

**KENTUCKY SUPREME COURT
OCTOBER 2023**

CRIMINAL:

CHRISTIAN RICHARD MARTIN V. COMMONWEALTH OF KENTUCKY

[2021-SC-0399-MR](#)

October 26, 2023

Opinion of the Court by Justice Bisig. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. VanMeter, C.J.; Keller, and Lambert, JJ., concur. Nickell, J., dissents by separate opinion in which Conley, J., joins. Thompson, J., not sitting.

Christian Richard Martin appealed as a matter of right from the Christian Circuit Court judgment sentencing him to life without the possibility of parole for his convictions of three counts of murder, two counts of burglary, one count of arson, one count of attempted arson, and three counts of tampering with physical evidence. On appeal, Martin argued the trial court erred by 1) admitting hearsay statements that the victims feared him, 2) allowing his ex-wife and stepson to refuse to testify on Fifth Amendment grounds, 3) excluding certain alleged alternative perpetrator (“aaltperp”) evidence, 4) admitting evidence of a bullet casing discovered by a lay witness and excluding evidence that witness failed a polygraph examination, 5) denying his motion for directed verdict on the arson and murder charges, and 6) allowing his two first-degree burglary convictions to stand in violation of double jeopardy principles. The Supreme Court held that the victims’ statements of fear of Martin were properly admitted under the forfeiture by wrongdoing and state of mind exceptions to the hearsay rule. The Supreme Court further held the trial court properly permitted Martin’s ex-wife and stepson to invoke the Fifth Amendment privilege. The Court also held that any error in excluding certain aaltperp evidence was either not preserved or harmless, that the trial court properly allowed testimony regarding the discovered bullet casing and properly excluded testimony regarding the witness’s failure of a polygraph examination, and that the evidence was sufficient to support a finding of two separate burglaries and thus there was no violation of double jeopardy principles. Finally, the Court held that while Martin was not entitled to a directed verdict on the murder charges, he was entitled to a directed verdict on the arson and attempted arson charges because there was no evidence to suggest the victims were alive when Martin started the fires. The Court thus reversed Martin’s arson convictions and affirmed the remainder of the Christian Circuit Court’s judgment and sentence.

LARRY MOULDER V. COMMONWEALTH OF KENTUCKY

[2022-SC-0155-MR](#)

October 26, 2023

Opinion of the Court by Justice Conley. All sitting. VanMeter, C.J.; Keller, Lambert, and Thompson, JJ., concur. Nickell, J., dissents by separate opinion in which Bisig, J., joins.

Larry Moulder appealed his convictions alleging several violations involving testimony of the victim and the failure of the trial court to strike a prospective juror, forcing him to use one of his preemptory strikes. The Supreme Court concluded the trial court should have struck the juror and declined to address any other issues. After a thorough review of the colloquy that occurred between the juror, the trial court, as well as counsel for both the defense and Commonwealth, the Court concluded that after five minutes the juror had not given an affirmative and unequivocal answer that she could be impartial and weigh the evidence fairly. Instead, it was evident she was troubled by there being a child-victim in the case. She had expressed clearly that this fact would make it difficult for her to be objective. The trial court, in front of the juror, told the Commonwealth that she could not be seated on the jury. The trial court then proceeded to tell the juror that he needed to hear her say that she could be fair and weigh the evidence fairly. Only after being told what she had to say if she wanted to be on the jury did she make an affirmative declaration that she could be fair and impartial. The Supreme Court held this was too far past the line of proper discretion and amounted to rehabilitation of the juror; the search for “magic words” that is prohibited by law. The Court reversed and remanded to the trial court.

LEWIS CARPENTER V. COMMONWEALTH OF KENTUCKY

[2022-SC-0179-MR](#)

October 26, 2023

Opinion of the Court by Justice Lambert. All sitting. VanMeter, C.J.; Bisig, Conley, Nickell, and Thompson, JJ., concur. Keller, J., concurs in result only.

