

**Commonwealth of Kentucky**  
**Supreme Court**  
No. 2007-SC-0833

**FILED**  
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SUPREME COURT

**TIMOTHY KIRBY**

**APPELLANT**

v.

Appeal from Laurel Circuit Court  
Hon. William Cain, Judge  
Indictment No. 99-CR-0179

**COMMONWEALTH OF KENTUCKY**

**APPELLEE**

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**Brief for Commonwealth**

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Submitted by,

**JACK CONWAY**

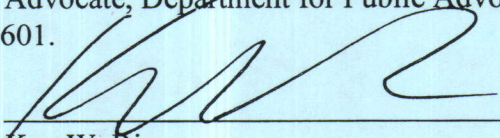
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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served May 6<sup>th</sup>, 2009 via United States mail to Hon. William Cain, Judge, Laurel Circuit Court, 101 Main Street, London, KY 40743; via electronic mail to Hon. Danny Evans, Commonwealth Attorney; and via Kentucky messenger mail service to J. Brandon Pigg, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

  
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## **INTRODUCTION**

Timothy Kirby, hereinafter “Appellant,” appeals from the Laurel Circuit Court’s determination that he was not eligible for the domestic violence exemption under KRS 439.3401(5). This case comes by way of a grant of discretionary review.

## **STATEMENT REGARDING ORAL ARGUMENT**

The Commonwealth believes that the issues raised on appeal may be adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

**COUNTERSTATEMENT OF POINTS AND AUTHORITIES**

**INTRODUCTION** ..... I

KRS 439.3401(5) ..... i

**STATEMENT REGARDING ORAL ARGUMENT** ..... ii

**COUNTERSTATEMENT OF POINTS AND AUTHORITIES** ..... iii

**COUNTERSTATEMENT OF THE CASE** ..... 1

KRS 439.3401 ..... 1

KRS 439.3402 ..... 2

Kirby v. Commonwealth,  
132 S.W.2d 233 (Ky. App. 2004) ..... 2

KRS 439.3401(5) ..... 5

Commonwealth v. Vincent,  
70 S.W.3d 422 (Ky. 2002) ..... 6

**ARGUMENT** ..... 6

**I. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT APPELLANT WAS NOT EXEMPT FROM BEING CONSIDERED A VIOLENT OFFENDER UNDER KRS 439.3401** ..... 6

KRS 439.3401 ..... 6

KRS 439.3401(3) ..... 6

KRS 439.3401(1)(c) ..... 6

KRS 439.3401(5) ..... 6

KRS 533.060 ..... 6

Commonwealth v. Vincent,  
70 S.W.3d at 424 ..... 7

<u>Kirby v. Commonwealth,</u> 132 S.W.3d 233 (Ky. App. 2004) .....	7
<u>Anderson v. Commonwealth,</u> 934 S.W.2d 276 (Ky. 1996) .....	7
<u>Holland v. Commonwealth,</u> 192 S.W.3d 433, 437 (Ky. App 2006) .....	8
<u>Commonwealth v. Plowman,</u> 86 S.W.3d 47 (Ky. 2002) .....	12
<u>Commonwealth v. Harrelson,</u> 14 S.W.3d 541 (Ky. 2000) .....	12
<b>CONCLUSION</b> .....	14

## COUNTERSTATEMENT OF THE CASE

On May 30, 1995, Appellant entered into a plea agreement with the Commonwealth, pursuant to which Appellant agreed to plead guilty to a charge of first degree manslaughter, a violent offense. (TR Vol. I<sup>1</sup>, 43; 45). In exchange for the plea, the charge was amended to manslaughter from the Laurel County indictment charging Appellant with murder for shooting his cousin, Brian Johnson, on October 14, 1999. (TR Vol. I, 1). The following facts were set forth in the Commonwealth's offer on a plea of guilty:

Brian Johnson, victim, and defendant were cousins that lived within 100 yards of each other. Johnson had been to defendant's mother's home. She alleged that Johnson tried to choke her but her word was the only evidence against physical evidence that refuted her claim. Defendant shot an SKS 7.62 rifle several times. One bullet struck Johnson in the back and killed him. Johnson was 180 feet from defendant and 40 feet from his home at the time.

