

Judicial Discretion



“Discretion”

Individual choice or judgment; Power of free decision or latitude of choice within certain legal bounds. [Merriam-webster.com](https://www.merriam-webster.com)

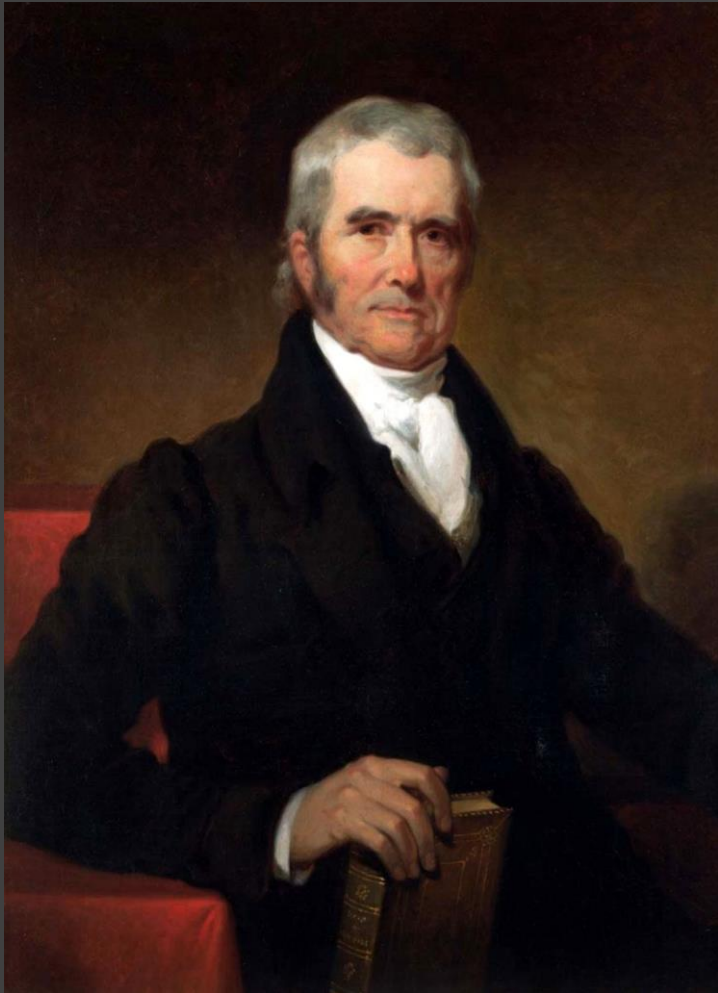
“Plenary Discretion”

Or “plenary authority” means complete in every respect; absolute; unqualified. [Merriam-webster.com](https://www.merriam-webster.com)

- Prosecutorial discretion whether to charge a crime and what charge to seek, sentencing recommendations;
- Congress’ power to regulate interstate commerce.

“Judicial Discretion” defined:

The power or right to make official decisions using reason and judgment to choose from among acceptable alternatives. Legal-dictionary.thefreedictionary.com



Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. **When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law;** and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law. ***Osborn v. Bank of the US, 22 US 738 (1824)***

“Judicial Discretion” defined in Kentucky

Discretion of court is a liberty or **privilege allowed to a judge**, within the confines of right and justice, to decide and act in accordance with what is fair, equitable, and wholesome, as determined by the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, **guided by the spirit, principles, and analogies of the law**, to be exercised in accordance with a wise, as distinguished from a mere arbitrary, use of power, and under the law...

“Judicial Discretion” defined in Kentucky

Discretion is not a judge's sense of moral right; neither is it his sense of what is just. He is not clothed with a dispensing power or privileged to exercise his individual notions of abstract justice. With him there is no scope for judicial caprice. Principles of law are to be ascertained and followed. Justice is administered in the courts on settled and fixed principles. ***City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964), overruled on other grounds, Nolan v. Spears, 432 S.W.2d 425 (Ky. 1968)***

Weighing of factors

In almost every case involving a discretionary decision, it will involve a weighing of factors or circumstances.