Carpenter was convicted by a jury of six counts of possession of matter portraying a sexual act by a minor (possession of child pornography). Carpenter challenged all six convictions on the basis that he was improperly denied a directed verdict because there was insufficient proof that he knowingly possessed two thumbnail images and four videos containing child pornography. He challenged the four convictions for possessing child pornography videos on the basis that the trial court did not conduct the Kentucky Rule of Evidence (KRE) 403 balancing test before allowing the videos into evidence. *Held*: The trial court did not err by denying a directed verdict. Considering the evidence as a whole, a reasonable jury could find Carpenter did not obtain the images and videos located within the unallocated space of

his computer by mistake or circumstance and that based upon the file names indicative of searches for pornography within the allocated space, Carpenter did indeed download and knowingly possess the items located within the unallocated space. However, the trial court abused its discretion by not viewing the videos before ruling that the videos were not unduly prejudicial and allowing them into evidence. The trial court needed to know what was in the videos to assess the potential prejudice to Carpenter against the evidence's probative value and properly exercise its discretion under KRE 403.

COMMONWEALTH OF KENTUCKY V. DANIEL MORELAND

[2022-SC-0245-DG](#)

October 26, 2023

AND

DANIEL MORELAND V. COMMONWEALTH OF KENTUCKY

[2022-SC-0414-DG](#)

October 26, 2023

Opinion of the Court by Justice Conley. All sitting. All concur.

Daniel Moreland pled guilty to three Class C felonies. He agreed to a twenty-year sentence with ten years to be served in prison and ten years to be served on probation, commonly known as a split sentence. He served his ten years in prison and was released on probation. When the Commonwealth sought to revoke his probation, Moreland argued that split-sentences were not authorized by the probation statute, KRS 533.020(1). The Court of Appeals agreed and held the portion of his sentence ordering him to serve ten years on probation was void. The Court of Appeals' decision, however, would have let Moreland free after only serving ten years in prison. The Commonwealth appealed and the Court granted discretionary review.

The Court affirmed insofar as the probation statute did not authorize split sentences. Probation is not an inherent power of the judiciary but granted by statute, therefore the statutory text is controlling. The text of KRS 533.020(1) only authorizes probation when the defendant is not sentenced to imprisonment. The Court clarified, however, that an underlying prison sentence is necessary before probation can be imposed because probation is in lieu of prison. Therefore, the statute means that when a defendant is ordered to serve any portion of his sentence in prison, he cannot serve the remaining portion on probation. The statutory scheme creates an "either/or" option, not a "both/and" option.

The Court reversed, however, insofar as the Court of Appeals' decision would have let Moreland go free from custody. The Court concluded that the proper remedy for a void order of probation is remand for resentencing. The fact that

the trial court had ordered Moreland to only serve ten years of imprisonment was just as void as the order of probation, because the order that he be released after ten years effectively amounted to either a de facto probation order, or a grant of parole, or a commutation of sentence. In any case, the order invaded the power of the executive branch and could not be given effect. Therefore, the agreed upon sentence of twenty years in prison was still effective and remand was necessary for the trial court, the Commonwealth, and Moreland to agree on a new way to serve the sentence. The Court affirmed in part, reversed in part, and remanded to the trial court for resentencing

PAUL W. JAMES V. COMMONWEALTH OF KENTUCKY

[2022-SC-0299-MR](#)

October 26, 2023

Opinion of the Court by Justice Bisig. All sitting. All concur.

Paul W. James appealed as a matter of right from the Grant Circuit Court judgment sentencing him to life in prison for his convictions of murder and tampering with a witness. James shot and killed Barry Kenner after longstanding animosity between the two families. During deliberations, the jury initially returned guilty verdicts on murder and three lesser-included offenses. After further instruction from the trial court and a clean set of instructions, the jury ultimately returned a guilty verdict on only the murder charge. On appeal, the Supreme Court held that the jury instructions did not yield a verdict that violated the unanimous verdict requirement, and the trial court properly denied James’s motion for a mistrial. The Court reasoned that the jury instructions were typical staircase instructions that were clear and explicit. The jury’s initial set of verdicts resulted from confusion and failure to follow the instructions, not a lack of unanimity. Once the jury found James guilty of murder, that conviction precluded conviction on any lesser-included offense and was surplusage.

