**PUBLISHED OPINIONS**
**KENTUCKY SUPREME COURT**
**APRIL 2012**

## I. CIVIL

### A. Charles L. Wilson, Jr. v. City of Central City, Kentucky
**2010-SC-000394-DG** **April 26, 2012**

Opinion of the Court by Justice Scott. All sitting; all concur. Appellant was an employee of the City of Central City, Kentucky, and was fired shortly after notifying authorities of certain safety violations at the water treatment plant. After his termination, he brought suit claiming that he was fired in violation of the Whistleblower Act (codified at KRS 61.101 *et seq*.), which prohibits employers, defined as "the Commonwealth of Kentucky, or any of its political subdivisions," from retaliating against its employees for divulging information "relative to an actual or suspected violation of any law . . . ." The trial court granted the City summary judgment, and the Court of Appeals affirmed. On appeal to the Supreme Court, Appellant argued that cities are political subdivisions of the Commonwealth under the Whistleblower Act, and, as a city employee, he was protected by the Act's provisions. The Court disagreed and upheld summary judgment in favor of the City, holding that cities are not political subdivisions of the Commonwealth for purposes of the Whistleblower Act, and Appellant therefore could not claim the Act's protections.

### B. Hollis Deshaun King v. Commonwealth of Kentucky
**2008-SC-000274-DG** **April 26, 2012**

Opinion of the Court by Justice Schroder Reversing and Remanding. Minton, C.J.; Noble, and Venters, JJ., concur. Abramson, J., concurs in result only without separate opinion. Cunningham, J., dissents with Scott, J., joining. After knocking and announcing their presence, police heard the sounds of movement inside an apartment. The police made a warrantless entry, finding drugs and drug paraphernalia. The defendant entered a conditional guilty plea to first-degree trafficking in a controlled substance, marijuana possession, and PFO II. The defendant appealed the denial of his motion to suppress evidence, and the Court of Appeals affirmed the circuit court. On discretionary review, the Supreme Court reversed and remanded, holding that any exigency that did arise was police-created, and could not be relied upon. Following a certiorari petition by the Commonwealth, the United States Supreme Court reversed, holding that police did not impermissibly rely on alleged exigent circumstances. The U.S. Supreme Court remanded to the Kentucky Supreme Court to address the issue of whether exigent circumstances existed.

On remand, the Supreme Court held that exigent circumstances did not exist when police entered the apartment. Police described sounds "possibly" consistent with the destruction of evidence, stating that they had heard similar sounds in the past when evidence was destroyed. But nothing in the record indicated that the sounds were anything more than the reasonable result of a knock on the door. The Supreme Court held that exigent circumstances deal in more than mere possibilities, and the officers' subjective belief that evidence was being destroyed was not objectively reasonable.

### C. Michael Mitchell v. University of Kentucky, et al.

**2010-SC-000762-TG** **April 26, 2012**

Opinion of the Court by Justice Schroder. All sitting. Cunningham, Noble and Venters, JJ., concur. Scott, J., concurs in result only without separate opinion. Abramson, J., concurs in result only by separate opinion in which Minton, C.J., joins. Michael Mitchell was terminated from his employment with the University of Kentucky for having a firearm in his vehicle, in either the glove compartment or the arm rest. He had a valid license to carry a concealed deadly weapon. Mitchell filed suit, alleging termination in violation of public policy. The circuit court granted summary judgment in favor of the University.

The Supreme Court, after granting transfer from the Court of Appeals, held that Mitchell was terminated in violation of public policy and UK was not entitled to summary judgment. Held: (1) Provided Mitchell stored his weapon in the vehicle's glove compartment, his discharge was contrary to KRS 527.020(8), which prohibits an organization from prohibiting a person from keeping a firearm in the glove compartment of a vehicle; (2) Because Mitchell had a valid concealed carry license, his discharge was contrary to KRS 527.020(4), which controls over conflicting statutory language permitting universities to exercise control over weapons, because the legislature has expressed a clear policy in favor of exempting a person's vehicle from restrictions on the possession of deadly weapons; (3) KRS 527.020 authorizes a civil cause of action; (4) Because Mitchell was legally entitled to possess a firearm in his vehicle, his discharge was contrary to KRS 237.106.

