

**PUBLISHED OPINIONS  
KENTUCKY SUPREME COURT  
December 2011**

**I. CRIMINAL LAW**

**A. Larrell Jarvor Porter v. Commonwealth of Kentucky**  
**[2010-SC-000189-MR](#) December 22, 2011**

Opinion of the Court by Justice Abramson. All sitting. Minton, C.J.; Cunningham, Schroder, Scott, and Venters, JJ., concur. Noble, J., concurs in result only. Larrell Porter was indicted for trafficking in a controlled substance and possession of drug paraphernalia. The Commonwealth initially offered Porter a twelve-year sentence, provided Porter agreed not to view a video of the drug buys. As part of this offer, defense counsel was permitted to view the video and disclose to Porter the entirety of its contents except for the identity of the informant. Porter rejected this offer and insisted on personally viewing the video. Porter eventually did plead guilty and received a twenty year sentence.

On appeal, Porter argued (1) the condition imposed by the Commonwealth in its first plea offer rendered his later plea unknowing and involuntary and, thus, the trial court erred when it denied his motion to withdraw his plea; (2) the Commonwealth violated discovery rules when it limited his right to view the video as part of the initial plea deal; (3) the condition violated his “substantial rights”; and (4) the prosecutor’s actions were improper.

The Supreme Court affirmed, holding the trial court did not abuse its discretion when it denied Porter’s motion to withdraw his guilty plea after considering the record and finding the plea was voluntary. Nor did the Commonwealth violate discovery because it timely disclosed the existence of the video and made it readily available to defense counsel and Porter. As to Porter’s third contention of error, the Court held the condition in the first plea offer did not violate Porter’s due process rights but rather was a valid exercise of prosecutorial discretion. Finally, the prosecutor’s actions were proper and the Commonwealth was not required to re-offer the initial plea deal.

**B. James L. “Hopsing” Miller v. Commonwealth of Kentucky**  
**[2010-SC-000562-MR](#) December 22, 2011**

Opinion of the Court by Justice Abramson. All sitting; all concur. On appeal from a twenty-year prison sentence for possession of a controlled substance, James "Hopsing" Miller argued (1) the Commonwealth improperly introduced evidence of his prior uncharged acts of misconduct during the penalty phase; (2) the presence of an armed guard violated his rights to a fair trial and due process;

and (3) the trial court erred when it refused to strike the jury for not representing a fair cross-section of the community.

The Supreme Court found Miller's prior uncharged acts of misconduct should have been excluded as being too prejudicial but denied Miller relief because he failed to preserve the claim and the error did not constitute manifest injustice. The Court also held the presence of a single armed guard did not render Miller's trial unfair or interfere with due process and the trial court properly denied Miller's motion to strike because Miller did not establish a prima facie violation of the fair cross-section requirement.

**C. Thomas E. Jones, Jr. v. Commonwealth of Kentucky  
2010-SC-000328-MR December 22, 2011**

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal; Imposition of restitution; Appellate review of sentencing issues. Issues presented: (1) Whether the imposition of restitution in excess of \$100,000.00 against criminal defendant at sentencing was an illegal sentence under KRS 532.032 and KRS 533.030(3), subject to appellate review despite the lack of preservation in the trial court; (2) whether the imposition of restitution violated defendant's due process rights; (3) whether jail fee may be assessed against an indigent defendant. Held: (1) Imposition of restitution under Kentucky's mandatory restitution statute (KRS 532.032) is not an illegal sentence and, without proper preservation, is subject to appellate review as palpable error under RCr 10.26. Allegation that restitution violates statutory maximum of \$100,000.00 is an assertion of an illegal sentence that may be reviewed by the appellate despite lack of preservation. (2) Due Process requires that imposition of restitution pursuant to Kentucky sentencing statutes conform to the following conditions: (a) reasonable notice to the defendant in advance of the sentencing hearing of the amount of restitution claimed and of the nature of the expenses for which restitution is claimed, and (b) a hearing before a disinterested and impartial judge that includes a reasonable opportunity for the defendant, with assistance of counsel, to examine the evidence or other information presented in support of an order of restitution; and (c) a reasonable opportunity for the defendant with assistance of counsel to present evidence or other information to rebut the claim of restitution and the amount thereof; and (d) the burden shall be upon the Commonwealth to establish the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence. (3) Indigent defendant was not immune from assessment of jail fee under KRS 441.265(1).

