requirement, including the 2 ethics credit requirement **close to home and at no cost!** Judges can also earn continuing judicial education credits through the Kentucky Law Update.

This program was designed as a service to all Kentucky attorneys regardless of experience level. It is supported by membership dues and is, therefore, every member's program. The program is a survey of current issues, court decisions, ethical opinions, legislative and rule changes, and other legal topics of general interest that Kentucky practitioners encounter daily. As such, the program serves both the general practitioner and those who limit their practice to specific areas of law. The Kentucky Law Update program is not intended to be an in-depth analysis of a particular topic. It is designed to alert the lawyers of Kentucky to changes in the law and rules of practice that impact the day-to-day practice of law.

About the Written Materials and Presentations

The KLU written materials are the result of the combined efforts of numerous dedicated professionals from around Kentucky and elsewhere. The KBA gratefully acknowledges the following individuals who graciously contributed to this publication:

Jared Burke
Robbie O. Clements
Rebekah Cotton
Stephen Embry
Jennifer Gaytan
Tressa Hamilton
Eric Harris
Robert A. Jenkins
Nima Kulkarni
Lori J. Reed
Jeffery L. Sallee
Sarah-James Sendor
Nichole Shelton
Misty Clark Vantrease
B. Scott West

Special Acknowledgments

Special thanks to the following KBA Sections, Committees, and other organizations whose participation and assistance with the 2025 Kentucky Law Update programs have been invaluable:

AppalReD Legal Aid
Casey Bailey & Maines PLLC
FNF Family of Companies
KBA Criminal Law Section
KBA Elder Law Section
KBA Law Practice Committee
KBA Office of Bar Counsel
Kentucky Access to Justice Commission
Kentucky Court of Appeals
Kentucky Legal Aid
Lawyers Mutual of Kentucky
Legislative Research Commission
Legal Aid of the Bluegrass
Legal Aid Society
New Americans Initiative
Supreme Court of Kentucky

Presentations are also made on a voluntary basis. To those who volunteer in this capacity, special gratitude is owed. Individuals who contribute to this program support the professional development of all members of the Kentucky Bar Association. We wish to express our sincere appreciation in advance to these individuals.

A special acknowledgment to the organizations, authors, presenters, moderators, and other 2025 Kentucky Law Update program volunteers will appear in the January 2026 issue of the *Bench & Bar*.

CLE and Ethics Credit

The one-day, in-person 2025 Kentucky Law Update program is accredited for 6 CLE credits, including 2 ethics credits. The 2025 On-Demand Kentucky Law Update is accredited for 9.25 CLE credits, including 3 ethics credits. One credit is awarded for each 60 minutes of actual instruction, as noted on the agendas provided on the KBA website.

The Kentucky Bar Association's 2025 Kentucky Law Update programs are accredited CLE activities in numerous other jurisdictions. Credit categories and credit calculations vary from state to state. CLE reporting information for other states will be provided at the registration desk at the in-person programs. The out-of-state information for the on-demand sessions will be available on the program website.

Kentucky judges: don't forget you can claim CJE credit for attending this program.

REMEMBER: Reporting attendance credits is now done online. Visit the Kentucky Bar Association website for reporting information. The activity numbers for the in-person and on-demand programs are listed on the corresponding agendas and must be used to report credits through the Member CLE Portal.

Evaluations

The 2025 Kentucky Law Update is *your* program, and your input *is* valued and needed. Links to the program evaluations for the live, in-person programs will be provided to all registrants via email. A link for the on-demand evaluation will be located on the program webpage. Please take a few minutes to complete the evaluation. We appreciate your assistance in improving this program.

Kentucky Bar Association
2025-2026 Board of Governors

Todd V. McMurtry
President
Ft. Mitchell

Matthew P. Cook
President-Elect
Bowling Green

J. Tanner Watkins
Vice President
Louisville

Rhonda Jennings Blackburn
Immediate Past President
Pikeville

Kyle R. Bunnell
Young Lawyers Division Chair
Lexington

Amelia M. Adams
Lexington

Douglas G. Benge
London

Miranda D. Click
Pikeville

Jennifer M. Gatherwright
Crescent Springs

William M. "Mitch" Hall, Jr.
Ashland

Sheila P. Hiestand
Louisville

Sarah Hay Knight
Somerset

LaToi D. Mayo
Lexington

Stephanie McGehee-Shacklette
Bowling Green

Susan D. Phillips
Louisville

Ryan C. Reed
Bowling Green

James A. Sigler
Paducah

Catherine D. Stavros
Fort Mitchell

Matthew C. Tierney
Owensboro

2025-2026 Continuing Legal Education Commission

Jennifer S. Nelson
First Supreme Court District

Colton W. Givens
Second Supreme Court District

Kelly K. Ridings
Third Supreme Court District

Megan P. Keane
Fourth Supreme Court District

Nealy R. Williams
Fifth Supreme Court District

Frank K. Tremper
Sixth Supreme Court District

Robert Stephen McGinnis, Chair
Seventh Supreme Court District

Justice Robert B. Conley
Supreme Court Liaison

Cassie H. Cooper
Director for CLE

Kentucky Bar Association CLE Staff

John D. Meyers
Executive Director

Cassie H. Cooper
Director for CLE

Lori J. Reed
CLE Attorney Editor &
Section/Division Program
Coordinator

Caroline J. Carter
CLE Lead Program
Coordinator – Annual
Convention & Virtual Education

Laura Cole
CLE Program Coordinator –
Kentucky Law Update & New Lawyer Program

Coleen Kilgore
CLE Compliance
Coordinator

Terri Marksbury
CLE Regulatory Coordinator &
Commission Paralegal

Clifford D. Timberlake
CLE Accreditation
Coordinator