(TR Vol. I, 42). Appellant was sentenced to serve fourteen and one half years in the penitentiary. (TR Vol. I, 46-47).

On December 13, 2002, Appellant filed a motion with the Laurel Circuit Court requesting that he be granted an exemption from the requirement under KRS 439.3401 that violent offenders serve a greater portion of their sentences prior to being eligible for parole. (TR, 4-8 ). Appellant claimed Brian choked Appellant's mother shortly before the shooting, thereby entitling Appellant to exemption from the application of KRS 439.3401 based on the domestic abuse exception contained within KRS

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<sup>1</sup>The Appellee will use the record designations utilized by Appellant. (Appellant's Brief, I).

439.3402. The Laurel Circuit Court entered an order denying Appellant's motion on February 14, 2003, ruling that the record and evidence of this case "clearly demonstrates that this Appellant, Timothy Kirby, is not excepted as a victim of domestic violence pursuant to KRS 439.3401." (TR, 23). Appellant appealed that ruling to the Kentucky Court of Appeals, with that Court determining that Appellant could be considered a victim of domestic violence for purposes of KRS 439.3401 due to the degree of kinship between Appellant, Miranda, and Brian. The Court of Appeals ordered the trial court to conduct an evidentiary hearing to determine whether the facts of the case would warrant the relief Appellant requested. See Kirby v. Commonwealth, 132 S.W.2d 233 (Ky. App. 2004) (hereafter "*Kirby I*").

Appellant's mother, Miranda Kirby, testified at the hearing. She said that on October 13, 1999, she and other family members were doing yard work in her yard. (VR No. 3, 6/30/05, 9:34:55.) Among these family members were Appellant, Brian's father and Brian's brother. (VR No. 3, 6/30/05, 9:35:11.) Once the work was finished, Appellant and his girlfriend returned to their home and went to bed. (VR No. 3, 6/30/05, 9:35:32.) Appellant's mobile home was located on his mother's property. (VR No. 3, 6/30/05, 9:35:42.) Other family members, including Miranda, walked to the home of Stella Johnson, Miranda's sister. (VR No. 3, 6/30/05, 9:35:55; 9:36:22.) There, they had a few beers and some whiskey. (VR No. 3, 6/30/05, 9:36:09.)

At some point during the evening, Brian came to Stella's residence. (VR No. 3, 6/30/05, 9:37:11.) It did not appear to Miranda that Brian was intoxicated at that time. (VR No. 3, 6/30/05, 9:38:07.) Once there, Brian drank some whiskey and said he

had just taken 3 Xanax pills. (VR No. 3, 6/30/05, 9:38:22.) Brian only stayed at the residence for a few minutes and he took a beer with him when he left. (VR No. 3, 6/30/05, 9:38:53.)

Miranda and her boyfriend, Philip Neil, left Stella's together between 12:30 p.m. and 1:00 a.m. (VR No. 3, 6/30/05, 9:39:41; 9:40:16.) Miranda's mother, Rosa Johnson, was at Miranda's home in bed when Miranda and Philip arrived home. (VR No. 3, 6/30/05, 9:41:08.) Miranda was unable to sleep, and at about 3:00 a.m., Miranda got up, made herself a glass of warm milk and sat at the kitchen table. (VR No. 3, 6/30/05, 9:41:40.) Someone knocked on the door, but Miranda ignored it. (VR No. 3, 6/30/05, 9:41:52.) The person then began walking around the house and banging on windows. (VR No. 3, 6/30/05, 9:42:38.) Finally, Brian started yelling, saying that he wanted a beer. (VR No. 3, 6/30/05, 9:43:06.) Even though Brian was told there was no beer inside Miranda's home, Brian continued banging on the door. (VR No. 3, 6/30/05, 9:43:12.) Because Miranda was afraid Brian would wake her mother, Miranda finally answered the door and said "Brian, what are you doing? My mom is right here trying to sleep." (VR No. 3, 6/30/05, 9:43:34.) At that point, Brian grabbed Miranda by the throat and told her he would kill her. (VR No. 3, 6/30/05, 9:43:44.) Brian released Miranda when Rosa entered the room. (VR No. 3, 6/30/05, 9:45:01.) When Philip entered the room with a stick in his hand, Miranda was able to take her mother back to the bedroom to assure Rosa that everything was alright. (VR No. 3, 6/30/05, 9:45:21.) Miranda then

