

KENTUCKY LAW UPDATE



2026

ADVANCING THE PROFESSION THROUGH EDUCATION

Supreme Court Criminal Law Case Update

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I. SEARCH AND SEIZURE ISSUES**A. Warrantless Seizure/Consensual Encounter v. Investigative Detention**

Osborne v. Commonwealth, 718 S.W.3d 622 (Ky. 2025), Estill Circuit Court; All sitting, opinion by Nickell, J., joined by Lambert, C.J., Bisig, Conley, Goodwine and Keller, J.J.; Thompson, J., dissents by separate opinion.

Acting on a tip, Kentucky state troopers showed up to Osborne's house in search of a stolen trailer. After explaining their purpose, Osborne agreed to allow the troopers to inspect his trailers and search his property. One trooper observed that Osborne kept placing his hands in his pockets, which contained two large bulges. From previous experience, the trooper knew that Osborne often carried a small handgun in his front pocket. On two previous occasions, he had asked Osborne to remove the gun and place it inside the residence before they talked. This time, when the trooper asked what was in his pockets, Osborne responded that he did not have a gun. Unsatisfied, the trooper asked him to empty his pockets. In the left was a large wad of cash. In the right, there was a baggie with a brown substance, which Osborne attempted to hide behind his back. Believing (correctly) that the bag contained heroin, Osborne was arrested and charged with trafficking. He moved to suppress the evidence on the ground that he was illegally seized and required to empty his pockets. The trial court found that it was a valid consent search.

The Supreme Court affirmed the trial court, finding the conclusion that this was a voluntary removal of the items was not clearly erroneous:

The line of demarcation between a consensual encounter and an investigative detention is a police officer's use of physical force, show of authority, or other application of explicit or implicit means of coercion "which . . . would compel a reasonable person to believe he was not free to leave." *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999). The standard governing this determination is objective and does not depend on the suspect's subjective beliefs regarding the nature of the encounter [citation omitted]. Similarly, a police officer's subjective intent "is irrelevant except insofar as that may have been" communicated to the suspect. *Id.* at 555 n.6.

This line of demarcation would be more easily understood if people would start asking "Do I have to?"

B. Warrantless Seizure/Fourth Amendment

Buechele v. Commonwealth, 718 S.W.3d 807 (Ky. 2025), Nelson Circuit Court; All sitting, all concur, opinion by Thompson, J.

Defendant was jaywalking. When police decided to stop and cite him for the violation, the defendant turned away and continued walking. The officer exited his patrol car, approached the defendant, and told him to stop. Defendant did not. Officer caught up with defendant and grabbed him from behind, putting his hands on his forearms. Defendant, whose hands were still in his pockets while being escorted to the patrol car, suddenly pulled out his hands. Officer looked down and noticed drugs scattered underneath his patrol car. Defendant then asked for a cigarette, and when the officer got the defendant's cigarette pack it contained additional drugs.

The defense moved to suppress the drugs, saying they were discovered after an unlawful seizure of the defendant on the grounds that, because of the condition of the street, including a lack of sidewalks, people who lived in the community commonly walked on the street in that area. Furthermore, Buechele argued that walking away from a police cruiser is not a valid justification for the officer to physically detain him, and the resultant drugs found were thus fruits of the poisonous tree. The trial court did not suppress the drugs, and the Court of Appeals affirmed.

The Supreme Court held that it does not violate the [Fourth Amendment](#) of the United States Constitution when police physically seize a person for an observed violation for the purpose of writing a citation if the person fails to cooperate with verbal commands.

Law enforcement officers who have probable cause to believe a traffic law violation has occurred may properly stop motorists and temporarily detain them without violating the [Fourth Amendment](#), regardless of the officer's subjective motivation for doing so. *Whren v. United States*, 517 U.S. 806, 810 19 (1996); *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001).

C. Warrantless Search/Search Incident to Arrest/[Fourth Amendment](#)

Hernandez v. Commonwealth, 730 S.W.3d 923 (Ky. 2026), Jefferson Circ. Court; All sitting, opinion by Nickell, J., joined by Lambert, C.J., Bisig, Conley, Goodwine, and Thompson, J.J., Keller, J., concurs in result only.

This case involved a search incident to arrest. The issue was whether the police had probable cause for arresting Hernandez in a double murder case. If the police have probable cause to arrest someone suspected of committing a felony outside the presence of a police officer, they may make a lawful arrest, even without an arrest warrant, thus making the warrantless search incident to arrest lawful.

Police were investigating the shooting deaths of two men who were killed in Louisville. Eyewitnesses told investigators that a green Chevy Tahoe pulled up next

to the victims' vehicle before gunfire erupted. Video surveillance showed the Tahoe had a unique antenna and wheels, and the rear window wiper arm had a distinctive spot of white paint. Police then received a tip from the sister of one of the victims that Hernandez's girlfriend may have knowledge. This girlfriend said that Hernandez had confessed to her that he had shot one of the men in the head, but then said he was only joking. Video surveillance of Hernandez's home showed a green Tahoe, a white spot on the rear wiper arm, and unique wheels and antenna which matched descriptions given by eyewitnesses. Finally, Hernandez was seen driving the vehicle numerous times and was observed in the video surveillance on more than one occasion exiting the Tahoe while in possession of a handgun.

Based on this, the police effected a warrantless arrest of Hernandez outside his home, and during the search incident to arrest, found the gun. The defense moved to suppress and was overruled. Hernandez entered a guilty plea reserving the suppression issue for appeal.

The Supreme Court held the Constitution does not require an *arrest* warrant where there is an arrest based upon probable cause. While a search of one's home requires either a search warrant or an exception to the warrant requirement, an arrest warrant on a felony requires neither; it only requires probable cause that a crime has been committed and that the suspect/arrestee committed it. There was plenty of probable cause in this case.

Note: This case has one of the most extensive discussions on the definition of probable cause that the author has ever seen.

II. PRETRIAL ISSUES AND MOTIONS

A. Joinder/Severance of Cases

Gibbs v. Commonwealth, 733 S.W.3d 204 (Ky. 2026), Hopkins County; All sitting, all concur, opinion by Goodwine, J.

Gibbs was charged with various sexual offenses, including rape of a child under 12 years old, incest with a child under 12 years old, rape of a minor under 14 years old, two counts of possession of matter portraying a sexual performance by a minor, several other sexual offenses, and PFO in the second degree. The charges stemmed from actions of the defendant against three different girls. Gibbs was convicted and sentenced to life in prison.