The Court also held that a portion of a police officer’s testimony, during which he stated that James was not appropriately distraught in a police interview, were improper but did not constitute palpable error. Officers are permitted to testify about a person’s demeanor and recount comments and behavior they personally observed. Additionally, a parole officer’s partially incorrect testimony regarding parole eligibility and meritorious good time credit did not render the trial fundamentally unfair because the officer later affirmed that, regardless of sentence length, James was not eligible for parole until he served twenty years. Finally, the Commonwealth’s comments in closing argument during the penalty phase did not constitute palpable error. While the Commonwealth should not have stated that the victim’s family asked that the jury impose a particular sentence, this statement was not egregious enough to render the overall trial unfair.

LARRY FINCH V. COMMONWEALTH OF KENTUCKY

2022-SC-0432-MR

October 26, 2023

Opinion of the Court by Justice Lambert. All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Nickell, JJ., concur. Thompson, J., concurs in result only by separate opinion.

Finch was found guilty of first-degree rape, first-degree sexual assault, and intimidating a participant in a legal process for crimes he committed against the fourteen-year-old daughter of his longtime live-in girlfriend. The results of the young girl's rape kit showed that Finch's semen was found in her vagina.

The Supreme Court held, first, that it was not palpable error for the Commonwealth to state during voir dire that Finch had a right not to testify and that his decision not to testify could not be held against him and to ask the venire, in the event he chose to testify, whether they could judge his credibility in the same manner as any other witness. The Court reasoned that the Commonwealth had accurately stated the law and then asked a question meant to assess whether the potential jurors could be impartial. And, because the statement occurred during voir dire, Finch had not yet decided whether to invoke his Fifth Amendment right. Next, the Court held that the trial court did not abuse its discretion by declining to strike two jurors for cause based on Finch's argument that the jurors' current and former employment, respectively, aligned them with victims of child sex abuse. Finch failed to present any reasonable ground that the jurors should have been struck apart from their employment, and the trial court therefore did not err by overruling his motions to strike. Finally, the Court held that cumulative error did not occur because: (1) the victim's testimony that she was being truthful was permissible because the defense alleged in opening that she was lying about the rape allegation; (2) the victim's mother and forensic interviewer did not improperly bolster her testimony; (3) no prejudicial error resulted from an investigating officer's testimony that Finch's DNA was obtained pursuant to a search warrant; and (4) the Commonwealth's closing argument did not make improper "golden rule" arguments, nor did it interject facts not in evidence in order to bolster the victim's credibility

ESTATE LAW:

MR. ROOF OF LOUISVILLE, LLC V. THE ESTATE OF AYANNA HENRY, DECEASED (SUCCESSOR ADMINISTRATOR NOT YET APPOINTED), ET AL.

[2022-SC-0177-DG](#)

October 26, 2023

AND

AMERICAN WATER HEATER COMPANY V. THE ESTATE OF AYANNA HENRY, DECEASED (SUCCESSOR ADMINISTRATOR NOT YET APPOINTED), ET AL.

[2022-SC-0178-DG](#)

October 26, 2023

Opinion of the Court by Chief Justice VanMeter. VanMeter, C.J.; Conley, Keller, Lambert, Nickell, and Thompson, JJ., sitting. Conley, Lambert, Nickell, and Thompson, JJ., concur. Keller, J., dissents by separate opinion. Bisig, J., not sitting.