Examples of Discretionary Rulings

- What amount to set bail;
- Whether to sever or join co-defendants in a criminal trial;
- Whether to continue the trial of a case;
- Whether to probate a defendant in a probatable case;
- Whether probative value of evidence is substantially outweighed by danger of undue prejudice to right to a fair trial;
- Whether best interests of the child warrants termination of parental rights of a parent;
- Whether to allow funds for an expert in an indigent case.

Limitations on Discretion

Prior Case Law:

***Penner v. Penner*, 411 S.W.3d 775 (Ky. App. 2013):** An abuse of discretion when trial court in a divorce case treated husband's restricted stock shares as both marital property (thus, subject to division between the parties) *and* as his income (for purposes of determining child support), in opposition to unpublished case of ***Burton v. Burton*, 2011 WL 557469 (Ky. App. 2011).**

Rule:

***Zewoldi v. Transit Authority of River City*, 553 S.W.3d 841 (Ky. App. 2018):** An abuse of discretion when the trial court refused to apply business record hearsay exception under **KRE 803(6)**, and refused to admit self-authenticating employee records.

Limitations on Discretion

Statute:

Pasley v. Pasley, 333 S.W.3d 446 (Ky. App. 2010): An abuse of discretion when trial court granted a Domestic Violence Order (DVO) without finding from a preponderance of the evidence that acts of domestic violence and abuse have occurred and may again occur, as per **KRS 403.750(1)**.

Constitution:

Abraham v. Commonwealth, 565 S.W.2d 152 (Ky. App. 1977): “[T]here is no discretion to refuse to reduce excessive bail,” adopting interpretation of **Eighth Amendment** by ***Stack v. Boyle, 342 U.S. 1 (1951)***.

Limitations on Discretion

Principles of Fairness:

Commonwealth v. James, 586 S.W.3d 717 (Ky. 2019): An abuse of discretion when trial court refused to grant a directed verdict of not guilty on charge of tampering with physical evidence when defendant dropped a glass pipe on the ground in plain view of a police officer, in spite of statutory language making it a crime to “conceal” or “remove” evidence.

“While it could be argued that the terms ‘remove’ and ‘conceal’ are so broad on their face as to include a person's act in dropping or tossing evidence with their back turned to an officer, such a reading would **‘lead to results that are inexplicably harsh.’**”

Standards of Review

Appellate standards range from most deferential to the trial court to the least deferential to the trial court.



“Abuse of Discretion” (Most deferential)

Abuse of discretion is a **standard of review** which applies in situations where a court is empowered to make a **decision of its choosing** that falls within a range of permissible decisions. ***Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004)**

Was the decision arbitrary, capricious, whimsical, or unsupported by sound legal principles?

“Abuse of Discretion” (Most deferential)

In other words, a “zone of reasonableness.” *Stack v. Boyle*, *supra*



“Clear Error” (Less deferential)

“Clear error applies to a review of a trial court's findings of fact.” *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004).

“Everyone has a right to their own opinion; no one has a right to be wrong in their facts.”



Bernard Baruch

“Clear Error” (Less deferential)

Whether the trial court's findings of fact are supported by **substantial evidence**. “[S]ubstantial evidence’ is ‘[e]vidence that a reasonable mind would accept as adequate to support a conclusion’ and... has sufficient probative value to induce conviction in the minds of reasonable men.” ***Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)**



“Clear Error” (Less deferential)

“[A]n error that is alleged in the trial court's findings of fact must be reviewed for clear error before the appellate court can reach the discretionary aspects of the trial court's decision.”

***Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004)**

There can be Different Evidentiary Standards for Finding Facts:

- **Probable Cause** (reasonable belief that something occurred)
- **Preponderance of the Evidence** (more likely than not that something occurred)
- **Clear and Convincing**
- **Beyond a Reasonable Doubt**



The higher the standard, the more substantial the evidence necessary to support the fact finding.