exited her home to go to Appellant's home, which was 50-75 feet away.<sup>2</sup> (VR No. 3, 6/30/05, 9:46:35; 9:48:45.) Before she got there, she heard Brian yelling "Yeah, go get Tim." (VR No. 3, 6/30/05, 9:46:42.) Miranda beat on Appellant's door to wake Appellant. (VR No. 2, 6/30/05, 9:46:54.) Upon learning what had happened, Appellant came outside with his gun. (VR No. 3, 6/40/05, 9:47:05.) By this time, Brian had walked onto the roadway and was walking away from Miranda's home and towards the home of Miranda's brother, who is Brian's father. (VR No. 3, 6/30/05, 10:04:18.) Appellant, not knowing what was going on, fired three shots in the air after he exited his home. (VR No. 3, 10:04:26.) Brian was in "the circle" at that time yelling "All of you sons of bitches will be dead by morning."<sup>3</sup> (VR No. 3, 6/30/05, 10:19:45.) Appellant then told Miranda that he would walk her back to her place. (VR No. 3, 6/30/05, 10:19:55.) While they were walking back to Miranda's home, Appellant "tripped on something" and the gun accidentally went off, striking Brian. (VR No. 3, 6/30/05, 10:19:59.) Miranda acknowledged that she did not believe she was in any danger when the fatal shot was fired as Brian was "halfway down the circle." (VR No. 3, 6/30/05, 10:20:09.) Miranda estimated that 15 minutes elapsed between the time Brian choked her and when Brian was shot. (VR No. 3, 6/30/05, 10:03:49.) The police investigation revealed that Brian was shot in the back and was facing towards his father's home and away from Appellant.

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<sup>2</sup> A diagram of the area was introduced as Commonwealth's Exhibit No. 1 at the evidentiary hearing and was attached to the Commonwealth's brief in the Court of Appeals.

<sup>3</sup> The road Miranda and Appellant live on forms a loop, which Miranda refers to as "the circle."

(VR No. 3, 6/30/05, 12:06:11.) The shell casings from Appellant's gun were found 180 feet from Brian's body. (VR No. 3, 6/30/05, 12:05:55)

After the hearing, the trial court allowed both parties to submit briefs on the issue of whether Appellant was entitled to the exemption contained in KRS 439.3401(5). After briefing, the trial court ultimately denied Appellant's "Motion for Exemption from KRS 439.3401." In doing so, the trial court found that Brian choked Miranda, but that "the domestic violence upon Miranda Kirby was too remote in time to be directly connected to the shooting of Brian Johnson." (TR IV, 212.) The trial court also found that "[t]he only evidence presented at the hearing was that the shooting was accidental. As such, the shooting of Johnson was not connected to the domestic violence against Kirby's mother." (Id.).