On review from the Court of Appeals' reversal of the trial court's dismissal of the civil actions of the respective estates of Ayanna Henry and Lena Bailey, the Supreme Court reversed. Ayanna Henry was found deceased in the basement of her family home. Upon arrival of first-responders, other members of Ayanna's family reported headaches and flu-like symptoms which were later determined to be the result of exposure to elevated levels of carbon monoxide in the home. These elevated levels are alleged to have been caused by some combination of a faulty repair to the home's gas water heater and disrupted ventilation from the water heater through the roof. Shanita Bailey was appointed administrator of Ayanna's estate and brought an action for wrongful death in that capacity against several defendants. Additional claims for personal injury were also made by Shanita, individually; Lena Bailey, individually; and Shanita as next friend of Aniya Henry. Lena passed away shortly after the action began and Shanita was appointed administratrix of Lena's estate shortly thereafter. A few months after Shanita's appointment, she too passed away. This time, no new administrator of any of the estates was appointed until over two years after Shanita's death. During this period, the case was practiced as though nothing had changed and Defendants were unaware the estates lacked an administrator. Upon discovery of this fact, Mr. Roof and American Water Heater moved to dismiss the claims of Shanita, individually; as administratrix of Ayanna's Estate; and as administratrix of Lena's Estate. The trial court granted the motion, concluding the statutory time limit on revival found in KRS 395.278 applied and the claims were not timely revived. On appeal, the Court of Appeals reversed, holding the death of the appointed individual does not cause the action to abate, but merely requires a new substitution with another representative, an action not bound

by the time limit of KRS 395.278. The Supreme Court reversed the Court of Appeals, looking to the history of KRS 395.280 to explain its relationship to KRS 395.278, KRS 411.140 and CR 25.01 and how that relationship shows the one-year time limit in KRS 395.278 was intended to apply in instances involving successive administrators. The Court clarified that the personal representative is not a nominal party, but rather is almost always the necessary real party in interest in postmortem litigation. Further, “successor” in the context of estate administration refers to a second or subsequent person or entity appointed by the district court, not just the initial person or entity appointed to administer the estate. Under these principles, any time the administrator of an estate dies or is removed, the one-year limitation period on revival in KRS 395.278 applies. Accordingly, the trial court was correct in dismissing the claims for failure to timely revive.

WRIT:

ARKK PROPERTIES, LLC, ET AL. V. DANIEL J. CAMERON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY, ET AL.

[2023-SC-0196-OA](#)

October 26, 2023

Opinion and Order of the Court by Chief Justice VanMeter. All sitting. Bisig, Keller, Lambert, Nickell, and Thompson, JJ., concur. Conley, J., dissents by separate opinion.

This original action comes before the Court on a Petition for Supervisory Writ under § 110(2)(a) of the Kentucky Constitution, which confers upon the Court the power to issue all writs as may be required to exercise control of the Court of Justice. Petitioners challenge the constitutionality of Senate Bill 126’s amendment to KRS 452.005, which grants a party or the intervening Attorney General in any action that challenges the constitutionality of a statute, executive order, administrative regulation, or administrative agency order, the unilateral authority, without a showing of cause, to transfer the case to another, arbitrarily-selected circuit court, thereby summarily divesting the circuit court in which the case was filed of any further jurisdiction over the case, including review of the propriety of the transfer request. The implementation of this transfer procedure mandates certain actions on the part of the Clerk of the Supreme Court and the Circuit Court Clerk. The Supreme Court granted the Petition for Supervisory Writ, finding that the issues presented fall within the Court’s exclusive authority and jurisdiction as Senate Bill 126 commands actions to be taken by the Clerk of this Court, and circuit court clerks, both of whom are under the supervision of the Chief Justice and the Supreme Court. The Court further held that Senate Bill 126 is an unconstitutional encroachment by the legislative branch of government on the constitutionally conferred judicial powers of this Court, in violation of the

separation of powers doctrine of the Kentucky Constitution. The Court elected not to extend comity to Senate Bill 126. Going forward, the Court directed the Supreme Court Clerk and all circuit court clerks presented with a “Notice of Transfer” filed pursuant to Senate Bill 126 to refrain from undertaking any of the duties imposed thereby.

ATTORNEY DISCIPLINE:

KENTUCKY BAR ASSOCIATION V. DAVID CURLIN

[2023-SC-0084-KB](#)

October 26, 2023

AND

KENTUCKY BAR ASSOCIATION V. DAVID CURLIN

[2023-SC-0085-KB](#)

October 26, 2023

All sitting. All concur.