## II. CRIMINAL LAW:

### A. Frederick Davis v. Commonwealth of Kentucky

**2010-SC-000108-MR** **April 26, 2012**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. After hearing the evidence in the first, guilt phase of trial, a circuit court jury convicted Davis of first-degree manslaughter and first-degree attempted manslaughter. At the conclusion of the second, penalty phase of trial, the jury recommended the maximum sentences of 20 years' imprisonment and

10 years' imprisonment respectively, to run consecutively for a total of 30 years' imprisonment. Before finally sentencing, the trial judge determined that the verdict form the jury used in the penalty phase erroneously failed to offer the jury the option to run the two sentences partially consecutively and partially concurrently (in whole or in part). To remedy the perceived error, the trial judge empanelled a new jury for the limited purpose of recommending whether the 10 and 20 year sentences of imprisonment recommended by the first jury should run concurrently or consecutively, in whole or in part. The second jury again recommended the sentences run consecutively for a total of 30 years' imprisonment. Assuming, without deciding, that the verdict form was erroneous, the Supreme Court found on appeal that the trial court acted within its discretion to conduct the trial by empanelling a new jury to decide whether to run Davis's sentences concurrently or consecutively, in whole or in part, before entering a final judgment of conviction. The Supreme Court also held that the trial court acted well within its discretion when it told Davis and the Commonwealth that it would play the entire guilt phase of the trial for the jury if they did not provide a summary of the evidence.

**B. Kenneth Malone v. Commonwealth of Kentucky**
**2010-SC-000491-MR April 26, 2012**

Opinion of the Court by Justice Abramson. All sitting; all concur. Defendant was convicted of murder for having shot to death a person he encountered at a rap session. Upholding the conviction, the Supreme Court held (1) that there was sufficient evidence identifying the defendant as the shooter; (2) that the trial court did not deny the defendant his right to present a defense when it limited evidence concerning the victim's and one of the eye-witness's drug and alcohol use; (3) that a combination murder instruction did not deny the defendant his right to a unanimous verdict; and (4) that the defendant was not denied his right to be present in the courtroom during supplemental jury instructions.

**C. Raymond Clutter v. Commonwealth of Kentucky**
**2010-SC-000630-MR April 26, 2012**

Opinion of the Court by Justice Abramson. All sitting; all concur. While serving a sentence in federal prison Appellant Raymond Clutter hired an attorney to investigate the possibility of having his federal sentence reduced or of receiving a deal on charges pending in Gallatin County, Kentucky. In exchange, Clutter was willing to provide information on a cold murder case in Boone County in which, unbeknownst to the police, he had been involved. Clutter's attorney contacted a Detective with the Boone County Sheriff's Department to discuss Clutter's interest in a reduced federal sentence or a plea deal on the Gallatin County charges. From information revealed during their conversations, the Detective was able renew the investigation into the

Boone County murder case and eventually tied Clutter to the crime. Clutter was convicted of murder and tampering with physical evidence and was sentenced to life imprisonment.

Clutter argued on appeal that the trial court erred when it permitted a witness to testify about information provided by his attorney in the pre-trial conversations with the Boone County Detective. Clutter maintained the information constituted statements made during plea discussions and thus was inadmissible under Kentucky Rules of Evidence (KRE) 410(4), which prohibits the admission at trial of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

The Supreme Court held the statements were not barred by KRE 410(4) because they were not made in plea discussions with "an attorney for the prosecuting authority." Plea discussions "with an attorney for the prosecuting authority" include discussions with the prosecutor as well as discussions with law enforcement officials who are either acting with the express authority of the prosecutor or who state they are acting with such authority. The Detective from Boone County was not such an authorized person as to the Gallatin County charges. Nor could there be any "plea discussions" as to the federal charges because Clutter had already been convicted, sentenced and was serving time. The Judgment of the Boone Circuit Court was affirmed.