Appellant appealed that decision to the Kentucky Court of Appeals. That Court, on August 10, 2007, rendered an unpublished opinion affirming the decision of the Laurel Circuit Court. (hereafter "Slip Opinion"). Portions of that opinion will be discussed in the argument below. In summary, the Court of Appeals interpreted this Court's decision in Commonwealth v. Vincent, 70 S.W.3d 422 (Ky. 2002) to require that Appellant show a connection between the domestic violence and the offense for which Appellant was convicted. (Slip Opinion, 5). The Court of Appeals believed that based on the evidence adduced at the evidentiary hearing, "the trial court's finding that the shooting was not connected to the choking was highly reasonable given the evidence." (Slip Opinion, 19). Further, while being outside the letter of the domestic violence exception, Appellant also fell outside its spirit of the statute which was meant to provide

leniency “for those individuals who have acted in response to having suffered abuse.”  
(Slip Opinion, 21).

The Appellant sought discretionary review from this Court, which was granted.

## **ARGUMENT**

### **I.**

#### **THE TRIAL COURT DID NOT ERR IN DETERMINING THAT APPELLANT WAS NOT EXEMPT FROM BEING CONSIDERED A VIOLENT OFFENDER UNDER KRS 439.3401**

The Court of Appeals did not err in determining that Appellant was not eligible to escape the violent offender sentencing guidelines since he did not qualify under the domestic violence exception. In so doing, the trial court correctly applied relevant case law, including Commonwealth v. Vincent, 70 S.W.3d 422 (Ky. 2002).

Individuals that are classified under Kentucky’s violent offender statute have significant limitations on probation and parole placed upon them. KRS 439.3401 provides that certain classes of offenders shall not be eligible for parole until they serve at least 85% of their prison sentence. KRS 439.3401(3). Among these classes of offenders are persons who have been convicted of or have pled guilty to Class B felony offenses involving the death of or serious physical injury to the victim. KRS 439.3401(1)(c); KRS 439.3401(3). Appellant pled guilty to such an offense. However, KRS 439.3401(5) states in part that “[t]his section shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with

regards to the offenses involving the death of the victim or serious physical injury to the victim.” This Court has held that in order to be entitled to the exemption in KRS 439.3401(5), there must “be a relationship between the domestic violence or abuse and the underlying offense.” Commonwealth v. Vincent, 70 S.W.3d 422, 424 (Ky. 2002)<sup>4</sup>. The Court of Appeals in *Kirby I* has already determined that the degree of kinship between Appellant, Miranda, and Brian was sufficient to qualify Appellant for the exemption contained in KRS 439.3401(5). The issue that was before the Court of Appeals on remand was whether the facts of the case establish that there was a relationship between the domestic violence against Miranda and the shooting death of Brian. *see Kirby v. Commonwealth*, 132 S.W.3d 233 (Ky. App. 2004).

The Court of Appeals did not err in holding that Movant was not entitled to the exemption. First, the Court of Appeals applied the correct legal standard of review, holding that the decision of the trial court could only be reversed if it was clearly erroneous, citing Anderson v. Commonwealth, 934 S.W.2d 276 (Ky. 1996). (Slip Opinion, 6). Anderson also instructs that the Appellant bears the burden at the evidentiary hearing to show by a preponderance of the evidence that he was the victim of domestic violence.

Further, the Court of Appeals noted that the trial court had great discretion as to its findings of fact, and could therefore choose to believe any or all of the testimony taken at the evidentiary hearing. (Slip Opinion, 19). The court affirmed the factual

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<sup>4</sup>This Court found that a history of domestic violence does not, by itself, trigger the parole exemption in KRS 439.3401(5). *See Commonwealth v. Vincent*, 70 S.W.3d at 424.

determinations of the trial court that “a significant amount of time had elapsed between the choking and the shooting” and that “the shooting was accidental.” (*Id.*, at 15-16). In making that determination, the Court of Appeals reviewed the evidence taken at the hearing, and gave due deference to the trial court.