Prior to trial, Gibbs moved to sever the cases into three, one for each girl involved. The trial court denied the motion, and the Supreme Court affirmed. Joinder of separate offenses is allowed if the offenses are of the same or similar character or are based upon the same acts or transactions connected together, or constituting parts of a common scheme or plan. To determine if joinder is appropriate, a trial court must find there is a "sufficient nexus" between or among the offenses to justify a single trial. In this case, the Supreme Court found that there was a common scheme or plan to obtain sexual gratification by engaging in sexual acts with easily accessible

and vulnerable victims. While the acts were not identical sexual crimes, the victims were of similar ages, occurred within the same year, and all occurred in Gibbs' bedroom. Moreover, he sought and retained photos of each of the victims. A sufficient nexus was thus established.

B. Denial of a Continuance

Simpson v. Commonwealth, 718 S.W.3d 900 (Ky. 2025), Kenton Circ. Court; All sitting, opinion by Goodwine, J., joined by Lambert, C.J., Bisig, Conley, Nickell and Thompson, J.J.; Keller concurs in result only.

In this murder case, trial was scheduled to begin on May 30, 2023. In the month prior to trial, the Commonwealth amended the indictment twice, once to include a charge of complicity to murder, and again to charge Simpson as a PFO in the first degree. Two weeks before trial, the defense moved for a continuance to allow time to hire an expert and prepare for trial based on the amended indictment. The trial court granted funds for an expert but denied the motion for a continuance. The trial proceeded as scheduled. The client was found guilty of murder and was sentenced to 30 years.

The Supreme Court considered each of the six factors listed in *Edmonds v. Commonwealth*, 189 S.W.3d 558, 564 (Ky. 2006):

- Length of the delay;
- Previous continuances;
- Inconvenience to the litigants, witnesses, counsel and court;
- Whether the delay is purposeful or is caused by the accused;
- The complexity of the case; and
- Whether denying the continuance will lead to identifiable prejudice.

In this case, the first five facts largely weighed in favor of granting the continuance, as the delay sought was only three months, there had been no prior continuances, and the murder case was proceeding relatively quickly. There was no showing in the record of any inconvenience, the defendant was not the cause of the delay, and complicity to murder is serious and of at least moderate complexity.

Nevertheless, the court can only find an abuse of discretion if there is some identifiable prejudice. A defendant must state with particularity how his or her case will suffer if the motion to postpone is denied. In this case, the defense argued that failing to grant a continuance was effectively a denial of the expert witness, which the court had simultaneously – by its own order – found to be “necessary for the preparation and presentation of a defense.”

A trial court cannot find that an expert witness is necessary for the preparation of a defendant's defense while simultaneously preventing him from hiring such an expert by denying a motion for a continuance. This amounts to identifiable prejudice amounting to an abuse of discretion, which necessitates reversal.

[There was also a “Moss” violation in the case, but as we fully discuss that in other cases, discussion is omitted here.]

C. Disqualification of Counsel

Schulkers v. Lape, 730 S.W.3d 903 (Ky. 2026), Kenton Circ. Court; All sitting, opinion by Thompson, J., joined by Lambert, C.J. Bisig and Conley, J.J.; Conley, J., concurs by separate opinion, joined by Lambert, C.J. and Thompson, J.; Goodwine, J., concurs in result only; Nickell J., dissents by separate opinion joined by Keller, J.

In this case, Schulkers was charged with second degree assault, first degree wanton endangerment, and DUI after striking a pedestrian with her vehicle. Her bond was set at \$2,500, but when the Commonwealth sought to have bond increased to \$15,000, her attorney argued at length that Schulkers was not impaired but had suffered an emergent condition resulting from her medical condition of “gabapentin” that she could not foresee. The attorney went into great detail about her medical condition, also stating that her medicines did not cause her to be intoxicated, that this was confirmed by medical records she had seen, and that her friend, who was a nurse, had seen her 15 minutes before and she did not appear intoxicated. More was said about what happened at the hospital after the incident, including details to the effect that her kidney levels had dropped dramatically because her body was not filtering out her prescribed medicine like it should, and this drop in levels caused the episode. The attorney also stated that the oxycodone that she was on was at therapeutic levels.

A year later, after discovery disclosures, the Commonwealth filed a “notice of conflict” alleging that a named physician would testify that Schulkers was not intoxicated, but simply had a speech impediment, and did not mention in the disclosures anything about gabapentin, kidney function, or an emergent medical condition. Thus, Schulkers’ attorney could be a “necessary witness” at trial because Miler’s prior statements were contradicted by her own medical expert. The Commonwealth then filed a motion to disqualify the attorney, saying she had a dual role of attorney and witness, and alleged the statements made at the bail hearing were important proof at trial because they go to the only contested issue. Ultimately, the trial court disqualified counsel, whereupon counsel filed a special writ of prohibition. The Court of Appeals denied the writ, and the Supreme Court took the case up as a matter of right.

The Supreme Court made two very significant findings in this case. First, the Court upheld the use of a special writ of prohibition as being proper, because in the event of a removal of an attorney, there is no adequate remedy on appeal.

The idea that a direct appeal, following conviction, could adequately protect the interests of a criminal defendant, who was separated from the lead counsel who had prepared her defense and stood ready for trial, is uncertain if not dubious. Assuming *arguendo* that Schulkers was convicted, how would any appellate tribunal be able to discern, short of the obvious ineffective assistance of substitute

counsel – a matter usually not raised or addressed in a direct appeal – whether a guilty verdict was derived only due to the replacement of Schulkers’s original counsel. As an academic matter, barring “overwhelming evidence of guilt,” that question would be speculative.

We recognize that an indigent defendant does not have the right to counsel of her choice at the onset of representation when assigned to be represented by the Department of Public Advocacy. [*United States v. Gonzalez-Lopez*](#), 548 U.S. 140, 144 (2006). However, we conclude that when such a defendant has been represented by the same counsel for a protracted period of time, that counsel is available to continue in the representation, and the defendant wishes to have such counsel continue in the representation, this combination of factors gives the defendant an interest in maintaining such counsel’s representation as “counsel of choice” under the [Sixth Amendment](#).

“Disqualification separates a party from the counsel of its choice with immediate and measurable effect.” [Citation omitted].

Thus, the courts have to be absolutely correct if they disqualify a counsel from a case. A close read of [Gonzalez-Lopez](#), upon which the court relied, shows that there is no “harmless error” analysis in the event the trial court gets it wrong.

Second, in this case the trial court erred in disqualifying counsel under the facts of this case. [SCR 3.130\(3.7\)](#) states that a “lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness except where... (3) [d]isqualification of the lawyer would work a substantial hardship on the client.” In elaborating on this, the Court said that there must be a “balancing test” employed which balances the party’s right to choice of counsel against the unfair prejudice created when the attorney testifies.

Although there may be times when the disqualification of a criminal defendant’s counsel is both proper and necessary, the showing of prejudice by the Commonwealth needed to disqualify opposing counsel must be more stringent than in obvious circumstances, not present here, where the attorney is an actual witness to material facts of the underlying crime.