David Curlin was a family court judge in Henderson County whose term of office began in January 2023. A month later, the KBA asked the Supreme Court to indefinitely suspend Curlin from the practice of law for failing to answer charges issued by the Inquiry Commission in two separate bar complains, each related to legal services he performed prior to his election as a judge. In spite of the fact he had personally signed for the charges, Curlin claimed he did not receive them when ordered to show cause why he should not be suspended from the practice of law. After the Court denied the KBA’s initial request Curlin be indefinitely suspended, the Court also ordered that Curlin file a formal answer to each of the Charges. Curlin failed to do so. The Court indefinitely suspended him from the practice of law pursuant to SCR 3.167.

KENTUCKY BAR ASSOCIATION V. BRITTANY LAWRYN OLIVER

[2023-SC-0223-KB](#)

October 26, 2023

AND

KENTUCKY BAR ASSOCIATION V. BRITTANY LAWRYN OLIVER

[2023-SC-0224-KB](#)

October 26, 2023

AND

KENTUCKY BAR ASSOCIATION V. BRITTANY LAWRYN OLIVER

[2023-SC-0225-KB](#)

October 26, 2023

All sitting. All concur.

Brittany Lawryn Oliver failed to respond to three separate bar complaints in these cases alleging she had not performed work after being hired to assist in filing three bankruptcy actions for three sets of clients. Her clients had all paid her advance fees, none of which she returned even though she had done no work on the cases. The Inquiry Commission issued formal charges against Oliver in all three cases. She did not respond to any of the charges. The Court indefinitely suspended Oliver from the practice of law pursuant to SCR 3.167 for her failure to file answers to the charges.

KENTUCKY BAR ASSOCIATION V. JAY ARTHUR ROSENBERG

[2023-SC-0273-KB](#)

October 26, 2023

All sitting. All concur.

Jay Arthur Rosenberg was permanently disbarred from the practice of law in Virginia and the District of Columbia. The Supreme Court of Kentucky ordered Rosenberg to show cause why he should not be subject to reciprocal discipline and permanently disbarred in the Commonwealth of Kentucky pursuant to SCR 3.435. Rosenberg failed to respond to the show cause order. The Court permanently disbarred him from the practice of law.

Rosenburg’s underlying conduct in Virginia involved his practice of law there without a license. Rosenberg had contracted a firm in India to prepare first drafts of deeds for his office, which turned out more than 2,000 deeds per year. No one in the firm was licensed to practice law in Virginia and the documents did not appear to have even been proofread by a Virginia lawyer, as they contained many spelling and grammar errors—and even substantive mistakes. Rosenberg admitted to this misconduct in Virginia and failed to show cause why identical discipline should not be imposed in Kentucky.

KENTUCKY BAR ASSOCIATION V. ERIC TULEY WEINER

2023-SC-0290-KB

October 26, 2023

All sitting. All concur.

Eric Tuley Weiner failed to file any answer to a total of ten charged counts of misconduct and they were handled as a default case pursuant to SCR 3.210(1). The Kentucky Bar Association's Board of Governors considered the ten counts against Weiner and found him guilty on eight of them. The majority of the Board recommended Weiner be permanently disbarred from the practice of law. The Court agreed with the Board's recommendation and permanently disbarred Weiner.

In one of the cases underlying Weiner's discipline, he had instructed his client he was paying the client's creditors with a portion of the client's workers' compensation settlement proceeds. Weiner failed to pay any creditors with the money. He also failed to file a motion with the workers' compensation administrative law judge seeking attorney's fees, which he also withheld from the settlement. Weiner was charged with violating SCR 3.130(1.15)(a), (1.16)(d), (8.4)(c), (1.4), and (8.1)(b).