Discounting Miranda's inconsistent and contradicted testimony, the trial court was left with evidence showing that, after the alleged choking, the situation was relatively calm for at least fifteen minutes prior to the fatal shooting. Indeed, the trial court found no other acts of domestic violence, either verbal or physical, other than the brief choking. Furthermore, because Kirby's guilty plea regarding intent was not conclusive, the trial court could consider and believe Miranda's testimony that Kirby tripped, while escorting Miranda home, and accidentally shot Brian in the back. However, even if the shooting was intentional, the trial court's finding that the shooting was not connected to the choking was highly reasonable given the evidence. Giving the trial court the proper deference required by the case law, combined with the lack of evidence and the absence of a finding regarding extreme emotional disturbance on Kirby's behalf or a finding of continuing domestic violence, we conclude that the trial court did not err when it found that the shooting was not connected to the prior act of domestic violence.

(Slip Opinion, 19).

The Court of Appeals analyzed its prior decision in Holland v. Commonwealth, 192 S.W.3d 433, 437 (Ky. App 2006) to discern the intent behind the domestic violence exemption to violent offender statute.

We agree with the *Holland* Court that the domestic violence exception set forth in KRS 439.3401(5) was meant, in part, to give leniency to those women who have suffered from “battered woman syndrome.”<sup>5</sup> This condition was initially researched by Lenore E. Walker, and she defined a battered woman as “a

woman who is **repeatedly** subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights.” [citation omitted]

(Slip Opinion, 20-21). The Court of Appeals concluded “[h]e simply does not deserve the benefit of the domestic violence exception, a leniency that is reserved for those individuals who have acted in response to having suffered abuse.” (Id., 21). The Court reconciled its decision with the mandate of *Kirby I*:

Our conclusion does no injustice to the law of the case under *Kirby I* because our Court held therein that Kirby fell within the class of individuals covered by KRS 439.3401(5) if his allegations were true -- that he was acting under extreme emotional disturbance when he shot Brian to prevent Brian from killing his mother. Even where domestic violence is one act like the case at hand, assuming an act of domestic violence even took place, this case fails to meet the spirit and intent of the leniency given under KRS 439.3401(5). Had Kirby walked in while Brian was allegedly choking his mother or threatening her with further imminent violence, we might conclude otherwise.

(Id., at 21).

Contrary to Appellant’s argument, the Court of Appeals did properly apply and consider Vincent and Holland. (Slip Opinion, 7-8). Appellant asserts that fact that the Appellant *accidentally* shot and killed Brian Johnson does not serve to remove him from the domestic violence exception.

An examination of Vincent is useful to understanding how Appellant’s position is flawed. Simply, how can you receive the leniency intended for victims that kill as a last resort out of fear, when the testimony clearly showed that you killed out of

*accident?* Vincent answers that question for us: you cannot. In Vincent, the appellant shot and killed her ex-husband. Vincent was upset about her ex-husband seeing another woman, and intending to take a trip with her. Vincent went to his home, armed with a handgun, and there she became upset when she saw the woman's name on his caller ID, and saw a card that was signed by her ex-husband. Testimony was contradictory as to what happened after that. A eyewitness said that Vincent pulled out the handgun and shot the victim. Vincent testified that the gun fell out of her purse and that she accidentally pulled the trigger, shooting the victim. This court that simply because Vincent may have been a victim of domestic violence previously at the hands of the victim,

the statute requires that there be a relationship between the domestic violence or abuse and the underlying offense. Proof of history of domestic violence between the defendant and the victim is not, by itself, sufficient to trigger the statute's parole exemption.

Vincent, 70 S.W.3d at 424. This Court ultimately concluded:

Vincent offered absolutely no evidence that connected the shooting with the history of domestic violence between Hitchcock and her. Vincent's version of the events was that the shooting was accidental. The Commonwealth's eyewitness testified that the shooting was deliberate and unprovoked. While we cannot state definitively what is necessary to show that a defendant is eligible for the domestic violence or abuse exception of KRS 439.3401(5), we can state and do hold that a prior history of domestic violence between a violent crime victim and the criminal defendant who perpetrated the violent offense does not, in and of itself, make the defendant eligible for the parole exemption of KRS 439.3401(5).

Id., at 425. In reaching that conclusion, this Court noted that language of the domestic violence exception required that the death "involve" the domestic violence.