The Court further said that “arguments of counsel are not evidence,” and that it was conjectural and speculative that the attorney would have to testify. Before such would happen, all of the following would have to occur:

- The defendant would have to testify;
- The defendant would have to testify as to facts that were refuted by the attorney's statements made at arraignment;
- The Commonwealth would have to decide to attempt to play a video of the arraignment to the jury to impeach the defendant;
- The judge would actually have to permit this;
- The attorney would then decide that it was necessary to testify in rebuttal in order to explain the prior statements;
- The judge would have to permit this also.

For the judge to make either ruling, it would mean the judge had to rule that the attorney's statements made at arraignment were relevant (something that the Supreme Court could not presently discern, despite recounting everything that was said by the attorney in the opinion), and that the relevance was not outweighed by danger of undue prejudice to the defendant. Reversed and remanded.

III. DISCOVERY ISSUES

A. Discovery Violation

Brown v. Commonwealth, 723 S.W.3d 667 (Ky. 2025), Fayette Circ. Court. All sitting, all concur.

Brown was convicted and sentenced to life imprisonment for the murder of 62-year-old Ava Creech, who was found bound, gagged, and decomposing in her apartment in Lexington. At trial, the prosecutor cross-examined Brown and asked whether he and his sister Patricia had ever had phone calls during which they discussed his case. Brown was in jail at the time, and all his phone calls were recorded. Defense counsel objected, noting that the recorded calls, at least some of which occurred the week of trial, had not been disclosed in discovery. Defense counsel requested an opportunity to review the calls during a break, but the prosecution asserted it did not have to disclose the calls, and the trial court overruled the objection. The prosecution then played portions of the calls to the jury, in which Brown told his sister that his lawyer advised "it's just hard to go in there and dispute the gun too much without making it look like you're lying about the murder," and an implication that a material witness for the Commonwealth had died.

The Supreme Court held that both calls were relevant and incriminating, reflecting both a possible consciousness of guilt, and thus disclosure was required under [RCr 7.24](#) and the court's discovery order. Also, the calls were recorded at least five days before Brown took the stand, meaning the Commonwealth had ample time to produce them before he testified.

As to the Commonwealth's contention that this was rebuttal evidence and not evidence relevant to their case in chief, the Court stated:

We also pause to note that the Commonwealth’s contention before the trial court that disclosure was not required because the calls were offered as rebuttal evidence was a misstatement of the law. To the contrary, we have plainly held that

the duty of discovery imposed [under [RCr 7.24](#)] does not end at the close of the Commonwealth’s case in chief. Rebuttal does not offer a protective umbrella, under which prosecutors may lay in wait. “A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced.”

[Citations omitted.] Thus, to the extent the trial court’s refusal to order the Commonwealth to disclose the calls was premised on the use of that evidence solely for rebuttal purposes, it was error.

The Supreme Court then “reluctantly” reversed the conviction, finding the defense was prejudiced by the withholding of the evidence.

We have held that a criminal discovery violation warrants reversal if “there is a reasonable probability that if the evidence were disclosed the result would have been different,” or if the lack of disclosure “makes it doubtful that defense counsel would have proceeded in the same manner at trial.” [Citation omitted.] Here, Brown points out that had he been aware of the Commonwealth’s possession of the recorded calls, he may have chosen not to testify at trial. He further points out he also may have chosen to testify but to address the calls preemptively during the course of direct examination. Brown also explains that he declined to pursue bifurcation of the felon in possession of a handgun charge on April 29, 2020. He asserts that had he known then of the Commonwealth’s intention to introduce the recorded calls from three days earlier in which he referenced a strategy of not vigorously contesting the gun charge to lend credibility to his denial of the murder charge, he might have chosen to seek bifurcation of the gun charge.

We find it both plausible and reasonable that Brown might have altered his defense in these meaningful ways had he known of the Commonwealth’s intention to produce the recorded calls at trial.

B. [Brady](#) Violation, Mid-Trial Disclosures

Mills v. Commonwealth, 718 S.W.3d 577 (Ky. 2025), Allen Circ. Court. All sitting, all concur, opinion by Conley, J.

Defendant was convicted of unlawful transaction with a minor, first degree, second degree unlawful transaction with a minor, possession of matter portraying sexual

performance by a minor and PFO in the first degree. During the trial, the Commonwealth called as a witness a “jailhouse snitch,” Troutt, who testified the defendant confessed to him that he knew prior to having sex that the child with whom he was involved was 13 years old at the time. Mills sought to undermine this testimony by suggesting Troutt fabricated the confession after reviewing his case file, to which Troutt had access, because they were incarcerated in the same jail cell. After cross-examining Troutt, the Commonwealth informed defense counsel and the court that they were in possession of a recorded interview of Mr. Troutt which had not been provided or previously disclosed. The trial court allowed defense counsel to watch the video, whereupon counsel argued there were three inconsistencies that she would have cross-examined Troutt upon had she been able to view the video first.

First, in the video Troutt says Mills told him she was a “juvenile,” as opposed to being 13. Second, Troutt failed to mention the circumstances of when and where the child informed Mills of her true age in the video, whereas at trial Troutt was specific that Mills admitted she told him when he got in his van. Third, and perhaps most importantly, Troutt testified that Mills had admitted they had anal sex, which the Supreme Court opined was what non-legal personnel typically believe “sodomy” to mean. However, the Commonwealth’s proof was of oral sodomy, not anal, supporting the notion that Troutt had merely read “sodomy” in the case file and assumed it meant anal sex.

The Supreme Court found the recorded statement to be [Brady](#) impeachment material, and the failure to disclose it to be a [Brady](#) violation which the Court could have cured by allowing the defense to recall and re-cross Troutt as to these developments. However, as Troutt was already returned to his new jail home in Tennessee, and it was difficult to procure his attendance, the court did not require this. The trial court should have, however, “even if it meant granting a continuance,” according to the Supreme Court. The Supreme Court also opined that [Brady](#) evidence that is material does not require a showing by a preponderance of the evidence that timely disclosure would have resulted in an acquittal. It does not have to be an actual probability; rather, it can be a “theoretical but still reasonable probability.” Thus, the verdict was not worthy of confidence, and the case had to be reversed.

IV. TRIAL EVIDENCE

A. Confrontation Clause – Machine Extracted Data

Baldwin v. Commonwealth, 723 S.W.3d 676 (Ky. 2025), Madison Circ. Court; All sitting, opinion by Lambert, C.J., joined by Bisig, Conley and Goodwine, J.J.; Keller and Thompson, J.J., concur in result only. Nickell, J., concurs in result only by separate opinion, joined by Thompson, J.