In the other case, another attorney in Weiner's office represented a client in a social security claim. While the claim was still pending, the client asked Weiner to represent her in another case against the insurer which had been paying her long-term disability benefits when it ceased paying those benefits. Weiner sent a demand letter to the insurance company but failed to inform the client about any subsequent communications. The client was eventually awarded social security disability benefits. Weiner later contacted the client to tell her he had gotten a check from the insurance company. The client picked up the check, which was written on Weiner's account. The client tried to cash the check several times before she was able to. Weiner never informed the client of the terms of the settlement with the insurance company. When the client tried to contact him at his office but was informed he was no longer there due to substance use disorder.

When the insurance company contacted the client a few years later, it informed her its medical board had determined she could return to work. It also demanded return of the check, as she had been awarded social security benefits. It was then she learned the total amount of the check sent to Weiner, because that was the amount her insurance company now demanded repaid. It turned out Weiner had kept a little over \$8,000 but had never accounted for these funds to his client. In connection with this second client, Weiner was charged with violating SCR 3.130 (1.3), two counts of (8.4)(c), (1.4), (1.16)(d), and (8.1)(b).

The Supreme Court adopted the recommendation of the Board of Governors and held Weiner was guilty of eight of the ten charged counts. It also agreed with the Board's recommendation to permanently disbar Weiner from the practice of law.

INQUIRY COMMISSION V. JARED ANDREW COX

[2023-SC-0297-KB](#)

October 26, 2023

All sitting. All concur.

The Inquiry Commission of the Kentucky Bar Association sought a temporary suspension of Jared Andrew Cox from the practice of law. The Inquiry Commission asserted there was probable cause that Cox poses a substantial threat of harm to the public pursuant to SCR 3.165(1)(b), (c), and (d). Cox had been convicted of a crime and the actions leading to his conviction put in grave issue whether Cox has the moral fitness to continue practicing law. The Commission also asserts Cox is addicted to intoxicants or drugs which deprived him of the physical and mental fitness to continue to practice law. Cox responded to the petition, setting forth mitigating circumstances and arguing he should not be subject to the temporary suspension.

Cox and his wife were involved in an altercation in which he physically assaulted his wife. He admitted he was heavily intoxicated at the time. His wife got an EPO against him and he was ordered to remain at least five-hundred feet away from her and refrain from any contact or communication. A three-year DVO was subsequently entered. Cox texted his wife on several occasion and mailed her numerous letters in violation of the DVO. He also forced entry into the marital home. He was found in contempt of the DVO and sentenced to one-hundred-eighty days in jail.

Cox has several pending criminal charges including first-degree strangulation, second-degree burglary, intimidating a participant in the legal process, third-degree terroristic threatening, and twelve counts of violating an EPO/DVO. The Court granted the Commissions petition and temporarily suspended Cox from the practice of law.

KENTUCKY BAR ASSOCIATION V. KAYCE RENAE POWELL

[2023-SC-0308-KB](#)

October 26, 2023

All sitting. All concur.

A Kentucky Bar Association trial commissioner found Kayce Renae Powell had committed four counts of misconduct in two separate cases. Specifically,

Powell was found to have violated SCR 3.130(3.4)(f), (8.2)(a), (3.5)(d), (8.1)(b), (1.3), (1.4)(a) and (b), (1.6), and (1.16)(d). The KBA Board of Governors adopted the trial commissioner's findings and conclusions and unanimously recommended Powell be suspended from the practice of law for one year and return any unearned fees connected to one of the cases.

In the first case, Powell was displeased with losing a will contest. She alleged a conspiracy in which the trial judge, two trial defense counsel, and the Court of Appeals had all conspired against both her and her client. Powell sued the two defense counsel, filed bar complaints against them, and filed several Judicial Conduct Commission complaints against the trial judge. The KBA trial commissioner and Board of Governors found she filed these complaints and lawsuits to gain an advantage in the case.

In the second case, Powell was representing a client when she closed her office. Without her client's knowledge, she discussed the case with another attorney and wanted him to take over. The client tried in vain for months to contact Powell. She had paid Powell a retainer that was never accounted for.

The Supreme Court agreed with the findings and recommendations of the trial commissioner, found Powell had violated the rules of professional conduct in the ways described by the trial commissioner, and held a one-year suspension from the practice of law was the appropriate sanction.