To find in Appellant's favor requires that the alleged violence between Appellant and Brian caused the assault rifle to accidentally fire. The proof below at the evidentiary hearing was that Appellant "tripped on something" and the gun accidentally went off, striking Brian. (VR No. 3, 6/30/05, 10:19:59.). In fact, Miranda, to whose aid Appellant was supposedly coming, testified that at the time of the shooting she was not in danger. (VR No. 3, 6/30/05, 10:20:09). Vincent clearly requires some connection between the acts of domestic violence and the actions that lead to the victims death. Here, the evidence showed no connection, only an *accident*. It is logically impossible for the alleged domestic violence to have caused Appellant to trip and accidentally shoot Brian. As the Court of Appeals noted, Appellant does not fall within the group of offenders who were intended to benefit from the domestic violence exception. There is not legal or equitable reason for him to have that leniency.

Further, Appellant criticizes the emphasis that the Court of Appeals placed on the fact that time had elapsed between the choking of Miranda, the alleged domestic violence, and the actual shooting of the victim. However, that was simply part and parcel of the determination of whether there was any connection between Brian's death and the acts of domestic violence. Miranda estimated that 15 minutes elapsed between the time Brian choked her and when Brian was shot. (VR No. 3, 6/30/05, 10:03:49.) The police investigation revealed that Brian was shot in the back and was facing towards his father's home and away from Appellant. (VR No. 3, 6/30/05, 12:06:11.) The shell casings from Appellant's gun were found 180 feet from Brian's body. (VR No. 3, 6/30/05, 12:05:55). Clearly, the more distant in time the shooting was from the act of domestic violence, the

less actual connection between the two would exist. Appellant asserts that domestic violence is a continuing violence and includes fear. That is all fine and well, except that Miranda specifically testified that she was in *no* fear or danger at the time of the shooting. (VR No. 3, 6/30/05, 10:20:09). Also, Appellant attacks the analysis of the Court of Appeals as to the seeming lack of extreme emotional disturbance evidence at the evidentiary hearing. However, that examination was not error when one considers that Miranda's testimony that the shooting was an accident was directly contradictory to the factual position of his plea, which was to the amended charge of manslaughter in the first degree. On the day of the plea, the Commonwealth moved to amend the murder charge to manslaughter in the first degree, while under extreme emotional disturbance. (TR I, 44). On the plea sheets, the Commonwealth gave the reason for the amendment: a jury may find that Appellant was acting under EED. (*Id.*, at 42). Finally, there is no error in the Court of Appeals examining the spirit of the domestic violence exception to the violent offender statute. Certainly, exploring the legislative intent behind a statute is a well settled tool of statutory construction. Commonwealth v. Plowman, 86 S.W.3d 47 (Ky. 2002). One the primary duties of a court when interpreting a statute is to give effect to the intent of the legislature. Commonwealth v. Harrelson, 14 S.W.3d 541 (Ky. 2000).

The Court of Appeals correctly held: "we conclude that he trial court did not err when it found that the shooting was not connected to the prior act of domestic violence." (Slip Opinion, 19). In reaching that conclusion the Court of Appeals correctly followed the mandate of *Kirby I*, and conducted an evidentiary hearing. Using its wide discretion and proper legal authorities, the Court of Appeals reached the correct

conclusion that Appellant's crime was not connected to the alleged act of domestic violence. There is no need for reversal.

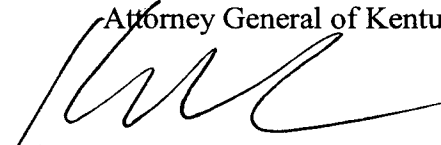
**CONCLUSION**

For all the foregoing reasons the judgment of the Laurel Circuit Court should be affirmed.

Respectfully Submitted

**JACK CONWAY**

Attorney General of Kentucky

A handwritten signature in black ink, appearing to read 'Ken W. Riggs', is written over the typed name and title.

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