This case involves a lot of issues, but only one is a matter of first impression for the Court. Defendant was found guilty of first degree rape, first degree sodomy, distribution of obscene material of a minor, use of a minor in a sexual performance, and first degree sexual abuse. It is the 68 counts of possession of matter portraying a sexual performance of a minor that will be discussed here.

In the course of investigating the sexual offenses that Baldwin was convicted of, Det. Friend obtained a search warrant for Baldwin's cell phone. He looked at the memory card and noted that several files had been deleted, but had titles such as "LS magazine," "LS models," "LS dreams," "David Hamilton," and others. This was significant to Det. Friend, because LS Studios is a now defunct Ukrainian company that produced and provided a subscription service for child pornography between 2001 and 2004, and David Hamilton was a well-known child pornography producer in the 1980s. Based on this, he obtained data extraction from the phone itself. The phone was sent to Cellebrite, which extracted the data, which showed 68 images of child pornography that had "creation dates" between October 7, 2018, and January 6, 2019.

While Cellebrite's technology of extraction is proprietary, it trains police officers how to use it to perform extraction of all data that exists on a device. The technology "clones" the information on the phone, uploads the data into a computer, and then the police plug the device into the forensic equipment and run the program. The data that is then spit out cannot be read or understood by the average person. Rather, a different program called Physical Analyzer "translates" all the raw data into an intelligible format. The trooper that testified as to this stated that one would have to have an extreme knowledge of computers and programming to know what the data meant before running Physical Analyzer. In this case, the police sent the phone to the United States Secret Service, which couldn't open the phone and thus sent it to Cellebrite, which extracted the data, put it on a thumb drive, and sent it back to the police.

At trial, defense counsel challenged the admission into evidence of the 68 images on the ground that Baldwin's Confrontation Clause rights were violated because he was unable to cross-examine the Cellebrite forensic analyst who extracted the data that led to the discovery of the images on his cellphone.

The Supreme Court held that extraction of raw data did not violate the Confrontation Clause:

[I]t is clear that the Confrontation Clause, although certainly applicable to forensic evidence, applies only to forensic evidence that is testimonial hearsay. It follows, then, that any Confrontation Clause inquiry raises two questions: does the evidence at issue constitute hearsay and, if so, is that hearsay testimonial? Neither the United States Supreme Court nor this Court have addressed that inquiry as it relates to the category of evidence at issue here: raw, machine produced data that contains no human input, conclusions, or assertions. After thorough review, we hold as a matter of first impression that raw, machine extracted Cellebrite data that is devoid of any human input, conclusions, or assertions does not implicate the Confrontation Clause because it is not testimonial hearsay.

The declarant is not the Cellebrite analyst who extracted and downloaded the data, nor is it the computer itself. Thus, it was not a hearsay statement, and the confrontation clause was not implicated.

[Note: Here is my question: How do you know that the Cellebrite analyst sent the correct flash drive, rather than send someone else's phone data? We hear about contamination of DNA samples all the time; defense attorneys sometimes raise questions about the chain of custody of drugs submitted to labs.]

B. Child Abuse Accommodation Syndrome

Hernandez Mendez v. Commonwealth, 733 S.W.3d 332 (Ky. 2025), Jefferson Circ. Court; All sitting, opinion by Nickell, J., joined by Lambert, C.J., Bisig, Goodwine, Keller, and Thompson, J.J.; Conley, J., concurs in result only.

Defendant was convicted of three counts of first degree sodomy, two counts of first degree sex abuse, and one count of distribution of obscene matter to a minor. He was sentenced to 20 years. During the trial, counsel for the defense cross-examined the police detective about the fact that the police did not swab the basement (where these events were alleged to have happened) for DNA or use a black-light kit to look for biologic evidence. In response, the detective stated it was not uncommon in delayed disclosure cases to forego the use of some evidence collection measures, and on redirect, she explained that the majority of her caseload were delayed disclosure cases in which reports are not made for months or even years after an assault has occurred. Defense counsel appealed the admission of this evidence, saying it was impermissible Child Abuse Accommodation Syndrome evidence.

The Supreme Court reiterated that CAAS evidence is not admissible as it is “habit of class of individuals” evidence that cannot be used to prove that another member of the class acted the same way under similar circumstances, or that the person is a member of a class because he acted the same way under similar circumstances. However, this testimony was not CAAS evidence:

Nowhere in her testimony did Det. Rusch compare M.R. to other victims, state or infer M.R. acted consistently with other victims, or offer an opinion as to M.R.'s credibility. Rather, the challenged statements related to the actions Det. Rusch took during the investigation to rebut the inference from *Hernandez Mendez* that the investigation was unreliable or incomplete. Her discussion of delayed disclosure cases was limited to her experiences and knowledge relative to the differing investigative and evidence collection methodologies utilized in such cases as compared to “fresh” reports of abuse.

C. Witness Bolstering

Boggs v Commonwealth, 718 S.W.3d 651 (Ky. 2025), Harlan Circ. Court; All sitting, opinion by Conley, J., joined by Lambert, C.J. and Thompson, J.; Nickell, J., concurs in part and dissents in part by separate opinion joined by Goodwine, J.; Keller, J., concurs in result only by separate opinion, joined by Bisig, J.

Boggs was convicted of multiple sexual offenses against multiple victims under the age of 12 and sentenced to 40 years in prison. The Supreme Court affirmed the convictions, but in doing so found error – albeit, harmless – in the testimony of the Child Advocacy Center interviewer, who vouched for the truthfulness of the children she interviewed. In particular, the following colloquy occurred, and was objected to, by the defense:

CW: Are you trained to identify any kind of indicators, such as if the children have been coached, can you look for indicators like that from your training?

Witness: Yes, and I found none of those factors to be present in the interview of either girl.

The Court found that the witness’s testimony was manifestly improper, and the trial court abused its discretion in admitting it. Nevertheless, improper bolstering is not a structural error, and thus it is subject to harmless error review. In this case, both of the children testified, in great detail, about the actions of Boggs, whereas the improper bolstering was less than 10 seconds long. Moreover, the girlfriend of Boggs testified she was a witness to a naked Boggs about to have sexual intercourse with one of the children, and that she screamed loudly, a scream that was heard by another witness, who heard the girlfriend state that Boggs was trying to get one of the children pregnant.

D. Moss Violation

Jones v. Commonwealth, 733 S.W.3d (Ky. 2026), Bath Circ. Court; All Sitting, opinion by Conley, J., joined by Lambert, C.J., and Bisig, Goodwine, Nickell and Thompson, J.J.; Keller, J., concurring in result only.