**D. Derryl D. Blane v. Commonwealth of Kentucky**
**2010-SC-000713-MR April 26, 2012**

Opinion of the Court by Justice Scott. All sitting. All concur. Appellant was convicted of two counts of first-degree trafficking in a controlled substance; one count of trafficking in marijuana, eight ounces or more; one count of possession of drug paraphernalia, second or subsequent offense; and of being a first-degree persistent felony offender (PFO). The Supreme Court affirmed in part, reversed and vacated in part, and remanded to the trial court for a new penalty phase. First, the Court reversed Appellant's conviction for trafficking in marijuana, eight ounces or more, holding that the trial court lost the ability to amend the trafficking charge after it had directed a verdict of acquittal for Appellant on that charge. Second, the Court reversed Appellant's conviction as a first-degree PFO as to Count 1 of the indictment and remanded for a new penalty phase because Appellant had not been convicted of two or more felonies at the time he committed the offense set forth in Count 1. The Court affirmed Appellant's remaining convictions.

**E. Joseph A. Singleton v. Commonwealth of Kentucky**
**2010-SC-000078-DG** **April 26, 2012**

Opinion of the Court by Justice Venters. All sitting, all concur. Criminal. Held: Traffic roadblock, established by city police to discover violators of the city's vehicle sticker ordinance, violates Fourth Amendment rights of motorist stopped by police without individualized suspicion of wrongdoing. The Kentucky Supreme Court held that the purpose of the roadblock was not distinguishable from general crime control roadblock struck down by the U.S. Supreme Court in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), thus the trial court properly suppressed evidence of other crimes found as a result of the unconstitutional stop.

**F. Commonwealth of Kentucky v. Patrick O'Conner**
**2010-SC-000343-DG** **April 26, 2012**

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Abramson, Noble, Schroder, and Venters, JJ., concur. Scott, J., dissents by separate opinion. Jury's finding of intentional abuse was not unreasonable where Appellant locked his three-year-old boy, three-year-old girl, and seven-month-old boy in their rooms during the middle of one of the hottest days of summer, Appellant had the only fans in the house in his room while he slept, the window in the girl's room was boarded up, the two three-year-olds were wearing urine soaked clothes, one of the children was hungry to the point of eating feces, two of the children had feces on their face, and Appellant had been warned previously about the conditions of the house.

**G. Patricia Buster v. Commonwealth of Kentucky**
**2011-SC-000002-MR**
**2011-SC-000005** **April 26, 2012**

Opinion of the Court by Justice Noble. All sitting; all concur. Appellant Patricia Buster entered a conditional guilty plea to four counts of complicity to first-degree rape. Appellant's conditional guilty plea preserved her right to appeal the adverse ruling of the trial court on her motion to suppress her written confession. This Court found that Appellant did not voluntarily waive her *Miranda* rights before making the confession. After she was arrested and brought to the police station, Appellant unequivocally asserted her right to remain silent. However, soon after asserting her right to silence, Appellant was re-approached by a police officer and social worker, who again asked if she would make a statement. Thus, the Court found that Appellant's right to cut off questioning had not been scrupulously honored. This Court reversed the trial court's denial of the motion to suppress. Appellant's conviction is vacated and this case is remanded to the trial court so that the Appellant can

withdraw her guilty plea.

## III. WORKERS' COMPENSATION:

**A.** Sidney Coal Company, Inc. v. Paul Kirk; Hon. Lawrence F. Smith, Administrative Law Judge; and Workers' Compensation Board
**2011-SC-000175-WC** **April 26, 2012**