**D. Rachel Blackburn v. Commonwealth of Kentucky  
2010-SC-000537-MR December 22, 2011**

Opinion of the Court by Justice Scott. All sitting; all concur. In this case, the Court reviewed two issues: (1) whether the trial court erred when it did not impanel a new jury after two jurors answered questions in open court without

being isolated from the other prospective jurors and (2) whether a forty-year sentence violated the maximum aggregate duration allowed by KRS 532.110(1). The Supreme Court affirmed the trial court's refusal to impanel a new jury because the court did not consider either of the responses given by the jurors to be prejudicial. However, the court held that that KRS 533.060(2) does not modify KRS 532.110(1) so that subsequent offenses run consecutively may exceed the maximum aggregate duration allowed by KRS 532.110(1)(c), thus overruling *Devore v. Commonwealth*, 662 S.W.2d 829 (Ky. 1984). As a result, the court vacated the forty-year sentence because the aggregate of the consecutive sentences could not exceed twenty years.

**E. David Hoff v. Commonwealth of Kentucky**  
**[2010-SC-000167-MR](#) December 22, 2011**

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Cunningham, Schroder, Scott and Venters, JJ., concur. Abramson, J., concurs in result only. Hoff was convicted of eight counts of first-degree rape and eight counts of incest for raping his young daughter. The Court reversed and remanded because of the extensive use of inadmissible hearsay and bolstering testimony. The physician who examined the child victim was allowed to testify about the victim's statements to him about the identity of the perpetrator and other information that was not pertinent to treatment or diagnosis under KRE 803(4). The physician also testified to the effect that he believed the child victim was telling the truth. The Court held that this inadmissible evidence constituted palpable error.

**II. ELECTIONS**

**A. Stacie L. Cook v. Lisha Popplewell, In her Capacity as County Clerk of Russell County, Kentucky And Russell County, Kentucky**  
**[2009-SC-000341-DG](#) December 22, 2011**

Opinion of the Court by Justice Venters. All sitting. Cunningham, Scott and Schroder, JJ., concur. Abramson, J., concurs in result, in which Minton, C.J., and Noble, J., join. Civil; Wrongful discharge; 42 USC § 1983 lawsuit alleging unconstitutional discharge by public employee for becoming a candidate running for election to public office against her boss, a county court clerk. Held: (1) there is no constitutional right to candidacy for public office under the First Amendment, and thus Defendants were entitled to summary judgment; (2) state immunity law inapplicable in § 1983 proceedings.

**III. PROPERTY**

**A. Reubin Bailey v. Preserve Rural Roads of Madison County, Inc., and Curtis Tate**  
**[2009-SC-000147-DG](#) December 22, 2011**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J., Abramson and Schroder, JJ., concur. Noble, J., dissents by separate opinion in which

Cunningham and Scott, JJ., join. Civil; Associational standing; Unconstitutional taking of property. Issues presented: (1) Was evidence sufficient to establish associational standing of an incorporated association in suit to force removal of gates from a road formerly maintained by the county as a public road? (2) whether road remained a public pass way after discontinuation of county maintenance; (3) whether county's decision to cease maintenance of road was an unconstitutional taking of landowner's property. Held: (1) testimony that an individual owning land situated on road was a member of and had contributed money to an association dedicated to preservation of road as an open public thoroughfare was minimal, albeit sufficient, evidence to establish a *prima facie* claim of associational standing and to shift the burden of going forward with contrary proof to the opposing party; (2) discontinuation of county's maintenance of road did not extinguish its status as a public way; (3) county's decision to stop maintaining the road was not an unlawful taking of property of from owner of land situated on the road. The Court of Appeals decision is affirmed.