This case presents the flipside, or opposite, of bolstering a witness. Kentucky law has long prohibited forcing one witness to characterize another witness’s testimony as a lie or otherwise to opine directly on another witness’s truthfulness. For three decades, this has been called a “Moss” violation, after *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997). In this drug trafficking case, the defendant took the stand in his case-in-chief, after the Commonwealth had called a witness against him, who testified that Jones had sold him some methamphetamine. The cross-examination was short, consisting of one line of questioning, which consisted primarily of the following questions:

- “So [the witness] just made that up?”
- “You just happened to have methamphetamine, use methamphetamine, and then [the witness] is not telling the truth?”
- The witness had admitted he was a felon, had gotten a DUI, and had purchased narcotics from Jones, “but your testimony today is that’s not accurate?”

The Supreme Court reversed, holding that the first two questions were clear *Moss* violations. While the third question was a closer call (because “not accurate” can also mean mistaken or in error, in addition to lying), in context of the first two questions it was also a violation. There were no objections to these *Moss* violations, so it was a palpable error reversal, showing the importance of not committing a *Moss* violation.

E. Evidence/Body Cam Footage/*Moss* Violation

Hartsfield v. Commonwealth, 730 S.W.3d 878 (Ky. 2025), Fayette Circ. Court; All sitting, all concur, opinion by Thompson, J., Bisig and Keller, J.J., concur in result only.

Defendant was accused of raping someone he met online and agreed to meet at the Ramada Inn in Lexington. Later, she called and reported that she was raped, sodomized, strangled, and the victim of other crimes as well. Police officers interviewed the victim at the Ramada Inn. These interviews were recorded on video camera. On one of the cameras, a police officer can be heard stating, under his breath, that he did not believe the alleged victim’s account of the night’s events. The Commonwealth moved to have this statement redacted. The defense opposed, arguing that it was lay opinion, and that the entirety of the tape should be shown because it gave context for the entire interview. The trial court ruled the entirety of the tape could come in. The Commonwealth filed an interlocutory appeal under [KRS 22A.020\(4\)](#), which allows the state to file an appeal on an adverse ruling.

The Court of Appeals reversed the trial court, and the Supreme Court affirmed the Court of Appeals, holding:

- The [Kentucky Rules of Evidence](#) do not contain an exception which allows for the blanket admission of body worn camera recordings.
- Therefore, if the statements on a video could not be uttered live in court, they can’t be played, either, just because they were recorded.
- There is no more a “provide context” exception to the hearsay rule any more than there is an “investigative hearsay” exception.
- The police officer’s statement would be inadmissible hearsay if offered for the truth.
- This is a *Moss* violation.

V. JURY INSTRUCTION/DELIBERATION ISSUES

A. Jury Instructions – Self Defense/Stand Your Ground

Shackles v. Commonwealth, 730 S.W.3d 832 (Ky. 2025), Jefferson Circ. Court; All sitting, opinion by Keller, J., Conley, Goodwine, and Nickell, J.J., concur; Bisig, J., concurs in result only, joined by Lambert, C.J., and Thompson, J.; Thompson, J., dissents by separate opinion.

Marvin and Shackles were childhood friends but fell into disagreement over details of the musical act they performed together. To make it worse, at some point Marvin found out that Shackles had engaged in a sexual relationship with his wife. One day, while attending a funeral, Marvin got a text that someone was trying to break into their apartment. He returned home to find two armed persons who approached him. While Marvin stood in his doorway, Shackles emerged with a gun. Marvin drew his gun and pointed it at Shackles. Shackles fired at Marvin, injuring him. However, Marvin admitted on video that he drew first, and would have fired at Shackles first if the safety had not been on. Shackles was charged with several counts, including first degree assault, based upon the shooting of Marvin.

At trial, Shackles sought a self-defense instruction, arguing he was justified because Marvin had actually tried to shoot him first and admitted as such. The trial court refused, on the basis that Marvin had a right to defend himself and his home under the “stand your ground” doctrine. In affirming, the Supreme Court held:

The language of [KRS 503.050\(1\)](#) plainly and unequivocally states that a criminal defendant may only use force to protect himself against the unlawful physical force of another. Simply put, there is no evidence that Marvin used any unlawful physical force. Further, in fact, he was engaged in presumably lawful force in the protection of his home and family. Our statutory language is clear: an individual who is not engaging in unlawful conduct and who is in a place where he has a right to be “has the right to stand his . . . ground and meet force with force, including deadly force, if he . . . reasonably believes it is necessary to do so to prevent death or great bodily harm to himself[.]” [KRS 503.055\(3\)](#)...

Here, the parties do not dispute that Marvin had legal ownership of his weapon, nor do they dispute that Marvin was standing in the doorway of his and Cassandra’s apartment, where his four children were also located, when the shootout occurred. In the lead-up to the shooting, two armed men, who had aligned themselves with Shackles, acted menacingly toward Marvin, his wife, and his four young children. Shackles then jumped out from behind a nearby tree and pointed a gun at Marvin and Cassandra. The act of pointing a gun at another is sufficient to constitute “force” under [KRS 503.055\(3\)](#).

B. Jury Instructions – Self Defense, Imperfect Self Defense

Masters v. Commonwealth, 724 S.W.3d 751 (Ky. 2025), Knox Circ. Court; All sitting, opinion by Conley, J., joined by Lambert, C.J. and Goodwine, J.; Thompson, J., concurs in result only; Nickell, J., concurs in part, dissents in part, joined by Bisig and Keller, J.J.

Masters, believing that his ex-wife (with whom he was reconciling) had been raped by four men, showed up at the residence where Masters was staying pursuant to an oral agreement and – at knife and taser point – “tortured” (Supreme Court’s words, not mine) the three men, trying to get them to confess to the rape. They did not confess, but one of the men, Welsh, attempted to fight back. When Masters’ back was turned, Welsh saw a knife sticking out of Masters’ waistband, which he grabbed and used to stab Masters in the back. Masters and Welsh struggled, and Masters eventually overwhelmed Welsh, took back the knife, and fatally stabbed Welsh.

At trial for murder and four counts of unlawful detention, Masters sought a self-defense instruction and an “imperfect self-defense” instruction, which the trial court refused. The Supreme Court did not reverse this decision, finding that it was not an abuse of discretion, given the entirety of the circumstances. Quoting *Townsend v. Commonwealth*, 474 S.W.2d 352, 354 (Ky. 1971), the Court held that “[o]ne who by his words and acts provokes and brings about a fight cannot claim self-defense. The law does not allow a man to create a bad or dangerous situation and then fight his way out.”

C. Jury Deliberations, Extraneous Information Learned by Jury

Lawless v. Commonwealth, 724 S.W.3d 679 (Ky. 2025), Jefferson Circ. Court; All sitting, opinion by Thompson, J., joined by Lambert, C.J., Conley, Goodwine, and Nickell, J.J.; Dissent by Bisig, J., joined by Keller, J.