Opinion of the Court. All sitting; all concur. Kirk's claims for work-related injuries that occurred in April, May, and October 2006 and his claim for an occupational hearing loss with a last exposure date of October 2006 were litigated together. The ALJ determined that the injuries produced a 24% impairment rating; that the hearing loss produced a 23% impairment rating; and that Kirk was partially disabled. The ALJ also determined that he was entitled to a 3.0 benefit multiplier under KRS 342.730(1)(c)1 because both impairments caused him to lack the physical capacity to return to his work as an underground coal miner and that he was entitled to an additional 0.2 multiplier based on his educational level. Having calculated awards of $429.16 for the injuries and $400.71 for hearing loss, the ALJ determined that KRS 342.730(1)(d) limited the combined weekly benefits to a maximum of $473.42, which was 75% of the state's average weekly wage. Although KRS 342.730(1)(d) limits the maximum benefit to the lesser of 99% of 66 2/3% of an individual's average weekly wage or 100% of the state's average weekly wage when KRS 342.730(1)(c)1 applies, Kirk failed to petition for reconsideration or appeal. The Workers' Compensation Board rejected Sidney Coal Company's argument that the ALJ erred by applying the 3.2 multiplier to the hearing loss benefit and affirmed in that respect. The Board acted *sua sponte* and relied on its authority KRS 342.285(2)(c), however, to reverse with respect to the ALJ's misapplication of KRS 342.730(1)(d) and to remand the claim with directions to correct the benefits limitation. The Court of Appeals affirmed. The Supreme Court affirmed with respect to both issues. Noting a physician's testimony that occupational noise exposure caused a compensable hearing loss and would progress if the exposure continued, the court determined that such evidence permitted a reasonable inference that Kirk did not retain the physical capacity to return to underground coal mining because it would involve continued exposure to hazardous noise. The court determined that the Board acted properly by reversing *sua sponte* and directing the ALJ to correct what was a patent legal error in applying the law to the facts as found. The court reasoned that whether an award conforms to Chapter 342 is a question of law that a court should review, regardless of whether contested by a party, and that KRS 342.285(2)(c) allows the Board to do so.

**B. Commonwealth of Kentucky, Uninsured Employers' Fund v. Jessie Rogers D/B/A Quality Exteriors; William Willis Ballard; Honorable Edward D. Hays, Administrative Law Judge; and Workers' Compensation Board**
**2011-SC-000335-WC** **April 26, 2012**

Opinion of the Court. All sitting; all concur. William Willis Ballard injured his right wrist, hand, knee, and ankle when he fell from a roof on February 27, 2009, his first day of work as a roofer for Jessie Rogers. His application for benefits alleged that his weekly wage on the date of injury was "$12.00/hr – 40 hrs/wk." The Uninsured Employers' Fund (UEF) was made a party and denied the existence of an employment relationship. Ballard testified that he injured his right shoulder in January 2009, while working for another roofing company; that Rogers hired him for $10.00 per hour in cash; and that he worked for Rogers for about three hours before the accident occurred. The ALJ found that Ballard was Rogers' employee; found that his average weekly wage was $400.00; and awarded income and medical benefits. The Board determined that the record contained insufficient evidence to apply KRS 342.140(1)(e) properly and relied on KRS 342.285(2)(c) as authority to remand the claim for further proceedings to include the taking of additional proof. The Court of Appeals affirmed, but the Supreme Court reversed. The court agreed that the record would not support a reasonable finding that Ballard's average weekly wage would have been $400.00 in the 13-week period immediately preceding his injury, as required by KRS 342.140(1)(e). The court determined, however, that the Board exceeded its authority by directing the ALJ to order additional proof because Ballard argued from the outset that KRS 342.140(1)(e) governed the calculation; failed to meet his burden of proof; and was not entitled to a second opportunity to do so.

## IV. FAMILY

**A. D.G.R.; and T.B.H. v. Commonwealth, Cabinet for Health and Family Services**
**2010-SC-000100-DGE** **April 26, 2012**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson and Venters, J.J., concur. Schroder, J., dissents by separate opinion in which Scott, J., joins. Cunningham, J., not sitting.

The trial court denied the Cabinet's petition to terminate parental rights. The Court of Appeals reversed, finding that the trial court's finding of fact were clearly erroneous and that the evidence overwhelmingly supported termination. This Court reversed the Court of Appeals because the trial court's finding of fact were supported by substantial evidence.

In a termination of parental rights case, the Cabinet is required under the termination statute, KRS 625.090, to prove the necessary statutory allegations by

clear and convincing evidence. The parents may present proof by a preponderance of the evidence that the child will not be abused or neglected in the future to allow the trial court to exercise its discretion *not* to terminate.