#### IV. RES JUDICATA

- A. **Beverly L. Miller v. Administrative Office of the Courts**  
[2007-SC-000609-TG](#) **December 22, 2011**

Opinion of the Court by Special Justice John T. McGarvey. Cunningham, Noble, Schroder, Scott, JJ., and Special Justice William T. Cain, concur. Minton C.J.; Abramson and Venters, JJ., not sitting. Miller filed suit in federal court against the Administrative Office of the Courts and several employees and officials in their official and individual capacities. After AOC was dismissed from the federal action on Eleventh Amendment sovereign immunity grounds, Miller filed suit against AOC in Jefferson Circuit Court. The state court case was held in abeyance pending resolution of the federal action. The claims against the employees and officials were eventually dismissed by the federal court based on Eleventh Amendment and qualified immunity.

AOC moved the circuit court to dismiss the state action based on the theory that res judicata barred Miller's claims. The motion was sustained because the federal court had already dismissed Miller's action against the AOC based on the same facts as the action pending in Jefferson Circuit Court. The Supreme Court disagreed, holding that Miller's state claims against the AOC based on alleged violations of due process rights and the Kentucky whistleblower's statute were not precluded by the dismissal of the federal action. Therefore, the matter was remanded to circuit court for further proceedings.

#### V. UNEMPLOYMENT INSURANCE

- A. **Kentucky Unemployment Insurance Commission v. David G. Hamilton**  
[2010-SC-000252-DG](#) **December 22, 2011**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J., Abramson and

Schroder, JJ., concur. Cunningham, J., dissents by separate opinion in which Scott and Noble, JJ., join. Civil; Unemployment compensation; Statutory construction. Issue presented: Whether, for purposes of computing the unemployment benefit of a worker who was injured on the job, the “extended base period” established in KRS 341.090(2) is limited to the period of four calendar quarters that immediately precedes the “base period” defined in KRS 341.090(1). Held: Statute’s use of the word “*the*” in “the four (4) quarters prior to the claimant’s base period,” unambiguously indicates intent of the General Assembly to restrict the “extended base period” to the four quarters that immediately precede the base period.

## **VI. WORKERS’ COMPENSATION**

- A. Vision Mining Inc. v. Jesse Gardner, et al. and Peabody Coal Company v. Joe Martinez, et al.**  
[2010-SC-00311-WC](#) **December 22, 2011**  
[2010-SC-00438-WC](#) **December 22, 2011**

Opinion of the Court by Justice Scott. Cunningham, Noble, and Venters, JJ., concur. Schroder, J., concurs in part and dissents in part by separate opinion. Minton, C.J., dissents by separate opinion, in which Abramson, J., joins. This case arose from the dismissal of two coal workers’ applications for benefits because the “consensus readings” of their X-rays interpreted them to be negative for coal workers’ pneumoconiosis. The Supreme Court held the “consensus procedure” required by KRS 342.316 for proving the existence of coal workers’ pneumoconiosis and the “clear and convincing” standard the statute requires to rebut such a consensus unconstitutional. Specifically, the court considered the distinction between coal workers’ pneumoconiosis claimants and other pneumoconiosis claimants to be arbitrary and therefore in violation of the equal protection guarantees of the Federal and State Constitutions

## **VII. ATTORNEY DISCIPLINE**

- A. Kentucky Bar Association v. Gail S. Slone**  
[2011-SC-000609-KB](#) **December 22, 2011**

Opinion and Order of the Court. All sitting; all concur. The Supreme Court suspended an attorney from the practice of law for thirty days. The attorney allowed a client’s workers’ compensation claim to be dismissed after the attorney improperly filed a medical document. The attorney also ignored multiple orders of the United States District Court for the Eastern District of Kentucky, which led to the dismissal of her client’s case, and resulted in her suspension from the practice of law before that court.