Defendant was convicted of two counts of murder and one count of burglary, first degree, and sentenced to life without possibility of parole. During the course of testimony, at the conclusion of the testimony of a prosecution witness – who, pursuant to a plea deal, was supposed to testify against the defendant but who, in actuality, testified in favor of the defendant – the trial court *sua sponte* ordered the witness to be taken into custody. The trial court gave as a reason that the witness had “violated the terms of his plea and diversion agreements by committing perjury” during his testimony. The jury was not present for this, but the media was, and during deliberations one of the jurors saw a television report in which this event was reported and informed the others in the jury room. At least one juror determined that she could no longer render a verdict based solely upon the evidence in trial, given this knowledge of what happened outside of trial. Defense moved for a mistrial, which was denied. The trial court replaced the juror with a randomly chosen alternate juror, gave an admonition not to consider anything not in evidence, and gave the case back to the jury. The defendant was found guilty.

The Supreme Court found that a mistrial should have been granted, notwithstanding the admonition:

The trial court's actions and statements, as communicated by the media report which Juror 1 shared with the rest of the jury, could only result in the jurors believing that the trial court had already adjudged Ross's credibility and found him to have been not only "less than completely honest," but to have committed criminal perjury necessitating his immediate imprisonment.

"Matters of a witness's credibility and of the weight to be given to a witness's testimony are solely within the province of the jury." *King v. Commonwealth*, 472 S.W.3d 523, 526 (Ky. 2015). A trial court may not substitute its own judgment of the credibility of a witness for that of the jury and neither may it attempt to, by its words or actions, sway a jury's own impressions.

D. Conduct of Commonwealth Representative/Comment on the Witness Testimony

Stinson v. Commonwealth, 727 S.W.3d 336 (Ky. 2025), Trigg Circ. Court; All sitting, opinion by Keller, J., joined by Lambert, C.J., Bisig, Goodwine, Nickell and Thompson, J.J.; Conley, J., concurs in result only.

This was a murder case in which the defendant was found guilty and sentenced to life without possibility of parole. One of the investigating officers was Det. Sergeant Dick, who was also the Commonwealth's representative during trial. During the trial, defense counsel twice objected to Sgt. Dick's reactions to statements made by witnesses with whom he disagreed, arguing that his actions may have influenced the jury. Defense argued that the sergeant had rolled his eyes, smiled, smirked, etc. as the witnesses all testified, and that his behavior was a form of non-verbal communication commenting on the credibility of the witnesses. Twice, the trial court instructed the Commonwealth to rein in Sgt. Dick, but the trial court's own ability to observe his actions for itself was blocked by a lamp. No motion for mistrial was ever made, but following the verdict, a motion for a new trial was filed, alleging impropriety by Sgt. Dick.

At the hearing on the motion for a new trial, nine witnesses (mainly sided with the defense) testified among them that they had witnessed:

- Facial expressions showing approval or disapproval;
- Mouthing words like "no, it isn't" or "yes, it is;"
- Nodding head in agreement;
- Shaking head in disagreement;
- "Charades," using his body motions, mouth open, a constant distraction;
- Throw his hands up and mouth words when defense counsel spoke about law enforcement failing to follow up on leads or send out fingerprints;

There is no doubt that Sgt. Dick did these things; however, there was no evidence that the jury was influenced thereby. No juror testified. The Court affirmed the trial court's decision not to grant a new trial, holding:

There is no doubt that the alleged behavior by Sergeant Dick, if it occurred, was inappropriate courtroom behavior and unbecoming of a sergeant with at least twelve years of law enforcement experience at the time. Likewise, the trial court does not indicate, and leaves us to wonder, why the lamp obscuring the trial court's view of Sergeant Dick was not moved, if it could be, after his actions were first brought to the trial court's attention so that the trial court could adequately monitor the situation....

Nevertheless, not all improper or questionable conduct results in prejudice to the defendant. Here, the trial court conducted a hearing on the motion for a new trial and heard testimony from nine witnesses, most of whom were aligned with the defendant and none of whom were jurors. The court failed to observe the alleged outbursts by Sergeant Dick, indicating some limit to how disruptive this behavior could have been. Taken together, the trial court did not abuse its discretion in failing to find that the jury had been unduly prejudiced by Sergeant Dick's alleged actions and in denying Stinson's motion for a new trial.

This Court now avails itself of the opportunity to describe best practice in this or similar situations. We strongly urge our trial courts to make every effort to personally observe potentially disruptive conduct brought to their attention and, if such conduct is indeed validated by the trial court, a strong admonition to the offending party is warranted. If courtroom decorum is significantly breached, then an admonition to the jury regarding same, whether requested or not by a party, may be warranted.

VI. DOUBLE JEOPARDY

A. Double Jeopardy/DUI and Wanton Murder

Young v. Commonwealth, 718 S.W.3d 698 (Ky. 2025), Lewis Circ. Court; All sitting, opinion by Nickell, J., affirming in part, vacating in part and remanding, joined by Bisig, Conley, Goodwine, Keller and Thompson, J.J.; Lambert, C.J. concurs in part and dissents in part.

This was a wanton murder, two counts of first degree assault, and DUI case. Defendant was found guilty on all counts and sentenced to 25 years imprisonment. The Supreme Court found a double jeopardy violation in Young being convicted of both wanton murder and DUI. Although the Supreme Court in a previous case had found that there was no double jeopardy violation when a defendant was convicted of both, in that prior case being intoxicated while driving was but one possible factor

necessary for aggravated wantonness. In this case, however, the entirety of the alleged wanton behavior was “operating a motor vehicle on or about May 18, 2020, while under the influence of alcohol or other impairing substance, and he caused an accident resulting in death or serious physical injury.” In other words, the entirety of the wanton behavior was the complete offense of DUI. Because the DUI required proof of no fact beyond those required for the wanton murder, a double jeopardy violation occurred.

B. Double Jeopardy/Bail Jumping

Blair v. Commonwealth, 718 S.W.3d 687 (Ky. 2025), Johnson Circ. Court; All sitting, opinion by Bisig, J., joined by Lambert, C.J., and Conley and Goodwine, J.J.; Dissent by Nickell, J., joined by Keller and Thompson, J.J.

Blair was charged with five felony counts of trafficking in methamphetamine and separately indicted for each charge in Johnson Circuit Court. He was arraigned on all charges during one court appearance, and bail in the amount of \$5,000 was set in each case. Blair failed to appear at his scheduled court date, resulting in him being charged with five bail jumping counts, plus PFO second degree. He moved to dismiss four of the five bail jumping charges.

The Supreme Court in a 4-3 opinion held that even though Blair committed only one singular act of nonappearance, five bail jumping charges are nevertheless permissible because of his five underlying felony charges which were brought in five separate indictments.