In this case, both the Cabinet and the parents had presented several witnesses to support their respective positions. It is the role of the trial court to assess the credibility of the witnesses and to determine which witnesses to believe. The trial court exercised its sound discretion in giving weight to the evidence presented by the parents, and the Court of Appeals erred in substituting its judgment for that of the trial court.

## V. REDISTRICTING:

### A. Legislative Research Commission v. Joseph M. Fisher; Jeff Hoover; Kim King; Frey Todd; Anthony Gaydos; Alison Lundergan Grimes, in her Official Capacity as Kentucky Secretary of State; Kentucky State Board Of Elections; Maryellen Allen, in her Official Capacity as Interim Acting Executive Director of The Kentucky State Board of Elections; David Stevens, M.D.; David O'Neill; Jack Stephenson; Marcus McGraw; and Kathy Stein

**2012-SC-000091-TG**
**2012-SC-000092-TG** **April 26, 2012**

Opinion of the Court by Chief Justice Minton. Cunningham, Noble, Schroder, and Venters, JJ., concur. Abramson, J., concurs with statement. Scott, J., not sitting. The Franklin Circuit Court found the legislative redistricting plans of House Bill 1 facially unconstitutional and issued a temporary injunction preventing the Kentucky Secretary of State and the Kentucky State Board of Elections from implementing the legislative districts created by the Bill. The Legislative Research Commission (LRC) appealed the trial court's decision, and the Court granted immediate transfer of the appeal to the Supreme Court. The Supreme Court affirmed the judgment of the trial court, holding that House Bill 1 violated Section 33 of the Kentucky Constitution by failing to achieve sufficient population equality and by failing to preserve county integrity. The Kentucky House of Representatives and Kentucky Senate redistricting plans both contained at least one district with a population deviation greater than 5 percent from the ideal district. And the LRC did not carry its burden of proving this excessive population variation was a result of a consistently applied rational state policy. Both plans also divided more than the mathematically minimum number of counties necessary to achieve approximate population equality. Because House Bill 1 was unconstitutional, and therefore null and void, and to ensure the orderly administration of the approaching 2012 elections, the Supreme Court remanded the case to the trial court to enjoin permanently the conduct of any election under the district boundaries established by the Bill.

## VI. TAX LAW:

### A. Connie Hancock, Floyd County Property Valuation Administrator, et al. v. Prestonburg Industrial Corporation, et al.

**2010-SC-000376-DG** **April 26, 2012**

Opinion of the Court by Justice Schroder Reversing and Remanding. Minton, C.J.; Abramson, Cunningham, Noble, and Venters, JJ., concur. Scott, J., dissents by separate opinion. The single issue is whether the Prestonsburg Industrial Corporation was a charitable organization under section 170 of the Kentucky Constitution, which exempts "institutions of purely public charity" from paying ad valorem taxes. Prestonsburg Industrial Corporation was founded as a private, nonprofit corporation to attract business and industry to the City for economic development. To accomplish this goal, PIC would buy property, make improvements, then sell the property to various businesses. Held: Applying *the test announced in Iroquois Post No. 229 v. Louisville, 309 S.W.2d 353, 355 (Ky. 1958),* the evidence does not establish that Prestonsburg Industrial Corporation was a purely public charity or that its property is employed for a purely charitable purpose.

## VII. WRIT:

### A. Commonwealth of Kentucky, Energy and Environment Cabinet v. Honorable Phillip J. Shepherd, Judge, Franklin Circuit Court, Frasure Creek Mining, LLC; ICG Hazard, LLC; ICG Knott County LLC; ICG East Kentucky, LLC; and Powell Mountain Energy, LLC and Appalachian Voices, Inc., et al.

**2011-SC-000482-MR**

**And**

**Frasure Creek Mining, LLC v. Honorable Phillip J. shepherd, Judge, Franklin Circuit Court; Commonwealth of Kentucky, Energy and Environment Cabinet; ICG Harzard, LLC; ICG Knott County, LLC; ICG East Kentucky, LLC; and Powell Mountain Energy, LLC**

**2011-SC-000485-MR** **April 26, 2012**

Opinion of the Court by Justice Abramson. All sitting; all concur. The Energy and Environment Cabinet and Frasure Creek Mining, LLC, sought an order prohibiting the Franklin Circuit Court from allowing groups of interested citizens to intervene in the Cabinet's enforcement action against the mining company for violations of the laws against water pollution. Upholding the Court of Appeals' denial of that relief, the Supreme Court held that federal law does not preempt the trial court's jurisdiction over the citizens' intervention, and that otherwise extraordinary relief is not appropriate because the Cabinet and the company can seek relief by way of appeal for what they claim are the trial court's procedural errors.