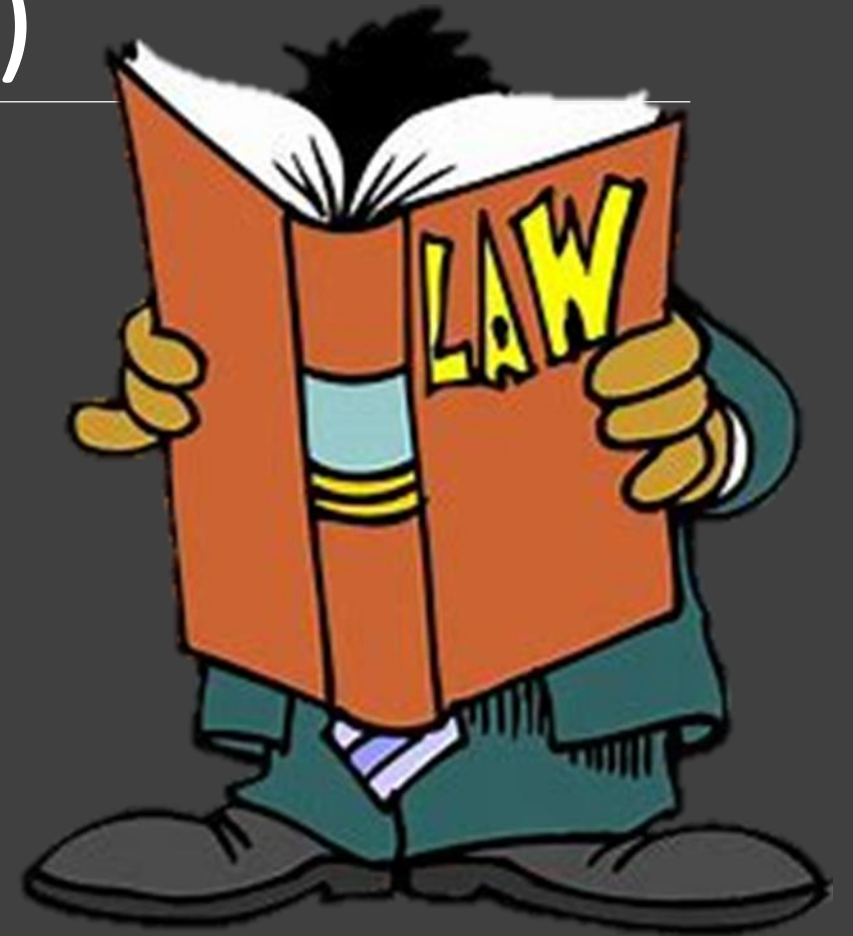
“De Novo” (Least deferential)

What is the right answer?
Appellate court decides the
issue as if it had not been
decided before.



“De Novo” (Least deferential)

“When reviewing a trial court’s denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law.” *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006)



Different Evidentiary Standards can have Different Appellate Review Standards

Suppression of Evidence Pursuant to a Consent Search Case:

- Evidentiary Standard that Arrestee Consented: **Preponderance of the Evidence**
- Appellate Review Standard for Fact Finding: **Clear Error**
- Appellate Review Standard for Decision Whether to Suppress: **De Novo**

Termination of Parental Rights Case:

- Evidentiary Standard for Finding Facts Supporting Termination: **Clear & Convincing Evidence**
- Appellate Review Standard for Fact Finding: **Clear Error**
- Appellate Review Standard for Decision Whether to Terminate Rights Based on those facts: **Abuse of Discretion**

Issuance of a Domestic Violence Order (DVO) Case:

- Evidentiary Standard for Finding that Violence has Occurred/Likely to reoccur: **Preponderance of the Evidence**
- Appellate Review Standard for Fact Finding: **Clear Error**
- Appellate Review Standard for Whether to Issue a DVO: **Abuse of Discretion**

Different Evidentiary Standards can have Different Appellate Review Standards

Allowing Expert Funds in an Indigency Case (Criminal or Family Law):

- Evidentiary Standard that Arrestee Consented: **Reasonable Necessity**
- Appellate Review Standard for Fact Finding: **Clear Error**
- Appellate Review Standard for Decision Whether to Suppress: **Abuse of Discretion**

Thank You!