By failing to appear, Blair violated five separate court orders, therefore justifying the imposition of five bail jumping charges. The Court relied upon *Paulley v. Commonwealth*, 323 S.W.3d 715 (Ky. 2010), to hold that a single act may result in numerous charges. In that case, the defendant was charged with nine counts of wanton endangerment after firing a single shot through the front door of a home in which nine people were present. Despite only committing one singular act, the Court deemed the nine separate charges permissible. Just as the decision to bring trafficking charges against Blair under five separate indictments is permissible prosecutorial discretion, the prosecutor properly exercised his discretion in bringing five bail jumping charges for one failure to appear.

Justice Nickell dissented, opining that a plain reading of the statute reveals the gravamen of the bail jumping offense is intentional failure to appear at a specified time and place, and not the number of separate offenses or cases which are pending and scheduled for disposition on that singular occasion. Justice Nickell pointed to the difference in penalty being a misdemeanor or felony based upon the nature of the crime, not the number.

VII. MENTAL INCOMPETENCY/CIVIL COMMITMENT

A. Mental Incompetency

Moore v. Commonwealth, 730 S.W.3d 868 (Ky. 2026), Todd Circ. Court; All sitting, all concur, opinion by Nickell, J.

In this case, the defendant was charged with felony DUI, felony driving on a DUI suspended license, and PFO in the second degree. When his competency was questioned, he was found competent to stand trial by KCPC and thus pled to a probated 20-year sentence. Nine days later, he was revoked. He appealed his sentence, which was reversed and remanded by the Supreme Court due to a sentencing error. Prior to resentencing, he was given another competency hearing. This time, he was found not competent but subject to becoming competent if put on a medication regiment. KCPC put him on Abilify, which he was on for 40 days, being discharged from KCPC on January 9, 2024. On February 2, a KCPC doctor testified that he was competent and that he was able to assist his lawyer in the preparation of his defense. Defendant's attorney argued to the court that there was no evidence the defendant had remained compliant with his medications while still in jail, that he could not give a sentencing statement if he was incompetent, and thus should not be resentenced. Nevertheless, he was sentenced that very day. Defendant appealed.

The Supreme Court held there was no evidence to conclude that Moore had fallen back into incompetency. His demeanor in February 2024 heavily contrasted with his demeanor at the previous sentencing (no interruptions with delusional thoughts, acted respectfully, was engaged during the entire proceeding, and even appeared to be reading along as the doctor testified to her report). "In other words, Moore made no showing to the trial court that he was incompetent."

B. Involuntary Civil Commitment/[KRS Chapter 202C](#) Hearings

Commonwealth v. H.M., 733 S.W.3d 211 (Ky. 2026), Scott Circ. Court; Opinion by Lambert, C.J., joined by Bisig, Conley, Nickell and Thompson, J.J.; Keller, J., concurs in part, dissents in part; Goodwine, J.J., not sitting.

H.M., a person with a history of mental illness, killed his live-in caretaker with an aluminum baseball bat. This followed a history of "terrorizing the neighborhood," including using a golf club to hack through a locked door in a basement. Upon being arrested and asked what had happened, H.M. asserted that "It's been like the devil, or something, in all the ways," that he had seen "a big shadow" that was "in the sky with wings," that the victim had "looked like the devil," and that "God told him to do it, and that should be good enough for innocent." H.M. was sent to Kentucky Correctional Psychiatric Center and found to be incompetent to stand trial for murder. KCPC also found that he was insane at the time of the killing. The Court found he was incompetent to stand trial and was not reasonably likely to become competent in the foreseeable future. Thus, a [KRS Chapter 202C](#) involuntary civil commitment proceeding was commenced.

Because there are few cases that explore [KRS Chapter 202C](#) proceedings, this case has a number of important “take-aways” for the criminal law practitioners, so some time will be spent on this case.

1. Evidentiary hearing on guilt/innocence.

The Supreme Court began by setting out the process for a civil commitment upon a finding that the defendant is not competent to stand trial, and will likely never be:

Commitment proceedings under [Chapter 202C](#) occur in two stages. First, unless the respondent waives it, the circuit court must hold an evidentiary hearing to determine “whether sufficient evidence exists to support a finding that the respondent is guilty of the crime charged against him. . . by a preponderance of the evidence.” [KRS 202C.030\(3\)](#).

Although it was clear the defendant had killed the victim, the issue of guilt hinged upon whether the defendant was guilty or not guilty by reason of insanity. At the hearing, there was a battle of experts to determine the answer to this question. The Kentucky insanity definition at that time was whether the defendant appreciated the criminality of his actions and had the capacity to conform his behavior to the requirements of law. In this case, the trial court found that H.M. was able to appreciate the criminality of his acts, based upon his statements in which he invoked the [Fifth Amendment](#), which the trial court found to be “a clear acknowledgment that he had committed a wrongful act and there would be consequences,” and further based upon H.M.’s statements to the police, which demonstrated an understanding that he had done something wrong. As for his ability to conform his actions to the requirements of law, the trial court noted that H.M. owned and possessed a golf club and a Louisville Slugger baseball bat for some period of time prior to committing the murder, and at no point did H.M. use either of those items to attack someone else, thereby demonstrating his ability to conform his behavior to the requirements of law.

The Supreme Court upheld this finding, but in so doing, it made several key findings and observations, all of which are worthy of discussion:

- a. *If a lower court reaches the correct judgment for the wrong reason, the appellate court may affirm the result upon any ground supported in the record.*

In this case, while the finding that H.M. could control his behavior because he had never used his golf club or bat to kill anyone before (a conclusion which the Supreme Court called “problematic”), the fact that H.M. was able to comply with officer’s orders upon arrest, allowed them to take his photograph and his clothing, and was

generally cooperative, supported a finding that he could control himself.

- b. *The defense asked for a directed verdict at the end of this bench hearing; however, the correct way to preserve the issue in a bench trial is to move for dismissal, not a directed verdict.*

Nevertheless, the Supreme Court held this was preserved anyway, because it would be absurd to argue that the Court was not given an opportunity to rule on the issues in this format.

- c. *The burden of proof on insanity is on the defendant, and it never shifts.*

It is the only true affirmative defense that does not require the Commonwealth to rebut once the defense has put on a *prima facie* case.

- d. *The reference to the defendant invoking the [Fifth Amendment](#) (in order to prove awareness of the criminality of one's act) is not improper in a civil case, like it would be in a criminal case.*

2. Evidentiary hearing on civil commitment.

Once a trial court has made the determination of guilt in the guilt/innocence phase of the [Chapter 202C](#) proceedings, what follows next is the commitment:

If the court makes that finding, it must hold a subsequent commitment hearing to determine “whether the respondent meets the criteria for involuntary commitment under [KRS 202C.050](#)” beyond a reasonable doubt. [KRS 202C.040\(3\)](#), (4).