## VII. ATTORNEY DISCIPLINE

### A. Charles C. Mattingly, III v. Kentucky Bar Association
**2011-SC-000779-KB** **April 26, 2012**

Opinion and Order. All sitting; all concur. Mattingly was publicly reprimanded for his professional misconduct and ordered to attend the Ethics and Professionalism Enhancement Program after he was found guilty of violating SCR 3.130-1.7(b) and SCR 3.130-3.4(c).

### B. Kentucky Bar Association v. Robert Trainor
**2012-SC-000010-KB** **April 26, 2012**

Opinion and Order. All sitting; all concur. Trainor was suspended by the Supreme Court of Ohio for 24 months, with the last 18 months to be probated subject to certain conditions. The Kentucky Bar Association recommended that the Supreme Court impose the same sanctions and the Court ordered Trainor to show cause why he should not receive reciprocal discipline under SCR 3.454(4). Because Trainor failed to show sufficient cause, the Court imposed reciprocal discipline retroactively to June 7, 2011, to run concurrently with the Ohio suspension.

### C. In re: Sara Paniagua de Aponte
**2012-SC-000020-CF** **April 26, 2012**

Order denying motion for this Court to reverse the decision of the Board of Bar Examiners denying the Applicant the right to sit for the Kentucky bar examination. All sitting; all concur.

The Applicant received her legal education in the Dominican Republic. She applied to take the Kentucky bar examination. The Board of Bar Examiners denied her application because she did not meet the requirements of SCR 2.014 which governs the legal education requirements of domestic and foreign-educated applicants who seek to take the bar examination.

The Court found that she was not eligible to take the bar examination under SCR 2.014 because her LL.M. degree was not an equivalent professional degree to the J.D. and she is not otherwise qualified as a foreign-educated applicant.

The Applicant also argued that she should be granted a waiver of SCR 2.014(3)'s requirements because she had passed the New York bar exam and had practiced law in other American jurisdictions. The Court found that these claims did not warrant a waiver.

**D. Timothy Crawford v. Kentucky Bar Association**
**2012-SC-000052-KB** **April 26, 2012**

Opinion and Order. All sitting; all concur. After conceding that he violated the Rules of Professional Conduct, Crawford petitioned the Court for consensual discipline of a sixty-one day suspension, with thirty-one days probated for two years provided he does not receive any additional disciplinary charges during that time and completes the next Ethics and Professionalism Enhancement Program.

**E. David Alan Friedman v. Kentucky Bar Association**
**2012-SC-000056-KB** **April 26, 2012**

Opinion and Order. Minton, C.J.; Cunningham, Schroder, Scott, Venters, JJ., J. Larry Cashen and Amanda Pope Thompson, Special Justices, concur. Abramson and Noble, JJ., not sitting. Friedman admitted to violating several rules of professional conduct and moved the Court to impose the sanction of permanent disbarment. The Court granted the motion and permanently disbarred Friedman from the practice of law.

**F. James Gregory Troutman v. Kentucky Bar Association**
**2012-SC-000122-KB** **April 26, 2012**

Opinion and Order. All sitting; all concur. Upon recommendation from the Character and Fitness Committee and the KBA, the Court reinstated Troutman to the practice of law in the Commonwealth.

**G. Clyde F. Johnson v. Kentucky Bar Association**
**2012-SC-000170-KB** **April 26, 2012**

Opinion and Order. All sitting; all concur. After admitting that his conduct violated SCR 3.130-3.4(c) and SCR 3.130-8.1(b), Johnson moved the Court to publicly reprimand and order him to attend the next Ethics and Professionalism Enhancement Program. The KBA did not object and Johnson's motion was granted.