At the time H.M. was committed under this chapter, there were four criteria that had to be met:

- The respondent presents a danger to himself or others as a result of his mental condition;
- The respondent needs care, training, or treatment to mitigate or prevent substantial physical harm to himself or others;
- The respondent has a demonstrated history of criminal behavior that has endangered or caused injury to others or had a substantial history of involuntary hospitalizations under [KRS Chapter 202A](#) or [202B](#) prior to the commission of the charged crime; **AND**
- A less restrictive alternative mode of treatment would endanger the respondent or others. [KRS 202C.050\(1\)](#) (eff. April 1, 2021, to July 14, 2024).

In upholding the trial court’s decision that all four prongs had been met with sufficient evidence, the Court refused to decide two issues.

- a. *The General Assembly’s changing of “and” to an “or” in 2024’s [HB 5](#) is of no consequence in this case, as the hearing was held before the change in the statute.*

The Court noted that in this case (and in a companion case released the same day by the Supreme Court, but not discussed in this article), two years after this proceeding, the General Assembly amended the statute to require only one of the four criteria had to be met. The Court in both cases noted the defense counsel had not brought this up as an issue (and why would they, given their cases required at that time for the Commonwealth to prove all four) and that the Court lacked jurisdiction to decide whether civil commitment was constitutional after finding only one of the factors to be present. ***This is a point the Court leaves “for another day.”***

- b. *The Court refused to decide whether the facts that gave rise to the case for which he was found incompetent can, in and of themselves, constitute sufficient proof for the third factor, whether this is a sufficient history of criminal behavior.*

The Court found in this case there was a significant history of criminal behavior, though uncharged and unconvicted, to support a criminal history. This leads one to assume that the Court will address it in a case in which the only criminal behavior is the act in this case.

VIII. POST-CONVICTION ISSUES

A. Parole Board Jurisdiction and Proceedings

Hodge v. Kentucky Parole Board, 720 S.W.3d 893 (Ky. 2025), Kenton and Franklin Circ. Courts, respectively; All sitting, opinion by Justice Bisig, J., joined by Lambert, C.J., and Thompson, J., concurrence and dissent in part by separate opinion by Bisig, J., joined by Nickell, J., dissent by separate opinion by Goodwine, J., joined by Conley and Keller, J.J., Keller dissents by separate opinion.

In this case involving a split of Court of Appeals panels, the Supreme Court held that the Kentucky Parole Board may delegate its authorities to conduct and decide parole decisions to administrative law judges. Both Hodge and Shane appealed the Board’s authority to do so, arguing the ALJs in their respective cases were without authorization to do so. However, both cases were reversed because the Board did not provide an opportunity for the inmates to file objections and exceptions to the findings of the ALJ like what happens in every other Board action.

B. Consecutive Sentencing/Possession of Controlled Substances

Commonwealth v. Amboree, 730 S.W.3d 887 (Ky. 2026), Henderson Circ. Court; All sitting, opinion by Conley, J., joined by Lambert, C.J., Goodwine, Thompson, J.J., dissent by Nickell, J., joined by Bisig and Keller, J.J.

This is a simple case of strict statutory construction. Amboree was convicted of two counts of possession of a controlled substance, first degree, under [KRS 218A.1415](#). The jury fixed the penalty at three years for each charge, and the trial court ran these two sentences consecutively. The defense argued that the statute mandated that three years is a cap on convictions, even if multiple convictions, of first degree possession of a controlled substance. The Supreme Court held:

This leads to the very purpose of this appeal. What exactly does “[t]he maximum term of incarceration shall be no greater than three (3) years, notwithstanding [KRS Chapter 532](#)” mean? We conclude the language is unambiguous. Incarceration is synonymous with imprisonment and “maximum term of incarceration” means nothing other than maximum period of imprisonment. “No greater than three years” is also unambiguous in its meaning. The sentence then concludes with “notwithstanding [KRS Chapter 532](#).” This phrase is equally unambiguous. It makes no distinction between different parts of [KRS Chapter 532](#). It does not say [KRS 532.080](#), nor [KRS 532.060\(2\)\(d\)](#), nor [KRS 532.110\(1\)\(c\)](#). It says “notwithstanding [KRS Chapter 532](#)” which can only mean “the entire [Chapter of KRS 532](#) is inapplicable” if it would make the term of incarceration longer than three years.

This interpretation is demanded by the word “notwithstanding.”

C. Post-Conviction/Illegal Sentences/Contract Law

Commonwealth v. Strunk, 718 S.W.3d 758 (Ky. 2025), Fayette Circ. Court; All sitting, opinion by Conley, J., joined by Lambert, C.J., Bisig, Goodwine, and Keller, J.J., Thompson, joined by Nickell, J.J., concurs in part and dissents in part.

Strunk accepted a plea bargain where he would plead guilty to two counts of second degree robbery, enhanced by his status as a second degree PFO, and receive a sentence of 20 years on the first count and 10 years on the second count for a total of 30 years. The defense counsel raised the question of whether the 30-year sentence would violate the aggregate term for Class C felonies to 20 years. The prosecution argued that it was two separate home robbery charges and thus they could be treated separately. On hearing this, the defendant desired to withdraw his plea. The trial court denied the motion to withdraw the plea and sentenced him to 30 years. In a post-conviction proceeding nine years later, via [CR 60.02](#), the defendant attacked the 30-year sentence, which was denied by the trial court. Importantly, he did not attack the denial of his motion to withdraw his guilty plea in post-conviction; rather, he attacked only the illegal length of the sentence.

The Court of Appeals reversed the trial court, holding the 30-year sentence violated [KRS 532.110\(1\)\(c\)](#)'s limit of a 20-year sentence where the highest felony was a C. The Court of Appeals remanded the case and instructed the trial court to impose a new sentence compliant with the sentencing guidelines.

The Supreme Court affirmed the Court of Appeals on the issue of whether the 30-year sentence was illegal. In deciding what was the appropriate remedy on remand, the Court held:

If the defendant attacks the conviction itself, which would necessarily obviate the guilty plea, *McClanahan [v. Commonwealth]*, 308 S.W.3d 694 (Ky. 2010)] holds the proper remedy is remand for the opportunity for the defendant to withdraw his guilty plea. If the appeal is only of the sentence, *Phon [v. Commonwealth]*, 545 S.W.3d 284 (Ky. 2018)] directs the Court to remand for resentencing. As to the latter scenario, if the illegality of the sentence stems from its being in excess of the legal maximum, resentencing should be limited to the imposition of the highest possible legal sentence, pursuant to *Phon*. If the sentence is illegal for reasons other than its excessive length, then remand should be for a wholly new resentencing hearing, in accordance with [*Commonwealth v. Moreland*, 681 S.W.3d 102 (Ky. 2023)].

In this case, since only the length of the sentence (and no other illegality) was attacked, and not the conviction itself, the remedy was to give the highest penalty available which was 20 years.